



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



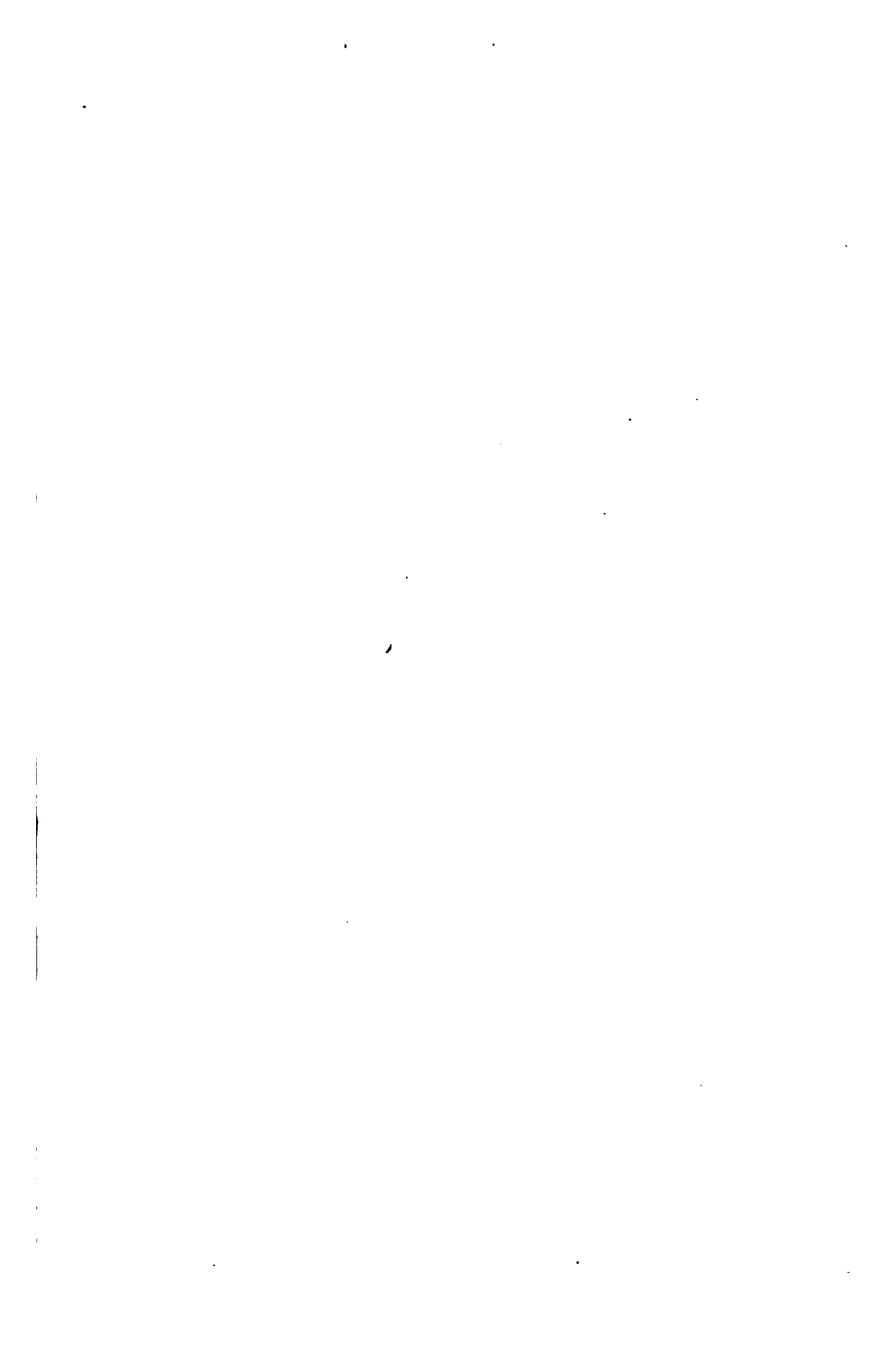
HARVARD LAW LIBRARY

Received NOV 15 1929



HARVARD LAW LIBRARY

Received NOV 15 1929



VIRGINIA REPORTS,

JEFFERSON--33 GRATTAN.

1730-1880.

ANNOTATED

UNDER THE SUPERVISION OF

THOMAS JOHNSON MICHIE.

THE MICHIE COMPANY, LAW PUBLISHERS,
CHARLOTTESVILLE, VA.
1901.

NOV 15 1929

Copyright, 1901,
by THE MICHIE COMPANY.

LD

REPORTS OF CASES
DECIDED IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

BY PEACHY R. GRATTAN.

VOLUME XVI.

FROM JULY 1, 1860, TO APRIL 1, 1865.

JUDGES
OF THE
SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

JOHN J. ALLEN, PRESIDENT.	
WILLIAM DANIEL.	RICHARD C. L. MONCURE.
GEORGE H. LEE.*	WILLIAM J. ROBERTSON.

Attorney General: JOHN RANDOLPH TUCKER.

*Judge Lee did not sit in the court after the April Term, 1861.

Entered according to Act of Congress, in the year one thousand eight hundred
and sixty-seven, for the

COMMONWEALTH OF VIRGINIA,

In the Clerk's Office of the Eastern District of Virginia.

TABLE OF CASES REPORTED.

Abrahams <i>v.</i> Peyton.....	470	Hume <i>and</i> Brown.....	456
Anderson's heirs <i>and</i> Blackenpickler ...	59	Insurance Company of the Valley of Vir-	
Baker <i>v.</i> Wise, governor.....	139	ginia <i>v.</i> Barley's adm'r.....	363
Barksdale & als. <i>v.</i> Neal.....	314	James River and Kanawha Co. <i>v.</i> Lee....	424
Barley's adm'r <i>and</i> Insurance Company		James River and Kanawha Co. <i>v.</i> Macfar-	
of the Valley of Virginia.....	363	land.....	424
Baylor <i>and</i> Hogshead & als.....	99	James River and Kanawha Co. <i>v.</i> Robin-	
Bayly's adm'r <i>v.</i> Chubb.....	284	son.....	434
Beckham & als. <i>and</i> Gibson.....	321	James River and Kanawha Co. <i>v.</i>	
Blankenpickler <i>v.</i> Anderson's heirs....	59	Wortham.....	424
Booth & al. <i>v.</i> The Commonwealth ...	519	Jones <i>v.</i> Bradshaw & others.....	355
Bradshaw <i>v.</i> The Commonwealth.....	507	Kent, Paine & Kent <i>and</i> Farmers Bank	
Bradshaw & others <i>and</i> Jones.....	355	of Va.....	257
Brickey & als. <i>and</i> Haseltine & Walton..	116	Lawson's ex'or <i>v.</i> Lawson.....	230
Brown <i>v.</i> Hume.....	456	Layne <i>v.</i> Norris' adm'r.....	236
Burroughs <i>v.</i> Peyton.....	470	Lee <i>and</i> The James River and Kanawha	
Calhoun & als. <i>and</i> Hoover.....	109	Co.....	424
Central Savings Bank <i>and</i> Mills & als....	94	Lloyd's ex'x <i>and</i> Smith's adm'r.....	295
Chubb <i>and</i> Bayly's adm'r.....	284	Macfarland <i>and</i> The James River and	
Commonwealth <i>and</i> Boath & al.....	519	Kanawha Co.....	424
Commonwealth <i>and</i> Bradshaw.....	507	Mann <i>v.</i> Parke.....	443
Commonwealth <i>and</i> Davis, sheriff.....	134	Mills & als. <i>v.</i> The Central Savings Bank	94
Commonwealth <i>and</i> Forde.....	547	Mitchell <i>v.</i> Moore & als.....	275
Commonwealth <i>and</i> Fox's adm'rs.....	1	Moore & als. <i>and</i> Mitchell.....	275
Commonwealth <i>and</i> Rider.....	499	Myers <i>and</i> Goodwyn & als.....	336
Commonwealth <i>and</i> Samanni.....	543	Neal <i>and</i> Barksdale & als.....	314
Commonwealth <i>and</i> Wash.....	530	Norris' adm'r <i>and</i> Layne.....	236
Davis, sheriff <i>v.</i> The Commonwealth....	134	Parke <i>and</i> Mann.....	443
Early & wife <i>v.</i> Friend & als.....	21	Parsons <i>v.</i> Harper.....	64
Elvira, a slave.....	561	Peyton <i>and</i> Abrahams.....	470
Farmers Bank of Va. <i>v.</i> Kent, Paine &		Peyton <i>and</i> Burroughs.....	470
Kent.....	257	Rider <i>v.</i> The Commonwealth....	499
Ferguson & als. <i>and</i> West.....	270	Robinson <i>and</i> James River and Kana-	
Forde <i>v.</i> The Commonwealth.....	547	wha Co.....	434
Fox's adm'rs <i>v.</i> The Commonwealth....	1	Roy & als. <i>v.</i> Roy's ex'or.....	418
Freeman's Bank <i>v.</i> Ruckman.....	126	Ruckman <i>and</i> The Freeman's Bank....	126
Friend & als. <i>and</i> Early & wife.....	21	Samanni <i>v.</i> The Commonwealth.....	543
Gibson <i>v.</i> Beckham & als.....	321	Skipwith & als. <i>and</i> Harvey....	393
Goodwyn & als. <i>v.</i> Myers.....	336	Skipwith <i>and</i> Harvey.....	410
Graves <i>and</i> Henry.....	244	Smith's adm'r <i>v.</i> Lloyd's ex'x.....	295
Harper <i>and</i> Parsons.....	64	Wash <i>v.</i> The Commonwealth..	530
Harvey <i>v.</i> Skipwith & als.....	393	West <i>v.</i> Ferguson & als.....	270
Harvey <i>v.</i> Skipwith.....	410	White <i>v.</i> White & als.....	264
Haseltine & Walton <i>v.</i> Brickey & als....	116	Wilmoth <i>and</i> Hogan.....	80
Henry <i>v.</i> Graves.....	244	Wise, governor <i>and</i> Baker.....	139
Hogan <i>v.</i> Wilmoth.....	80	Wortham <i>and</i> The James River and Kana-	
Hogshead & als. <i>v.</i> Baylor.....	99	wha Co.....	424
Hoover <i>v.</i> Calhoun & als.....	109		



TABLE OF CASES CITED.

Adams' adm'r and Dow, 5 Munf. 21	33	Bracegirdle v. Orford, 2 Maule & Sel. 77	77
Adams and Mowry, 14 Mass. 327.....	234	Bradley and United States, 10 Pet. 343	343
Adams and Whitworth, 5 Rand. 333.....	105	.....	332, 333
Alexander and Dade, 1 Wash. 30....	248, 255	Braham and Barker, 3 Wils. 338.....	73
Alexander v. The Duke of Wellington, 2		Branch v. The Commonwealth, 2 Call,	
Russ. & Myline, 6 Cond. Eng. ch. 383..	492	510.....	330
Allen and Russell, 3 Kerman 173.....	29-34	Branham and Wilkerson, 5 Alab. 608....	510
Almond v. Mason, &c., 9 Gratt. 700.....	333	Brent and Barbone, 1 Vern. 176.....	120
Anderson v. Barry; 2 J. J. Marsh. 265...	300	Brent v. Chapman, 5 Cranch 358.....	238
Andrews v. Avery, 14 Gratt. 229.....	327, 328	Bridges and Curtis, Comb. 450.....	233
Andrews v. Herriot, note, 4 Cow. 528....	128	Briggs and Sheely, 2 Har. & John. 363...	83
Angel v. Hadden, 15 Ves. 244.....	121	Brookman and Read, 3 T. R. 151.....	
Angove v. Dungey, 2 Ves. Jr. 304.....	121	.....	299, 300, 306
Armstrong v. Huntons, 1 Rob. 326.	360	Brooks v. Calloway, 12 Leigh 466 84, 85,	87
Auditor and Preston, 1 Call 471.....	137	Brown and Harriman, 8 Leigh 197.....	76
Avery and Andrews, 14 Gratt. 229..	327, 328	Browning v. Headley, 2 Rob. 340... 248,	249
Aylett v. Roane, 1 Gratt. 282.....	332	Brown and Leroux, 74 Eng. C. L. 801... 128	
Badeau v. Rogers, 2 Paige 209.....	121	Brown v. State of Maryland, 12 Wheat.	
Baird and McNeil & Turner, 6 Munf. 316.	105	419	172, 189, 196
Ballou and Gassis, 6 Pet. 761.....	212	Bull & wife and Calder & wife, 3 Dall.	
Baldrige and Ring, 7 B. Mon. 535.....	256	386	178
Bank of Marietta v. Pindall, 2 Rand. 465		Burchell and McMahon, 2 Phil. 22 Eng.	
.....	130, 131, 133	ch. 127.....	36, 45
Bank's adm'r v. Markesberry, 3 Litt. 275	255	Burch and Enders' ex'ors, 15 Gratt. 64... 433	
Barbone v. Brent, 1 Vern. 176.....	120	Burdock and The People, 3 Caine 104....	
Barker v. Braham, 3 Wils. 368.....	73	.....	508, 510, 513
Barksdale and Garth's ex'ors, 5 Munf. 101	238	Burnham v. Webster, 5 Mass. 266.....	441
Barron v. Mayor and City Council of		Burnley v. Duke, 2 Rob. 102	326
Baltimore, 7 Pet. 243.....	153	Buster's ex'or v. Wallace, 4 Hen. & Mun.	
Bartlett v. King, 12 Mass. 537	11	82.....	76
Barry and Anderson, 2 J. J. Marsh. 265..	300	Butler v. State, 5 Gill & John. 577.....	300
Bass's ex'ors v. Elam, 4 Munf. 301.....	238	Calder & wife v. Bull & wife, 3 Dall 386	178
Bassel v. Bell, 10 Mees and Welsb. 350...	233	Calloway and Brooks, 12 Leigh 466.....	
Battle and Metcalfe, Gilm. 191.....	428	.....	84, 85, 87
Beal v. Larigstaf, 2 Wils. 371.....	510	Calwells v. Shields & Somerville, 2 Rob.	
Beck and Taylor, 3 Rand. 316.....	95, 96	305	370, 371, 372, 385
Beckley v. Palmer, 11 Gratt. 625.....	361	Campbell and Gorman, 14 Georgia 137..	405
Beadle and Hopkins, 1 Caine 347.....	82	Campbell v. Morris, 3 Har. & McHen. 535	215
Behrens and Sieveking, 2 Milne & Craig		Carr's adm'r v. Glascock's adm'r, 3 Gratt.	
581.....	121	347.....	239
Bell and Bassel, 10 Mees & Welsb. 350...	233	Cary v. Bertie, 2 Vern. 332.....	34
Bennet v. Whitehead, 2 P. Wms. 644. 29,	34	Cator and Rex, 4 Burr, 2026	11
Berlton and Smith, 1 East 241.....	378	Cawood's case, 2 Va. Cas.	510
Berry and Thompson, 3 John. ch. 395...	120	Chambers v. Robinson, 1 Str-691.....	75
Bertie and Cary, 2 Vern. 332.....	29, 34	Chance and Sims & Smith, 7 Texas 561..	405
Beverly and Miller, 4 Hen. & Mun. 415..	33	Chapman and Brent, 5 Cranch 358... ..	238
Biskerstaffe and Newburgh, 1 Vern. 295		Chapman and Miller, 2 Speer 769.....	
.....	29, 34	.....	143, 184, 187, 189, 222
Bissell v. Gold, 1 Wend. 210.....	73	Charles River Bridge v. Warren Bridge,	
Blackbird Creek Marsh Co. and Wilson,		11 Pet. 420	493
2 Pet. 245.....	142, 148, 169	Charlton v. Unis, 4 Gratt. 58.....	556
Blakeney and The United States, 3 Gratt.		Cherry's Case, 2 Va. Cas. 20.....	523
405.....	492	Chilton and Pickett & wife, 5 Munf. 467.	280
Blakey and Newby's adm'r, 3 Hen. &		Chouteau v. Webster, 6 Metc. 1....	290, 292
Mun. 57.....	238	Christian and Whittington, 2 Rand. 353..	62
Board of Wardens of Philadelphia and		City of New York v. Miln, 11 Pet. 102...	
Cooley, 12 How. U. S. 299. 169, 176, 202,	211	.....	150, 151, 156, 159, 173, 174, 176, 189, 206
Bolland and Flight, 4 Russ. 298, 3 Cond.		Clark v. Diddle, 16 Wend. 601	90
Eng. ch. 675.....	112	Clark and Hart, 27 Eng. L. & E. 567....	40
Bolton Duke of v. Deane, Prec. ch. 516..	34	Clay and Nelson, 7 J. J. Marsh. 138.....	41
Boon and Green's heirs, 5 B. Mon. 556...	256	Clay v. Smith, 3 Pet. 411.....	166
Bostick and Thompson, 1 McMul. 75.....	41	Clipson and Shadgett, 8 East. 328.....	73
Boxley and Wade, 5 Leigh 442.. 248, 255,	409	Clowston and Lightly, 1 Taunt. 42.....	233
Boyle v. Zacharie, 6 Pet. 348.....	166	Clue and Martyn, 83 Eng. C. L. 631 311.	312
Boylston and Langston, 2 Ves. Jr. 107...	121		

Codrington v. Lloyd, 2 Ad. & El. 449, 35 Eng. C. L. 433.....	73	Eades v. Vanderput, 5 East. 39.....	233
Colvin and Roberts, 3 Gratt. 358.....	331	Eason and Henderson, 9 Eng. L. & E. 339.....	30, 31, 36, 37, 44, 46
Commonwealth and Branch, 2 Call 510..	330	East Hartford v. Hartford Bridge Company, 10 How. U. S. 511.....	489, 491
Commonwealth v. Jackson's ex'or, 1 Leigh 485.....	324	Elam v. Bass's ex'ors, 4 Munf. 301.....	233
Commonwealth and Monteith, sheriff, 15 Gratt. 172.....	334	Elliott and Conner, 18 How. U. S. 591..	161, 184
Conner v. Elliott, 18 How. U. S. 591 161, 184		Elliot and The State, 14 Texas 423....	508
Conogochagus Bank and Rees, 5 Rand 326.....	428	Ellison v. Ellison, 6 Ves. 656.....	249, 253
Cooley v. Board of Wardens of Philadelphia, 12 How. U. S. 299.. 169, 176, 202,	211	Ellis and Waller's ex'ors, 2 Munf. 88....	300
Corfield v. Coryell, 4 Wash. C. C. 371.....	217	Elsebe Maas, 5 Chr. Rob. Adm. 155....	492
..... 143, 163, 184,	217	Enders' ex'ors v. Burch, 15 Gratt. 64....	433
Cornish v. Tanner, 1 Young & Jer. 333..	122	Enos and Garland, 4 Munf. 504.....	238
Corporation of Carlile v. Wilson, 13 Ves. 275.....	28	Epes and Harvey, 12 Gratt. 153.....	405
Corporation of Georgetown v. Goszler, 6 Wheat. 593.....	489	Evans v. Thomas, 2 Str. 883.....	510
Coryell and Corfield, 4 Wash. C. C. 371.....	217	Eyre v. Jacob, 14 Gratt. 422.....	3
..... 143, 163, 184,	217	Fairbairn and Davis, 3 How. U. S. 636..	11
Cottenham and The United States, 1 Rob. 615.....	492	Farrington and Davis, Walker 304.....	85
Coutts v. Walker, 2 Leigh 268.....	465	Faulkner's adm'r v. Harwood, 6 Rand, 125.....	120
Cowles and Howell, 6 Gratt. 393.....	415	Fay v. Wenzell, 8 Cush. 315.....	510
Cox v. Thomas, 9 Gratt. 323.....	327	Felgate and Turner, 1 Lev. 95, 1 Sid. 272, 7 Ray 73.....	73
Crenshaw v. The Slate River Co., 6 Rand. 245.....	180	Fisher v. Basset, 9 Leigh 119.....	326
Cross v. Cross' adm'r, 9 Leigh 245.....	239	Fitzhugh and Kitty, 4 Rand, 600.....	239
Cunningham v. Mitchell, 4 Rand. 189....	138	Fitz Randolph and Moore's adm'r, 6 Leigh 175.....	112
Cunningham and Skipwith, 8 Leigh 271..	465	Flemings v. Riddick, 5 Gratt. 272.....	362
Curry v. Pringle, 14 John. 444.....	73	Fletcher v. Peck, 6 Cranch 87, 112.....	312
Curtis v. Bridges, Comb. 450.....	233	Flight v. Bolland, 3 Cond. Eng. ch. 675..	112
Cutts and Hoggart, 1 Craig & Phil. 204..	121	Flinn and Manns, 10 Leigh 93.....	325
Dade v. Alexander, 1 Wash. 30.....	248, 255	Foster v. Stewart, 3 Maule & Sel. 191....	233
Dandridge and Spotswood, 4 Hen. & Mun. 139.....	238	Fox v. The State of Ohio, 5 How. U. S. 410.....	153, 164
Dartmouth College Case, 4 Wheat. 518....	151, 152	Franklin v. Depriest, 13 Gratt. 357.....	334
Davenport v. Brewett's adm'r, 9 B. Monr. 94.....	256	Frazier v. Frazier's ex'or, 2 Leigh 642..	320, 321, 322, 323
Davenport & Lacon, 16 Coun. 331.....	35	Ganaway v. The State, 22 Alab. 772. 508,	510
Davenport & al. and Sinnot, 22 How. U. S. 243.....	201, 204	Garland v. Enos, 4 Munf. 301.....	238
Davies v. Fairbairn, 3 How. U. S. 636....	11	Garth's ex'or v. Barksdale, 5 Munf. 101.	238
Davis v. Farrington, Walker 304.....	35	Gassis v. Ballow, 6 Pet. 761.....	212
Davis and King, 1 Leach 306.....	11	Gay v. Moseley, 2 Munf. 543.....	238
Davis and Poindexter, 6 Gratt. 481.....	106	Geiger's adm'r's and Dold's trustee, 2 Gratt. 98.....	253
Davis and Turner, 1 B. Monr. 152.....	255	George and Howell, 1 Mad. ch. 13.....	112
Davison and Wilson, 5 Munf. 178.....	119	Gibbons v. Ogden, 7 Wheat. 1.....	142, 144, 145, 148, 151, 168, 170, 171, 178, 196, 199
Davy and Spengler, 15 Gratt. 381.....	103	Gilmore v. Wilbur, 12 Pick. 120.....	233
Deane v. Duke of Bolton, Prec. ch. 516..	34	Gilpin and Horn, Amb. 255.....	28
Debolt and Ohio Life and Trust Co., 16 How. U. S. 416.....	489, 492, 493	Givens v. Mann, 6 Munf. 191.....	238
Depriest and Franklin, 13 Gratt. 257....	334	Glascok's adm'r and Carr's adm'r's, 3 Gratt. 343.....	239
Dibble and Clarke, 16 Wend. 601.....	90	Glyn v. Duesbury, 11 Simon 147.....	121
Dold's trustee v. Geiger's adm'r's, 2 Gratt. 98.....	253	Gold and Bissell, 1 Wend. 210.....	73
Doty v. The State, 7 Blackf. 427.....	508	Gorman v. Campbell, 14 Georgia, 137....	405
Douglas' widow and adm'r x v. Yallop, 2 Burr. 722.....	510	Graham v. Langston, 1 Mary. 59.....	291
Dow v. Adams' adm'r, 5 Munf. 21.....	33	Graham v. Woodhull, 1 Caine 406.....	510
Dozier v. Joyce, 8 Port. 303.....	510	Graham v. Woodson, 2 Call 249.....	33
Drummond v. Newcomb, 4 Leigh 57.....	509	Graves and Henry, 16 Gratt. 244.....	409
Duesbury and Glyn, 11 Sim. 147.....	121	Green's heirs v. Boon, 5 B. Monr. 556....	256
Duke and Burnley, 2 Rob. 102.....	326	Grim and Payne, 2 Munf. 297.....	440
Duke of Bolton v. Deane, Prec. ch. 516..	34	Griswold v. Sedgwick, 6 Cow. 456, 1 Wend. 126.....	73
Duke of Wellington and Alexander, 2 Russ. & Mylne 35, 6 Cond. Eng. ch. 383	452	Groves v. Slaughter, 15 Pet. 499.....	168
Dungey v. Angove, 2 Ves. Jr. 304.....	121	Guy and Shelby, 11 Wheat. 361.....	238
Duval v. Myers, 2 Mary. 401.....	112	Hadden and Angel, 15 Ves. 244.....	121
		Hambly v. Trott, Cowp. 371.....	233
		Hamilton v. Marks, 19 Eng. L. & E. 321.	123
		Hancock v. Day, 1 McMul. 69.....	41, 51
		Hanlin and Irvine, 10 Serg. & Rawl 221..	36

Harriman v. Brown, 8 Leigh 697.....	76	Kekewich v. Manning, 12 Eng. L. & E. 120.....	252, 253
Harrison v. The State, 10 Yerg. 542.....	515	Keller v. Woodlick, 6 Cow. 118.....	91
Hart v. Clarke, 27 Eng. L. & E. 567. . .	40	Kemper v. Hawkins, 1 Va. Cas. 40.....	178
Hartford Bridge Company v. East Hartford, 10 How. U. S. 511.....	489, 491	Kerr and Union Bank of Maryland, 2 Mary. ch. 460.....	123
Hatcher v. Lewis, 4 Rand. 152.....	428	Kettlewell and Meek, 23 Eng. ch. 464....	252
Hatcher v. Silsbury, 2 Young & Col. 54, 21 Eng. ch.....	112	King and Bartlet, 12 Mass. 537.....	11
Harvey v. Epes, 12 Gratt. 153.....	405	King v. Davis, 1 Leach 306.....	11
Harvey and Merest, 6 Taunt. 442.....	77	King of France v. Morris cited, 3 Yates 251.....	35
Harvey and Metcalf, 1 Ves. 248.....	125	King and Roberts, 10 Gratt. 184.. . . .	239
Harwood and Faulkner's adm'x, 6 Rand. 125.....	120	King v. Shanks, 12 B. Monr. 410.....	405
Hawes and Medd, 7 Cow. 332.....	73	Kinney and Watts, 3 Leigh 272.....	112
Hawkes v. Hawkey, 8 East 427.....	83	Kitty v. Fitzhugh, 4 Rand. 600.....	239
Hawley and Hawkes, 8 East 427.....	83	Kline and Hudson, 9 Gratt. 379.....	361
Hawkins and Kemper, 1 Va. Cas. 40... 178		Klopman and Landry, 13 Louis. Ann. 345.....	170
Hawkins and Klopman, 13 Louis. Ann. 345.....	178	Knoop and State Bank of Ohio, 16 How. U. S. 369.....	491, 492, 493
Headley and Browning, 2 Rob. 340... 248,	249	Lacon v. Davenport, 16 Conn. 331.....	35
Henderson v. Eason, 9 Eng. L. & E. 339 30, 31, 36, 37, 39, 44, 46	409	Lacy v. Wilson, 3 Munf. 313.....	238
Henry v. Graves, 16 Gratt. 244.....	409	Lady Lincoln and White, 8 Ves. 363. . .	39
Herriot and Andrews, note, 4 Cow. 528..	128	Lady Ormond v. Hutchinson, 13 Ves. 47..	39
Hoar and Jones, 5 Pick. 285.....	233	Landry v. Klopman, 13 Louis. Ann. 345.....	178
Hodson and Smith, &c., 4 T. R. 211.....	233	Langston v. Boylston, 2 Ves. Jr. 107....	121
Hoggart v. Cutts, 1 Craig & Phil. 204... 121		Larigstaff and Beal, 2 Wils. 371.....	510
Holladay and Walker, Comyn 272.....	36	Lashbrook and Jordaine, 7 T. R. 601. . .	95
Holt and Robertson, 1 McMul. 475... 41,	51	Lawrence and Michie, 5 Rand. 571.....	33
Honner v. Morton, 3 Cond. Eng. ch. 298. 248		Lazier and Wilson, 11 Gratt. 477.....	105
Hooks v. Smith, 18 Alab. 338.....	405	Leach and Money, 3 Burr. 1742.... 153,	179
Hopkins v. Beedle, 1 Caine's R. 347.....	82	Ledbetter and Oldham, 1 How. Miss. 43.....	122, 123
Hopkins v. Smith, 3 Barb. S. C. 602.... 90		Lee and Hornsby, 2 Mad. 16.....	248
Hopkins v. Vanvechten, 5 John. 211.... 83		Lee and Stuart, 3 Call 421.....	330
Horne and Wheeler, Willes 208.....	36	Leicester v. Perry, 1 Bro. C. C. 305....	120
Horn v. Gilpin, Amb. 255.....	28	Leroux v. Brown, 74 Eng. C. L. 801....	128
Hornsby v. Lee, 2 Mad. 16.....	248	Lewis and Hatcher, 4 Rand. 152.....	428
Howard v. The Mayor and Council of Columbus, 6 Georgia 213.....	405	Lewis v. McGee, 1 A. K. Marsh. 199. 61, 62	
Howell v. Cowles, 6 Gratt. 393.....	415	Lewis' ex'ors and Ruffners, 7 Leigh 720.....	27, 33, 38, 41, 50
Howell v. George, 1 Mad. 13.....	112	Leyfield's case, 10 Coke 92.....	299
Hubbard and Sanderson, Verm. 462.... 83		License cases, 5 How. U. S. 504. 169, 175,	198
Hudson v. Kline, 9 Gratt. 379.....	361	Lightly v. Clouston, 1 Taunt. 112.....	233
Huff v. Mills, 7 Yerg. 41.....	119	Livingston v. Van Ingen, 9 John. 507....	185
Hughes and Voyles, 23 Eng. L. & E. 271.....	253	Lloyd and Codrington, 2 Ad. & El. 449, 35 Eng. C. L. 437.....	73
Hughey and Porter, 2 Bibb 232.....	83	Lloyd and Parsons, 3 Wils. 341, 2 Wm. Black, 845.....	73
Hunter and McFarland, 8 Leigh 489.... 106		Lomax v. Pendleton, 3 Call 538.....	33
Hunt, &c. v. McRea, 6 Munf. 454.....	427	Long's case, 2 Va. Cas. 318.....	523
Huntson and Armstrong, 1 Rob. 326.... 360		Louisa R. R. Co. v. The Richmond, Frederickburg, & Potomac R. R. Co., 13 How. U. S. 71.....	493
Hutcheson, sheriff v. Priddy, 12 Gratt. 85.....	326	Lucas and Towner, 13 Gratt. 705.....	415
Hutchinson and Lady Ormond, 13 Ves. 47.....	39	Lupton v. White, 15 Ves. 432.....	39
Hutton v. Simpson, 2 Vern. 722.....	38	McFarlan and Moses, 2 Burr. 1005.....	232
Inh. Stockbridge, v. Inh. West Stockbridge, 12 Mass. 400.....	510	Mann and Givens, 6 Munf. 191.....	238
Inh. West Stockbridge and Inh. Stockbridge, 12 Mass. 400.....	510	Manning and Kekewich, 12 Eng. L. & E. 120.....	252, 253
Irris v. Hanlin, 10 Serg. and Rawle 221.. 36		Manns v. Flinn, 10 Leigh 93.....	325
Jackson's ex'or and Commonwealth, 1 Leigh 485.....	324	Marksberry and Bank, 3 Litt. 275.....	255
Jackson and Purdew, 1 Rus. 1.....	248	Marks and Hamilton, 19 Eng. L. & E. 321.....	123
Jacob and Eyre, 14 Gratt. 422.....	3	Martyn v. Clue, 83 Eng. C. L. 681.. 311, 312	
James and Munroe, 4 Munf. 194.....	323	Mason, &c. and Almond, &c. 9 Gratt. 700	333
John, a slave v. The State, 2 Alab. 290.. 513		Mayor and City Council of Baltimore and Barron, 7 Pet. 243.....	153
Jones v. Hoar, 5 Pick. 285.....	233	Mayor and City Council of Columbus v. Howard, 6 Georgia 137.....	405
Jones v. Williams, 2 Call 102.....	33	McCall and White, not reported.....	27, 30
Jordaine v. Lashbrook, 7 T. R. 601.....	95		
Jordan v. Wilkins, 2 Wash. C. C. 482... 30, 36			
Joyce and Dozier, 8 Port. 303.....	510		
Kane and Paul, 14 Pet. 33.....	234		

McFarland v. Hunter, 8 Leigh 489.....	106	Oldham and Ledbetter, 1 How. Miss. 43	
M'Gee and Lewis, 1 A. K. Marsh. 199. 61, 62		Orford and Bracegirdle, 2 Maule & Sel. 77.....	122, 123
McMahon v. Burchell, 2 Phil. 22 Eng. ch. 127.....	36, 45	Ory v. Winter, 16 Martin 277.....	129
McMurray v. Rawson, 3 Hill 59.....	36	Palmer and Beckley, 11 Gratt. 625.....	361
McNeil & Turner v. Baird, 6 Munf. 316.....	105	Parmer and Wiley, 14 Alab. 627.....	222, 223
McRea and Hunt, &c., 6 Munf. 454.....	427	Parsons v. Lloyd, 3 Wils. 341, 2 Wm. Bl. 845.....	73
McWhirt's case, 3 Gratt. 594.....	537	Parsons and Sergeant, 12 Mass. 149.....	29, 36, 51
McWilliams and Steinman, 6 Barr. 171.....	91	Passenger cases, 7 How. U. S. 283.....	142, 148, 150, 151, 168, 169, 175, 189, 196
Mead v. Hawes, 7 Cow. 332.....	73	Patterson and Pollard, 3 Hen. & Mun. 67.....	361
Meek v. Kettlewell, 1 Have. 464, 23 Eng. ch.....	252, 253	Patterson v. Winn, 11 Wheat. 380.....	62
Mendum's Case, 6 Rand. 704.....	468	Paul and Kane, 14 Pet. 33.....	234
Merest v. Harvey, 6 Taunt. 449.....	77	Paul and Moore's ex'or, 2 Bibb 339.....	300
Metcalfe v. Battaile, Gilm. 141.....	428	Paul and Thompson, 6 Whart. 620.....	35
Metcalf v. Harvey, 1 Ves. 248.....	125	Payne, &c. and Grim, 2 Munf. 197.....	440
Mickie v. Lawrence, 5 Rand. 571.....	33	Peck and Fletcher, 6 Cranch 87, 127.....	312
Miller v. Beverly, 4 Hen. & Mun. 415.....	33	Peebles and Scott, 2 Smeedes & Marsh 546, 85	
Miller v. Chapman, 2 Speer 769.....		Pendleton and Lomax, 3 Call 538.....	33
Mills and Huff, 7 Yerg. 45.....	119	Pennsylvania and Butler, 10 How. U. S. 416.....	490
Miln and City of New York, 11 Pet. 102		People v. Burdock, 3 Caine 104.....	508, 510, 515
150, 151, 156, 159, 173, 174, 176, 178, 179,	198	Perkins v. Perkins, 21 Georgia 13.....	510
Mitchell and Cunningham, 4 Rand. 189.....	138	Perry and Leicester, 1 Bro. C. C. 305.....	120
Money v. Leach, 3 Burr. 1742.....	153, 179	Peyton and Morrow, 8 Leigh 54.....	331, 332, 333, 334
Monroe v. James, 4 Munf. 194.....	323	Peyton's adm'r and Taylor's adm'r, 1 Wash. 252.....	300
Monteith, sheriff, v. Commonwealth, 15 Gratt. 172.....	334	Pickett & wife v. Chilton, 5 Munf. 467.....	280
Moore's adm'r v. Fitz Randolph, 6 Leigh 175.....	112	Pierce and Sayer, 1 Ves. Sen. 232.....	39
Moore's ex'or v. Paul, 2 Bibb 330.....	300	Pindall and Bank of Marietta, 2 Rand. 465.....	130, 133
Moran's Case, 9 Leigh 651.....	527	Pleasants v. The State, 15 Ark. 624.....	510
Morgan v. Morgan, 1 Atk. 489.....	29, 34	Plumer's case, 3 Gratt. 645.....	11
Morris and Campbell, 3 Har. & McH. 535	215	Poindexter v. Davis, 6 Gratt. 481.....	106
Morris and The King of France, cited 3 Yates 251.....	35	Polk's lessee v. Wendal, 9 Cranch 87, 11 Wheat. 380.....	62
Morris v. Peyton, 8 Leigh 54.....	331, 332, 333, 334	Pollard v. Patterson, 3 Hen. & Mun. 67.....	361
Morris and The United States, 10 Wheat. 246.....	492	Porter v. Hughey, 2 Bibb 232.....	83
Morris and Ward, 4 Har. & McH. 330.....	217	Powell and Williams, 9 Port. 493.....	510
Morton and Hounner, 3 Russ. 65, 3 Cond. Eng. ch. 258.....	248	Pownall v. Taylor, 10 Leigh 172.....	243
Mosely and Gay, 2 Munf. 543.....	238	Pratt v. Wright, 13 Gratt. 175.....	333
Mosely v. Moss, 6 Gratt. 534.....	83, 84, 85, 88, 89, 91	Preston v. The Auditor, 1 Call 471.....	137
Moses v. McFarlan, 2 Burr. 1005.....	232	Prewitt's adm'r and Davenport, 9 B. Monr. 94.....	257
Moss and Mosely, 6 Gratt. 534.....	83, 84, 85, 88, 89, 91	Priddy and Hutcherson, sheriff, 12 Gratt. 85.....	326
Mowry v. Adams, 14 Mass. 327.....	234	Pringle and Curry, 11 John. 444.....	73
Murray's Case, 2 Va. Cas. 504.....	144, 180	Purcell v. Wilson, 4 Gratt. 16.....	239, 242
Myers and Duval, 2 Mary. 401.....	112	Quarles' ex'or v. Quarles, 2 Munf. 321.....	23
Nelson v. Clay, 7 J. J. Marsh. 138.....	41	Ramsey & als. v. Ramsey's ex'or, 13 Gratt. 664.....	419, 420
Newburgh v. Bickerstaffe, 1 Vern. 295.....	29, 34	Rastal and Straton, 2 T. R. 366.....	232
Newby's adm'r v. Blakey, 3 Hen. & Mun. 57.....	238	Rawson and McMurray, 3 Hill 59.....	36
Newcomb v. Drummond, 4 Leigh 57.....	509	Read v. Brookman, 3 T. R. 151.....	299, 300, 306
New York v. Miln, 11 Pet. 102.....	150, 151	Redd v. St. Francis county, 17 Ark. 416.....	224
Nichols v. Squire, 5 Pick. 169.....	11	Rees v. Conococheague Bank, 5 Rand. 326.....	428
Norman & wife and Warren & wife, Walker 387.....	85	Rex v. Cator, 4 Burr. 2026.....	11
Norvell and Warwick, 1 Rob. 308.....	62	Rex v. Turner & als., 1 Stra. 139.....	510
Norway v. Rowe, 19 Ves. 144.....	40	Richardson and Sturton, 13 Mees. & Welsb. 21.....	36
Obenchain & Jones, 10 Gratt. 259.....	253	Richards v. Salter, 6 John. ch. 445.....	121
Ogden and Gibbons, 9 Wheat. 1.....	142, 144, 145, 148, 151, 168, 170, 171, 189,	Richmond, Fredericksburg and Potomac R. R. Co. v. The Louisa R. R. Co., 13 How. U. S. 71.....	493
196, 199		Riddick and Flemings, 5 Gratt. 272.....	362
Ogden v. Saunders, 12 Wheat. 369.....	166	Ring v. Baldrige, 7 B. Mon. 535.....	256
Ohio Life and Trust Company v. Debolt, 16 How. U. S. 416.....	489, 492, 493		

Roane and Aylett, 1 Gratt. 282.....	332	State of Ohio and Fox, 5 How. U. S. 410.....	153, 164
Roberts v. King, 10 Gratt. 184.....	239	State and Pleasants, 15 Ark. 624.....	510
Robertson and Holt, 1 McM. 475.....	41, 51	Steinman v. McWilliams, 6 Barr 171.....	91
Robinson and Chambers, 1 Stra. 691.....	75	Stewart and Foster, 3 Maule & Sel. 191.....	233
Rogers and Badeau, 2 Paige 209.....	121, 122	St. Francis county and Redd, 17 Ark. 416.....	224
Rowe and Norway, 19 Ves. 144.....	40	Straton v. Rastal, 2 T. R. 366.....	232
Ruffners v. Lewis' ex'ors, 7 Leigh 720.....	27, 33, 38, 41, 50	Strelly v. Winson, 1 Vern. 297.....	28
Russell v. Allen, 3 Kernan 173.....	29, 34	Stuart v. Lee, 3 Call 420.....	330
Sackridge and Ward, 3 Caine 263.....	309	Sturton v. Richardson, 13 Mees. & Welsb. 21.....	36
Salisbury v. Hatcher, 21 Eng. ch. 54.....	112	Swan v. Swan, 8 Price 518.....	40
Salter and Richards, 6 John. ch. 445.....	121	Tanner and Cornish, 1 Young & Jer. 333.....	122
Sandback and Thomas, 1 Stark. 306.....	74	Tatum v. Wright, 3 Zab. 429.....	161
Sanderson v. Hubbard, 14 Verm. 462.....	83	Taylor v. Beck, 3 Rand. 316.....	95, 96
Sanders' ex'ors v. Sanders, 12 B. Mon. 40.....	256	Taylor's adm'r v. Peyton's adm'r, 1 Wash. 252.....	300
Sangston and Graham, 1 Mary. 59.....	291	Taylor and Pownal, 10 Leigh 172.....	243
Santee's Case, 2 Va. Cas. 363.....	463	Therley's case, 7 Leigh 743.....	523
Sargent v. Parsons, 12 Mass. 149.....	29, 36, 51	Thomas and Cox, 9 Gratt. 323.....	327
Saunders and Ogden, 12 Wheat. 369.....	166	Thomas and Sandback, 1 Stark. 306.....	74
Sayer v. Pierce, 1 Ves. Sen. 232.....	39	Thomas v. Soper, 5 Munf. 28.....	238
Scott v. Peebles, 2 Smeedes & Marsh. 546.....	85	Thompson v. Berry, 3 John. ch. 395.....	120
Scott v. Wynn, 7 Leigh 63.....	375	Thompson v. Bostick, 1 McM. 75.....	41, 51
Sedgwick and Griswold, 6 Cow. 456, 1 Wend. 126.....	73	Thompson and Vidal, 11 Martin 23.....	128
Shadgett v. Clipson, 8 East 328.....	73	Thompson and Yarborough, 3 Smeedes & Marsh. 295.....	112, 122
Shafer v. Smith, 7 Har. & John. 67.....	77	Thouren v. Paul, 6 Whart. 620.....	35
Shanks and King, 12 B. Mon. 410.....	405	Towner v. Lucas, 13 Gratt. 705.....	415
Sheeley v. Briggs, 2 Har. & John. 363.....	83	Trott and Hambly, Cowp. 371.....	233
Shelby v. Guy, 11 Wheat. 361.....	238	Tullidge v. Wade, 3 Wils. 48.....	77
Shelley and Walton, 1 T. R. 296.....	95	Tunstall and Walker, 3 How. Miss. 259, 2 Smeedes & Marsh. 639.....	291, 292
Shelton's ex'ors v. Welsh's ex'ors, 7 Leigh 175.....	429	Turner v. Davis' adm'r, 1 B. Mon. 152.....	255
Shields & Somerville and Calwells, 2 Rob. 305.....	370, 371, 372, 385	Turner & als. and Rex, 1 Stra. 139.....	510
Sieveking v. Behrens, 3 Milne & Craig 581.....	121	Union Bank of Maryland v. Kerr, 2 Mary. ch. 460.....	123
Simpson and Hutton, 2 Vern. 722.....	38	Unis & Charlton, 4 Gratt. 58.....	556
Sims & Smith v. Chance, 7 Texas 561.....	405	United States v. Blakeney, 3 Gratt. 405.....	492
Sinnot v. Davenport & als., 22 How. U. S. 243.....	201, 204	United States v. Bradley, 10 Pet. 343 332, 333	492
Skipwith v. Cunningham, 8 Leigh 271.....	465	United States v. Cottenham, 1 Rob. 615.....	492
Slate River Co. and Crenshaw, 6 Rand. 245.....	180	United States v. Morris, 10 Wheat. 246.....	492
Slaughter and Groves, 15 Pet. 499.....	168	Upshaw v. Upshaw, 2 Hen. & Mun. 381	248, 252
Smith v. Berlton, 1 East 241.....	378	Vanderput and Eades, 5 East 32.....	233
Smith and Clay, 3 Pet. 411.....	166	Van Ingen and Livingston, 9 John. 507.....	185
Smith v. Hodson, 4 T. R. 211.....	233	Vanvechten v. Hopkins, 6 John. 211.....	83
Smith and Hooks, 18 Alab. 338.....	405	Vidal v. Thompson, 11 Martin 23.....	128
Smith and Hopkins, 3 Barb. S. C. 602.....	90	Voyles v. Hughes, 23 Eng. L. & E. 271.....	253
Smith and Shafer, 7 Har. & Johns. 67.....	77	Wade v. Boxley, 5 Leigh 442.....	248, 252, 409
Smith v. State of Maryland, 18 How. U. S. 71.....	153, 157, 174, 176, 183, 189, 205, 208	Wade v. Tullidge, 3 Wils. 48.....	77
Snidow and Williams, 4 Leigh 14.....	239, 242	Walker v. Coutts, 2 Leigh 271.....	465
Soper and Thomas, 5 Munf. 28.....	238	Walker v. Holladay, Comyn 272.....	36
Spencer's Case, 2 Leigh 751.....	541	Walker v. Tunstall, 3 How. Miss. 259, 2 Smeedes & Marsh. 638.....	291, 292
Spengler v. Davy, 15 Gratt. 381.....	103	Wallace and Buster's ex'or, 4 Hen. & Mun. 82.....	76
Spotswood v. Dandridge, 4 Hen. & Mun. 132.....	238	Waller's ex'ors v. Ellis, 2 Munf. 88.....	300
Squire and Nichols, 5 Pick. 169.....	11	Waller v. Waller, 1 Gratt. 454.....	419
State Bank of Ohio v. Knoop, 16 How. U. S. 369.....	491, 492, 493	Walton v. Shelley, 1 T. R. 296.....	95
State and Butler, 5 Gill & John. 577.....	300	Ward v. Sackride, 3 Caine 263.....	309
State v. Doty, 7 Blackf. 427.....	508	Ward v. Morris, 4 Har. & McH. 330.....	217
State v. Elliot, 14 Texas. 423.....	508	Warren Bridge v. Charles River Bridge, 11 Pet. 420.....	493
State and Ganaway, 22 Alab. 772.....	508, 510	Warren & wife v. Norman & wife, Walker 387.....	85
State v. Harrison, 10 Yerg. 542.....	515	Warwick v. Norvell, 1 Rob. 308.....	62
State and John, a slave, 2 Alab. 290.....	513	Watts v. Kinney, 3 Leigh 272.....	112
State of Maryland and Brown, 12 Wheat. 419.....	172, 189, 196	Webster and Burnham, 5 Mass. 266.....	441
State of Maryland and Smith, 18 How. U. S. 71.....	153, 157, 174, 176, 183, 189, 205, 208	Webster and Chouteau, 6 Metc. 1.....	290, 292
		Welsh's ex'ors, and Shelton's adm'rs, 7 Leigh 175.....	429

16 GRATT.

CASES CITED.

Wendal and Polk's lessee, 9 Branch 87, 5	Wilson v. Davisson, 5 Munf. 178.....	119
Wheat. 293.....	Wilson and Lacy, 3 Munf. 313.....	238
Wenzell and Fay, 8 Cush. 315.....	Wilson v. Lazier, 11 Gratt. 477 ..	105
Wheeler v. Horne, Willes 208.....	Wilson and Purcell, 4 Gratt. 16	239, 242
Wheeling Bridge Case, 18 How. U. S. 432	Winn and Patterson, 11 Wheat. 380.....	62
Whitehead and Bennet, 2 P. Wms. 644...	Winson and Strelly, 1 Vern. 297.....	28
White and Lady Lincoln, 8 Ves. 363.....	Winter and Ory, 16 Martin 277	129
White and Lupton, 15 Ves. 432.....	Woodhull and Branham, 1 Caine, 496....	510
White v. McCall, not reported.....	Woodlick v. Keller, 6 Cow. 118.....	91
Whitworth v. Adams, 5 Rand. 333.	Woodson and Graham, 2 Call 249.....	33
Wilbur and Gilmore, 12 Pick. 120.....	Worsham's adm'r v. Worsham's ex'or, 5	
Wiley v. Parmer, 14 Alab. 627.....	Leigh 589.....	328
Wilkerson v. Branham, 5 Alab. 608.....	Wright and Pratt, 13 Gratt. 175.....	333
Wilkins and Jordan, 2 Wash. C. C.	Wright and Tatum, 3 Zab. 429.....	161
482.....	Wymark's Case, 5 Coke 74.....	299
Williams and Jones, 2 Call 102.....	Wynn and Scott, 7 Leigh 63.....	375
Williams v. Powell, 9 Port. 493.....	Yallop and Douglas' widow & adm'r, 2	
Williams v. Snidow, 4 Leigh 14.....	Burr. 722.....	510
Wilson v. Black Bird Creed Marsh Co., 2	Yarborough v. Thompson, 3 Smeedes and	
Pet. 245.....	Marsh. 45.....	119, 122
Wilson and Corporation of Carlisle, 13	Zacharie and Boyle, 6 Pet. 348....	166
Ves. 275.....		

CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Fox's Adm'r's v. The Commonwealth.

July Term, 1860, Lewisburg.

1. Statute—Tax on Collateral Inheritances—Repealed. *

—The § 15 of the act of March 2, 1854, which imposes a tax on collateral inheritances, has been repealed by the act of March 18, 1856, imposing taxes for the support of the government, though there is no provision of the latter act repealing the former.

2. Statutes—Repeal by Implication.†—Where it is manifest that a law is intended to embrace and include the whole legislation on the subject to which it refers, provisions of former laws on that subject, not embraced in it, are repealed by implication.

3. Same—Rules of Construction.‡—For rules on the construction of statutes, see opinion of *Moncure, J.*

*Statute—Tax on Collateral Inheritances—Repealed.

—In *Miller v. Com.*, 27 Gratt. 113, the court cited the principal case as holding that the omission of the tax upon collateral inheritances from the tax law operated as a repeal of the statute imposing such tax.

†Statutes—Repeal by Implication.—The proposition laid down in the second headnote, that where it is manifest that a law is intended to embrace and include the whole legislation on the subject to which it refers, provisions of former laws on that subject, not embraced in it, are repealed by implication, has been approved in several subsequent cases. See *Hogan v. Guilgon*, 29 Gratt. 710; *Davies v. Creighton*, 33 Gratt. 600; *Somers' Case*, 97 Va. 761, 33 S. E. Rep. 361. See also, *McCreedy v. Com.*, 27 Gratt. 982.

Several cases cite the principal case as authority for the proposition that the law does not favor a repeal of a statute by implication, unless the repugnance be plain and then only to the extent of such repugnance. See *Wash., etc., R. Co. v. Alexandria, etc., R. Co.*, 19 Gratt. 603; *Holladay v. Auditor*, 77 Va. 429; *Justice v. Com.*, 81 Va. 211; *Fulkerson v. Bristol*, 95 Va. 5, 27 S. E. Rep. 815; *Dunfee v. Childs*, 45 W. Va. 159, 30 S. E. Rep. 104. See also, *Forqueran v. Donnelly*, 7 W. Va. 115; *Ryan v. Com.*, 80 Va. 385.

Where there are two affirmative statutes, on the same subject, if they do not conflict with each other, but may be so construed as that they may consist together, the latter will not be construed as a virtual repeal of the former. *Warder v. Arell*, 2 Wash. 282. See also, *Fulkerson v. Bristol*, 95 Va. 5, 27 S. E. Rep. 815; *State v. Cain*, 8 W. Va. 733.

‡Same—Rules of Construction.—Several cases cite the principal case as authority for the proposition that the intention of the legislature—which is the cardinal rule in the interpretation of statutes—is to be gathered not merely from the words but also from the cause and necessity of the act being made, from a comparison of its several parts and other

This was a motion in the Circuit court of Fauquier county, by the commonwealth against the administrators with the will annexed, of John Fox, deceased, to recover the tax on collateral inheritances, imposed by the 15th section of the acts of March 2, 1854, entitled "An act imposing taxes for the support of government," Sess. Acts 7.

The defendants appeared and insisted, 2 *that the act of March 2, 1854, had been repealed by the act of March 18, 1856, having the same title; and the facts were agreed by the parties.

It appears from the facts agreed, that John Fox died on the 26th of January, 1859, having made a will which was duly admitted to probate in the Circuit court of Fauquier county. By his will he emancipated his slaves, and gave his whole property in trust for their use. The commissioner of the revenue for the county of Fauquier assessed the property for taxation, taking the value fixed upon it by the appraisers appointed by the court of probate, which, for the slaves emancipated, was one hundred and eight thousand two hundred and fifty dollars; for the lands and personal property, twenty-five thousand three hundred and sixty-nine dollars; and for money and credits, seventy-one thousand six hundred and eighty dollars—making together, two hundred and five thousand two hundred and ninety-nine dollars, which at two per cent., made the tax four thousand one hundred and five dollars and ninety-eight cents.

On the hearing of the case the Circuit court held that the act of March 2, 1854, was not repealed by the act of March 18, 1856; but also held that the value of the negroes manumitted was not liable to the tax of two per centum, as of the decedent's estate; and judgment was rendered for the sum of \$1,940 98, the amount of the tax on the other property. From this judgment the administrators of Fox obtained a writ of error to this court.

Macfarland and Roberts, for the appellants.

The Attorney General, for the Commonwealth.

acts *in pari materia* and even from extraneous circumstances which may throw light on the subject. See *Claffin v. Steenbock*, 18 Gratt. 800; *Universal Life, etc., Co. v. Cogbill*, 30 Gratt. 81; *Lackland v. Davenport*, 84 Va. 688, 5 S. E. Rep. 540; *State v. Cain*, 9 W. Va. 509.

See also, *Hutchings v. Commercial Bank*, 91 Va. 68, 30 S. E. Rep. 950; *Branham v. Long*, 78 Va. 352.

MONCURE, J. This case involves the question, whether the fifteenth section of the act passed March 2, 1854, entitled "An act imposing taxes for the support of government," *which declares that "the tax on the estate of a decedent, prescribed by the thirty-ninth chapter of the Code of Virginia, shall be two per centum of such estate," (Sess. Acts p. 7,) was repealed by implication by the act passed March 18, 1856, having the same title, (Sess. Acts p. 11,) there being no such provision in the latter act.

This question was noticed in the opinion of Judge Lee in *Eyre v. Jacob*, 14 Gratt. 422, and he inclined to think there was no such repeal, but thought it unnecessary to express an opinion upon it. *Id.* 440. It was not decided, and did not, in fact, arise in the case, but comes up now, for the first time, to be decided by this court.

It was stated on the one side, and conceded, I believe, on the other, in the argument of this case, that it was the uniform and unvarying practice of the legislature, from the very organization of the government down to the time of the adoption of the present Code, (or at least, the session of 1848-9, when the Code was under consideration,) to pass an annual tax law, embracing all the taxes imposed for the support of government during the current year; and no instance occurred during all that period, of a permanent tax, or one which was created to endure longer than a year. The revisors proposed a change of this practice, and recommended a scheme of taxation which is substantially embodied in the Code. Their reasons for doing so are set forth in a note to chap. 40, page 230, of their report; in which they say: "It has been the usage to pass a law annually on this subject; each law being a copy, or nearly a copy, of that which preceded it. But it is a usage for which no very good reason is perceived. Formerly, when there were few subjects of taxation, the annual law was a short one. But now it occupies six pages of the Session Acts. The present chapter, though embracing every subject, curtails the length of *the law, and will render it unnecessary to do more in any year than alter the rate of taxation when there is occasion for it. If not altered, the previous law will remain in force. Such a law as this will not only save legislation and printing, when there is no occasion to change the law, but will guard against the possible contingency of a failure on the part of the two houses of the assembly to agree upon a new revenue law."

The proposed scheme is embodied in chapters 35, 38, 39 and 40 of the Code. The first three of these chapters provided for the assessment of taxes; the 35th on property, the 38th on licenses, and the 39th on dividends, certain estates of decedents, process in suits, official seals and deeds, wills and administrations. The 40th chapter prescribes what is to be collected on each subject of taxation; and embraces four sections, declaring the yearly amount of taxes, to wit: § 1, on the persons and subjects mentioned in the 35th

chapter; § 2, on the licenses mentioned in the 38th chapter; § 3, on the subjects mentioned in the 39th chapter; and § 4, on each officer of government receiving a salary out of the treasury other than the governor or a judge; the subject of this section being mentioned in none of the proceeding chapters, because the tax is directed to be deducted at the time the salary is audited and paid, and therefore, neither the commissioner of the revenue nor the sheriff has anything to do with it. The first three of these four chapters depend on the last, and without it, or something else in its stead, are ineffectual. A repeal of the last, in whole or in part, if nothing else be adopted in the place of what is repealed, is a virtual repeal, or suspension to the same extent, of that which depends upon it. There can be no tax unless its amount, or the means of ascertaining its amount be prescribed by law.

The tax in question, called the tax on collateral inheritances, is imposed by the Code; the portions of it relating *to this tax being, ch. 35 § 42 p. 184, ch. 39 §§ 6-12 pp. 214 and 215, and ch. 40 § 3 p. 220. The last chapter and section declares in regard to it, that "the tax on the estate of a decedent, prescribed by the 39th chapter, shall be two per centum of such estate."

The Code was adopted in August, 1849, and took effect on the 1st of July, 1850. No tax law was passed at the session of the legislature of 1849-50; consequently the tax law contained in the Code, without alteration or addition, was the law of 1850.

In 1850-51, Sess. Acts p. 3, an act was passed imposing taxes in addition to the taxes then imposed by law, on certain subjects. This act was an amendment of the tax law contained in the Code; which, as thus amended, was the law of 1851.

In 1851 the present amended constitution was adopted, which made important changes on the subject of taxation and finance, (see Art. iv. §§ 22, 23, 24, and 25,) and went into operation at the close of that year.

In 1852, at the first session of the legislature under the new constitution, it became necessary to conform the tax law to the provisions of that instrument, and several acts were passed for that purpose: as "An act concerning commissioners of the revenue," passed April 24, 1852, Sess. Acts p. 3; an act amendatory thereof, passed May 24, 1852, *Id.* p. 6; "An act authorizing the issuing of licenses in certain cases," passed June 5, 1852, *Id.* p. 11; and "An act imposing taxes for the support of government for the fiscal year 1852-53," passed June 5, 1852. *Id.* p. 14. The first section of the last act declares "that for a year there shall be levied and collected on the persons and subjects mentioned in the act of Assembly passed on the 24th day of April, 1852, and any act amendatory thereof, the taxes following, to-wit:" and then proceeds in the subsequent sections to prescribe the amount of taxes. Though thus expressly referring *only to the persons and subjects mentioned as aforesaid, it is a perfect tax law, and embraces other persons and subjects; indeed, all on which

a tax was intended to be imposed. The act was evidently drawn after the model of the 40th chapter of the Code, for which it was designed as a substitute. The subjects are taken up in the same order in each; as 1st; property; 2d, licenses, and 3d, other subjects; the only material difference in the order being, that the section imposing a tax on officers of government receiving a salary out of the treasury, which is the 4th and last of the chapter, is ranged with the sections relating to taxes on property in the act. The tax on the estate of a decedent, prescribed by the 39th chapter of the Code, is mentioned in the same words in the 40th chapter and the said act, and the same amount of two per centum of such estate is imposed by each. The words have the same relative position in each, following those which prescribe the tax on bank dividends, and preceding those which prescribe it on process, &c.; though they form, with them, one section of chapter 40, to-wit: § 3, while they alone constitute one section of the act, to-wit: § 16. The 20th section of the act expressly repeals chapter 40 of the Code. In 1852-3, an act was passed (April 7, 1853,) entitled "An act concerning the assessment and collection of the public revenue," Sess. Acts p. 9; which commences by declaring "that the following, in addition to the enactments of the Code of Virginia, not hereinafter repealed, shall be permanent provisions of the revenue laws of the commonwealth," and contains many sections; some of them introducing new provisions, others amending different sections of the Code, and others repealing other sections of the Code and various subsequent acts. And on the same day another act was passed, entitled "An act imposing taxes for the support of government," Id. p. 19; which commences

7 by declaring "that there shall be levied and collected on the persons and subjects mentioned in the act of assembly passed on the 7th day of April, 1853, entitled an act concerning the assessment and collection of the public revenue, the taxes following, to-wit. This act is almost a literal copy of the act of 1852, page 14, except that it increases the amount of taxes, and does not, as that does, profess to be for a year only. Nor does it, as the 40th chapter of the Code does, direct the taxes to be "yearly as follows." Like the act of 1852, it embraces the tax on "collateral inheritances," and expressly repeals the 40th chapter of the Code. It is a perfect tax law, comprehending all the taxes intended to be imposed for the support of government.

In 1853-4, Sess. Acts p. 3, an act was passed entitled "An act imposing taxes for the support of government," which seems to be a literal copy of the act of 1852-3, p. 19, containing as that does, the tax on collateral inheritances," and an express repeal of chapter 40 of the Code. And it is, therefore, like that, a perfect tax law.

In 1854-5 there was no session of the legislature; and therefore the tax law passed in 1853-4 was the law for the fiscal years ending in 1854 and 1855.

In 1855-6, Sess. Acts p. 11, an act was passed entitled "An act imposing taxes for

the support of government," the commencement and first seven sections of which seem to have been literally copied from the act of 1853-4, (except that the amount of the taxes is very much increased in the act of 1855-6,) and many other sections of the two acts bear a close resemblance; showing that the later act was penned with the former before the draftsman; though in many respects the two acts differ, both in form and substance. The point of difference most material to the present enquiry, is that the act of 1855-6 wholly omits the tax on collateral inheritances, while

8 it literally copies, except as to amount *of taxes, the section which next precedes and that which next follows the section imposing a tax on collateral inheritances in the act of 1853-4, and also in the act of 1852-3. It contains no express repeal of chapter 40 of the Code, as does the act of 1853-4, and also do the two next preceding tax acts.

In 1856-7 there was no session of the legislature. In 1857-8 there was; but no tax law was passed, and consequently the act of 1855-6 remained in full force. In 1858-9 there was no session of the legislature. In 1859-60 there was; and a tax law was passed, in which is again omitted the tax on collateral inheritances, as it occurs in chapter 40 of the Code and in subsequent acts; though a tax on "collateral inheritances" of real estate is imposed by another act then passed. Sess. Acts ch. 1, § 38.

I have thus set out in detail the course of legislation on this subject, because I thought it very material to the present enquiry; which, I repeat, is: whether the section in the act of '53-4 imposing a tax on collateral inheritances, is repealed by implication by the act of '55-6, which contains no such section.

The latter act contains no repealing clause or words; and therefore, it repeals nothing expressly. If it repeals any other law or part of a law, it only does so by implication. Statutes may be repealed by implication, as well as expressly. Every statute is by implication a repeal of all prior statutes as far as it is contrary and repugnant thereto, and that without any repealing clause. Sedg. on St. and Con. law, 123-129. Or, as it is elsewhere expressed, "every affirmative statute is a repeal by implication of a precedent affirmative statute, so far as it is contrary thereto; for *leges posteriores priores contrarias abrogant*: Dwarria 673, (9 Law Lib.) But the leaning of the courts is against the doctrine. The

9 law does not favor a repeal by implication, unless the repugnance be "quite plain, and then only to the extent of such repugnance. Id. 674. The presumption is that the legislature, when it entertains an intention, will express it in clear and explicit terms; and it is generally to be taken that the legislature only meant to modify or repeal the provision of any former statute in those cases where such its object is expressly declared. Id. 717. This, however, is not always the case, and statutes are often passed without the precaution being used of ex-

pressly repealing other, or parts of other statutes intended to be repealed.

Whether a former statute is intended to be repealed by a later one, is always a question of intention, which is to be ascertained, when not plainly expressed, by construction of the later statute. The intention thus ascertained must prevail, as well in regard to the question of repeal, as in regard to any other question which can arise as to the meaning and effect of the statute. The rules of construction of a statute are in most respects the same as the rules of construction of deeds and wills; but in some respects they are not, the difference arising from the different nature of the subjects. Such of the rules of construction of a statute as seem to have a bearing upon this case will be noticed. Most of them may be found in Dwarris ch. xii.

In the exposition of a statute the leading clue to the construction to be made, is the intention of the legislator; and that may be discovered from different signs. As a primary rule, it is to be collected from the words; when the words are not explicit, it is to be gathered from the occasion and necessity of the law, being the causes which moved the legislature to enact it. Id. 693.

The safe and established rule of construction is, that the intention of the law-giver and the meaning of the law are to be discovered and deduced from a view of the

whole and of every part of a statute
10 taken and *compared together. It is the most natural and genuine exposition of a statute to construe one part by another part of the same statute, for that best expresses the meaning of the makers, and such construction is *ex visceribus actus*. And this construction, of itself, imports, *ex vi termini*. Id. 698, 703.

As one part of a statute is properly called in to help the construction of another part, and is fitly so expounded as to support and give effect, if possible, to the whole, so is the comparison of one law with other laws made by the same legislator, or upon the same subject, or relating expressly to the same point, enjoined for the same reason and attended with a like advantage. In applying the maxims of interpretation, the object is, throughout, first to ascertain, and next to carry into effect the intentions of the framer. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. It is, therefore, an established rule of law that all acts in *pari materia* are to be taken together, as if they were one law: and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system, and having one object in view. And the rule, it is said, equally applies, though some of the statutes may have expired, or are not referred to in the others. Id. 699, 700.

Besides the occasion and the reason of the enactment, the letter of the act, the context, the spirit of the act, the subject matter and

the provisions of the act, have all to be considered. Id. 702.

It is a well settled rule of law, that every charge upon the citizen must be imposed by clear and unambiguous language. Statutes which impose a duty upon the public will be critically construed with reference to the particular language in which they
11 are expressed. *When there is any ambiguity found, the construction must be in favor of the public; because it is a general rule, that where the public are to be charged with a burden, the intention of the legislature to impose that burden must be explicitly and distinctly shown. Id. 749. See also Plumer's case, 3 Gratt. 645.

Besides these rules, which I have taken from Dwarris, there are some others stated in Sedg. on St. and Con. law, which seem to be very pertinent to this case. After stating it to be well settled that a subsequent statute, which is clearly repugnant to a prior one, necessarily repeals the former, although it do not do so in terms; the author says: "And even if the subsequent statute be not repugnant in all its provisions to a prior one, yet if the latter statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the original act." Id. 124. "So, on the same principal, a statute is impliedly repealed by a subsequent one revising the whole subject matter of the first. And in the case of a statute revising the common law, the implication is equally strong. So where an act is an offence at common law, and the whole subject is revised by the legislature, the common law is repealed." The following authorities are cited in support of these views, and seem fully to sustain them: *Davies v. Fairbairn*, 3 How. U. S. R. 636; 16 *Barbour S. C. R.* 15; 12 *Mass. R.* 537; 5 *Pick. R.* 168; 10 *Id.* 37; 11 *Id.* 350. In *Bartlet, &c., v. King*, 12 *Mass. R.* 537, 545, the court said: "A subsequent statute revising the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law, as well as in reason and common sense, operate to repeal the former: according to the cases of the *Rex v. Cator*, 4 *Burr. R.* 2026; and the *King v. Davis*, 1 *Leach's cases* 306." In *Nichols v. Squire*, 5
12 *Pick. R.* 169, the court affirmed the *same principle, observing that in *Bartlet v. King*, an exceedingly useful statute, passed in 1754, concerning donations and bequests to pious and charitable uses, was held not to be in force, the legislature having, in 1785, legislated upon the same subject, and omitted to re-enact the provisions of that statute.

I will now consider the case in connection with the rules of construction and authorities before stated and referred to. The 15th section of the act of 1853-4 is not only not expressly repealed by the act of 1855-6, but there is no repugnancy between that section and any of the sections of the latter act. Both could well stand together, if such were the intention of the legislature; and such, in an ordinary case, would be presumed to be the intention of the legislature. But if, in this

case, the later act revised the whole subject matter of the former, and was clearly intended to prescribe the only rule that should govern on the subject; in other words, if it was clearly intended to be a complete tax law, embracing all the taxes in existence for the support of government after its passage; then, as a whole, it is plainly repugnant to the former act and every part of it, and as much repealed it as if that had been done in express terms. The question, and the only question, therefore, is: Was the act of 1855-6 intended to be a complete tax law?

This question depends upon the character of the act itself, the nature of the subject, the course of prior legislation upon it, and all the surrounding circumstances.

The act has the form and all the features of a perfect tax law. It has the appropriate title to such a law; and the same title which every such law has had since the foundation of the government, namely: "An act imposing taxes for the support of government."

It is very long, containing more sections, probably, than any tax law ever before contained; is minute in its details; embraces several subjects not embraced in any former law, and omits very few contained in the next preceding tax law; to-wit: the act of 1853-4. It does not profess to be amendatory, or to impose additional taxes, as does the act of 1850-51.

The nature of the subject seems to render it proper that a general tax law should be passed at every session of the legislature; and that it should be perfect in itself, embracing all the taxes intended to be imposed for the support of government. There is not legislative power which has been more carefully guarded by constitutional checks, the exercise of which is watched with more jealousy by the people, than the power to impose taxes. None should be imposed but what are required by public necessity and convenience; and as they are ever varying, there seems to be a fitness and propriety, if not necessity, in having complete action on the subject at every session of the legislature. The continually recurring questions which address themselves to the legislature at each succeeding session are: How much money must now be raised for the support of government? and on what subjects, and in what proportion, can the burden be laid with least inconvenience to the people? A heavy tax might properly be imposed at a period of great public necessity, which, when the necessity had passed away, might be unjust and oppressive to the last degree. Representative responsibility might be sufficient to prevent the legislature from passing an unjust and oppressive tax law, but not to compel them to repeal it after it had been passed by their predecessors.

The course of former legislation on the subject was accordingly uniform; and at every annual session of the legislature, from the very foundation of the government down to the adoption of the present Code, (or, at least, down to the session of 1848-9, when the plan of the revisors, whose reports was then under consideration,

was pursued,) a perfect tax law was passed for the current fiscal year. A different policy, it is said, was then introduced. It is true, the revisors, as we have seen, recommended the plan of a permanent tax law, which was accordingly engrafted on the Code. But it has since been partially pursued and acted on by the legislature. The Code gave the tax law for 1849-50, as it only went into effect on the 1st of July, 1850. And it partially gave the law for 1850-51, being amended by an act then passed. It has given the law for no other year, neither in whole nor in part. This has been owing in part, perhaps, to the adoption of the new constitution, which has made radical changes on the subject of taxation; but mainly, I think, to the inherent propriety of the ancient plan. We find, therefore, that in 1852, at the first session of the legislature after the adoption of the new constitution, a perfect tax law was passed, expressly for the current year, and the 40th chapter of the Code was expressly repealed. In 1852-3, another perfect tax law was passed, though not expressly for the current year; and the 40th chapter of the Code was again repealed. And in 1853-4 another and precisely similar tax law was passed—similar even as to the amount of the taxes. And at the next session of the legislature, to-wit: in 1855-6 the act in question was passed, which, as we have seen, has the form and all the appearance of a perfect tax law. At the next session of the legislature, to-wit: in 1857-8, for some cause, of which I am uninformed, no tax law was passed, and the act of 1855-6 therefore continued in force. This was a contingency, to provide for which was the motive of the revisors, in part, for recommending a permanent tax law; and to that extent, such a law has proved to be convenient. At the last session of the legislature, to-wit: in 1859-60, another tax law was passed, having the form and all the appearance of a perfect tax law. The practice of the government, then, as well since as before the adoption of the Code, seems to have been in favor of the plan of enacting a perfect tax law at each succeeding session of the legislature.

Convenience, if not necessity, has induced this practice. At each succeeding session of the legislature a report is made by the auditor of public accounts, showing the probable receipts and disbursements of the current fiscal year. The committee of finance reports a tax bill embracing the subjects intended to be taxed, but leaving blank the amount of tax on each subject; and the blanks are filled by the legislature, whose view in filling them is to raise only so much revenue as may be necessary for the support of government. It is extremely improbable that any subject intended to be taxed would be omitted in the bill by the committee, on the supposition that the legislature did not intend to increase the tax thereon, but intended the former law to remain in force as to such subject. This view applies with much force to the session of 1855-6, when the necessities of government required a great

increase of revenue, and the amount of the former tax on each subject was generally doubled.

The reason of the thing, and all the other surrounding circumstances, seem also to concur in showing that the act of 1855-6 was intended to be a complete tax law. Of all the laws upon the statute book, none should be plainer, or freer from doubt and ambiguity, than those which impose the burden of taxes upon the people. They should be so plain that everybody may at once understand them, and especially the ministerial officers who have an agency in assessing and collecting the taxes—as the auditor, commissioners of the revenue, and sheriffs. Convenience dictates that all the taxes imposed for the support of government, should be embraced

16 *in one act, so as to be seen at one view, instead of being sought for in different and scattered acts; and especially that no room should be left for doubt whether particular sections of different tax laws, though not embraced in the last, were intended to remain in force.

What, then, was the motive of the legislature in omitting to insert in the act of 1855-6, the 15th section of the act of 1853-4? That omission was by design. They had before them the former in framing the later act, and copied portions of it literally. They copied literally, except as to amount of tax, the section which preceded and that which followed (though the latter was a long one) the 15th section in the former act. Why did they carefully omit the 15th section? Was it merely to save words? to avoid the unnecessary insertion of only two lines? Did they omit it because they intended not to increase the tax, but to let it remain as before, and therefore considered it unnecessary to repeat it in the later act? Why, then, did they pass the act of 1853-4 at all, which was but a copy of the act of 1852-3? Why did they, in the act of 1855-6, insert other portions of the act of 1853-4 as to which no change was made of the amount of tax? The tax on every male free negro, between 21 and 55 years of age, is the same in each act. So, also, is the tax on every license to a person selling goods by sample, card, or otherwise, except at some store or place of trade; and the tax on every license to the owner of a jackass or stallion, for the services of which compensation is received; and the tax on every license permitting theatrical performances in a public theatre; and on every license permitting, for a year, the sale of refreshments in a theatre during such performances. The words imposing these taxes might as well have been omitted in the act of 1855-6 as those imposing

17 a tax on collateral inheritances, if a saving of words had been the only *motive for omitting the latter. Would the legislature, for such a motive, have left in so much doubt a matter about which their meaning should have been perfectly plain? Having embraced in the act of 1855-6 almost all the other subjects embraced in the act of 1853-4, would they not have embraced this subject also, if they had intended to continue the tax; especially when it could so easily

have been done; and more especially as it had been done in the act of 1853-4?

On the other hand, if we suppose they intended to discontinue the tax, we at once see an adequate motive for omitting the subject in the act of 1855-6. For, although that may not have been the most regular mode of discontinuing the tax, it was, at least, a natural one. The legislature being engaged in framing a complete tax law, it naturally occurred to them that any existing tax omitted in that law would thereby, of necessity, be discontinued. It did not occur to them that a doubt might arise, whether the act was intended to be a complete tax law, or they would have prevented it by expressly repealing the act of 1853-4. Conceding it to be a complete tax law, it was necessarily repugnant to, and without any repealing clause ipso facto repealed, all former tax laws.

We can readily conceive the motive of the legislature for discontinuing the tax on collateral inheritances in 1855-6, if, in fact, they intended to do so. A doubt arose as to the constitutionality of the tax some time after the adoption of the new constitution, and the legislature may have determined not to impose it again; at least, until its constitutionality should be judicially affirmed. If they had been assured of its constitutionality, they would probably not only have included the tax in the act of that year, but also increased it, as they did in almost all other cases.

But, besides the tax on collateral in-
18 heritances, some *other taxes included in the act of 1853-4 are omitted in the act of '55-6, and these will now be noticed. They are three in number.

The first is the tax on the salary, not exempt from taxation, of each officer of the government receiving the same out of the treasury, other than the governor and judges, imposed by the 2d section of the act of '53-4. This section is wholly omitted in the act of '55-6, and I think was omitted for the purpose of discontinuing the tax. If it had not been intended to discontinue the tax, it would probably not only have been inserted, but increased, in the act of '55-6, as was the tax on the income of other offices. The tax on the income of both classes of offices was the same in the act of '53-4, and had been the same in former acts. There is no reason for believing that a difference would have been made between them in the act of '55-6, had it been intended to continue both. The discontinuance of a tax on the income of one of these classes was probably a means used of making, in effect, a small addition to the salaries of that class.

But it may be said that the intention of the legislature to discontinue this tax is indicated, not only by its omission, but also by its express exception in that part of the act which imposes a tax on the income of officers of the State, "other than that of an officer receiving a salary out of the treasury.

This exception was made in the same manner in former tax laws; and was made because the tax on the two classes of offices

was imposed by different sections of these laws, and therefore the exception was proper to avoid the appearance of a double tax on one of the classes. The tax was imposed by different sections because the tax on one class was collectible by the sheriff, while the other was to be deducted at the time the salary was audited and paid. There is no

19 repugnancy between *the 2d section of the act of '53-4 imposing a tax on officers receiving their salaries out of the treasury, and the 6th, of the act of '55-6, imposing a tax on officers other than the former; any more than there would be between the same sections if contained in the same act. The repugnance is between the acts, not the sections; and consists in the fact that each act is a complete tax law. But while the exception creates no repugnance between the two sections, it would, perhaps, have had some effect in preventing the legislature from omitting, in the act of '55-6, the 2d section of the act '53-4, if they intended to continue the tax imposed by that section, as it would have involved that intention in greater doubt.

The second of these omissions is the tax on every license to a merchant or mercantile firm to sell provisions or agricultural commodities, the growth or production of this State, or some of the United States, imposed by the 6th section of the act of '53-4. This section is wholly omitted in the act of '55-6, and I think was omitted for the purpose of discontinuing the tax, no doubt with a view to encourage agriculture. It was probably considered unjust and impolitic to impose an additional tax upon a merchant whose stock in trade consists, in part, of provisions or agricultural commodities. A person whose stock in trade consists wholly of such articles is a merchant, and is embraced by the 14th section of the act of '55-6, imposing a tax on every license to a merchant; and by that only, unless there be some other provision of the law taking him out of the operation of that section, or subjecting him to some other and additional tax. It is not probable, therefore, that the legislature would have omitted, in the act of '55-6, the 6th section of the act of '53-4, if they had intended to continue the tax imposed by that section; though

20 there is no positive repugnancy between that *section and the 14th section of the act of '55-6, any more than there would be if both were embraced in the latter act. As before stated, the repugnancy is between the two acts, and not the two sections.

The third and last of the omissions is that part of the 10th section of the act of '53-4 which imposes a tax "on every license to a person who may receive rough frame work of any description, from other States, and put it together in this, for the purpose of sale." This tax probably was found by experience to be wholly unproductive, and therefore was discontinued by being omitted in the act of 1855-6.

Upon the whole, my conclusion is, that the act of 1855-6 is a perfect tax law, embracing all the taxes intended to be imposed for

the support of government; that it omitted the tax on collateral inheritances for the purpose of discontinuing it; and therefore, that it repealed by implication the 15th section of the act of 1853-4. Other views might be presented in support of the same conclusion, but it is unnecessary to do so, and my opinion has already been too much prolonged. The result of it is that the judgment of the Circuit court ought to be reversed, and the motion overruled.

ALLEN, P., and DANIEL and ROBERTSON, Js., concurred in the opinion of Moncure, J.

LEE, J., dissented.

Judgment reversed.

21 *Early & Wife v. Friend & als.

July Term, 1860, Lewisburg.

[78 Am. Dec. 649.]

(Absent, LEE, J.)

1. **Tenants in Common—Account of Rents and Profits—Equity Jurisdiction.**—One tenant in common may maintain a suit in equity against his co-tenant, who has occupied the whole of the common property, for an account of rents and profits.

2. **Same—Interpretation of Statute.**—Whenever the nature of the property is such as not to admit of its use and occupation by several, and it is used and occupied by one only of the tenants in common; or whenever the property, though capable of use and occupation by several, is yet so used and occupied by one as in effect to exclude the others, he receives more than comes to his just share and proportion in the meaning of the statute.†

3. **Same—One Tenant in Possession—Liable to Co-Tenants for Rent.**—Where the common property is rented out by one tenant in common, he is accountable to his co-tenants for their share of the rents he has received. And where he occupies and uses the whole property himself, he is liable to his co-tenants for a reasonable rent for it in the condition it was when he took possession.

4. **Same—Same—Same—Interest.**—Interest is to be paid upon the rents found to be due from the tenant in common in possession to his co-tenants.

This was a bill filed in March, 1848, in the Circuit court of Kanawha county, by Richard K. Cralle against Joseph and Thomas R. Friend, Samuel H. Early and wife, and others, asking for an account of the rents, issues and profits of a certain salt property and a tract of land in the county of Kanawha, which the Friends owned as tenants in common with the plaintiff and the other defendants and of which the Friends

22 had held *exclusive possession. The record is very voluminous, but the facts necessary to show the points decided by the court are as follows:

***Tenants in Common—Measure of Accountability.**—See *Graham v. Pierce*, 19 Gratt. 28, and *foot-note*, where the cases in point are collected. In addition, see the principal case cited in *Dobson v. Hays*, 29 W. Va. 601, 2 S. E. Rep. 429; *Moore v. Ligon*, 30 W. Va. 152, 155, 3 S. E. Rep. 575.

†See the statute quoted in the opinion of Judge MONCURE.

Dr. John J. Cabell died in 1834, leaving a large real estate in the city of Lynchburg, and in the counties of Bedford and Kanawha. In the county of Kanawha he owned a valuable salt property, and a tract of land. The persons entitled to share his estate were his widow and five children, viz: Mrs. Cralle, wife of Richard K. Cralle; Mrs. Ward, wife of Henry C. Ward; Mrs. Friend, the wife of Thomas R. Friend; Paulina Cabell, and Henry Ann Cabell, who afterwards married Samuel H. Early. Thomas R. Friend qualified as administrator on the estate.

In November, 1834, a friendly bill was filed in the Hustings court of Lynchburg, by the widow and heirs of John J. Cabell, for a division of his estate; and on the same day commissioners were appointed to make the division.

Prior to October, 1835, Henry C. Ward had died, Paulina Cabell had died an infant intestate and unmarried, and Mrs. Cralle had died, leaving an infant daughter, Mary C. Cralle; and in October of that year, these deaths were suggested; and Mary C. Cralle was made a party plaintiff. And the court set aside the former order appointing commissioners to divide the estate; and at the same time reappointed them, with directions to assign the widow her dower, and to divide the property among the four surviving heirs, Mary C. Cralle being substituted for her mother.

The commissioners divided the property in Lynchburg, allotting to the widow her third, and to each of the heirs her fourth in severalty; but in relation to the salt property on the Kanawha they say: "That a portion of Dr. Cabell's real estate, to wit, the salt works

and furnace on the Kanawha, do not seem to them capable of *division; and as they are now of great value, and as their present value may hereafter be still more increased or diminished, according to a variety of circumstances, they have felt it their duty to give each party a certain designated interest therein, so that each may be alike profited by an advancement of its value, or suffer equally from any further depreciation." And the property having been valued twenty-five thousand dollars: to Mrs. Cabell, the widow, was allotted one-third for her dower, at \$8,333 34, and to each of the four surviving heirs was allotted one-fourth of the remainder, at \$4,166 66. And the tract of land on the Kanawha was allotted to the four heirs, each one undivided fourth thereof valued at \$3,750.

The commissioners having made their report, the parties seem to have taken possession of the real estate allotted to them in severalty; and nothing more was done in the case until November, 1845, when the report was directed to lie one month for exceptions; and no further proceedings appear to have been taken in the cause.

By deed, bearing date the 19th December, 1835, Mrs. Cabell, the widow of Dr. Cabell, acting for herself and as guardian of her daughter, Henry Ann Cabell, leased to Thomas R. Friend her third of the said salt property, and Henry Ann Cabell's one-fourth

of the remaining two-thirds thereof, for ten years, commencing on the 25th of December, 1836. For the widow's third he was to pay \$500 a year, and for Henry Ann Cabell's interest he was to pay \$300 a year. And it was agreed that if the widow died before the end of the ten years, the lease as to her part was to cease; and if Henry Ann Cabell attained to the age of twenty-one years, or married before the ten years expired, upon the happening of either of these contingences, the lease as to her interest was to cease; or if continued thereafter, it was to be at the pleasure of the said Henry Ann, if she attained

24 *the age of twenty-one years, or of her husband if she should marry before the time expired.

By another deed of the same date, Mrs. Ward, for the consideration of \$8,750, conveyed to Thomas R. Friend her fourth in the two-thirds of the said salt property, her fourth in the third thereof allotted to Mrs. Cabell for life, and her fourth of the tract of land on the Kanawha.

Thomas R. Friend having thus acquired the interest of Mrs. Cabell, Henry Ann Cabell, and Mrs. Ward, and being entitled to another fourth in right of his wife, took possession of said salt property, and he and his father, Joseph Friend, worked it in partnership until 1842. In January of that year Thomas R. Friend conveyed all his interest in the property to Joseph Friend, who continued to work the property on his own account from that time. When they took possession the property was very much out of repair; and whilst it was occupied by them very expensive improvements were made upon it, by which the issues and profits of the property were greatly increased.

It appears that Mrs. Cabell lived until some time in the year 1843. In the same year Henry Ann Cabell attained the age of twenty-one years; and in 1846 she married Samuel H. Early, a marriage settlement having been previously executed, whereby her property was conveyed to Jubal A. Early, in trust for her separate use. It appears, too, that the rent due to Mrs. Cabell was paid, as was that due to Henry Ann Cabell, up to 1843, a part of it having been paid to Early after the marriage. And Joseph Friend, in his answer, avers that neither Henry Ann Cabell, after she came of age, nor her husband, after the marriage, ever expressed any wish to change the terms of his holding under the lease aforesaid; "and hence he has always hitherto

25 regarded himself as holding and occupying under the original *rent reserved." It also appears that the plaintiff Cralle had received from Hewitt, Ruffner & Co. \$500 a year as dead rent for his interest as tenant by the curtesy in the property up to the year 1841.

Before the bill was filed in this case, Mrs. Ward and Mrs. Thomas R. Friend had died; the latter leaving four infant children surviving her, who were parties defendants in this suit.

In 1848 the court directed accounts of the rents, issues, and profits of the salt property and the tract of land on the Kanawha, whilst

in the possession of the Friends, to be taken : one of these accounts was to commence when they took possession, and be continued until the 28th of January, 1842, when Thomas R. Friend conveyed his interest in the property to Joseph Friend, and was to be charged to them jointly; and another was to extend from that period until the first day of the next term of the court, and was to be charged to Joseph Friend.

The commissioner returned his report, which was excepted to by all the parties; and the cause came to be heard on the 22d of February, 1853, when the court made a decree, which was changed in some respects by another decree, made on the 17th of February, 1855. By these decrees the court held that the co-tenants of the Friends were entitled to share in the actual profits made on the salt property, according to their several interests, and to recover from the Friends their share of the net profits which had been received by them, except for such time as the shares of any of the parties were actually rented, or for which they had theretofore received compensation. And having determined the interests of the different parties in the profits, and fixed the time from which they were each entitled to share them; and having also fixed the nature of allowances

which should be made to the Friends ;
26 and deciding *that they were not to be charged with interest upon the annual profits, the report was recommitted with instructions to the commissioner, to restate and settle the account upon the evidence then in the record, or which might be produced.

From this decree Samuel H. Early and wife, and the trustee, Jubal A. Early, applied for an appeal, which was allowed.

The case was most elaborately argued in printed notes, upon all the questions raised in it, by Beverly R. Johnston and Price for the appellants, and Conway Robinson and Fry for the appellees, Thomas R. and Joseph Friend ; but the decision of the court involves but two of these questions.

For the Appellants, it was argued—If the court had no jurisdiction of the case, the defendant must have been badly advised, when he asserted in his answer, which he also swore to, that the regular course had been pursued for the attainment of rents and profits. And with the perfect assurance which he felt, that upon taking the account, a large balance would be found in his favor, he might well challenge the investigation. That investigation has been made. It was prayed for by the one party and conceded by the other, each claiming a balance in his favor. But these expectations could not possibly be realized on both sides. A balance could not be on both sides—one or the other must be the creditor and the other the debtor. One or the other party must be disappointed in his hopes. So the learned and able counsel for the defendants, fearing that their client was too sanguine, when he anticipated a large balance upon settlement in his favor, have now, for the first time, discovered that the court cannot take jurisdiction of the case to ascertain the actual amount of the balance, or on which side it will fall.

27 *An account of rents and profits being the object of the suit, and being prayed for in the bill, and being acquiesced in, in the answer, there being no plea to the jurisdiction, it seems to us that without the aid of our act of Assembly, and without the aid of any adjudicated case, but upon the general principle, and general practice of a court of equity, it would require the want of jurisdiction to be very palpable before it would, at this stage of the case, dismiss the bill. *Ruffners v. Lewis's ex'ors*, 7 Leigh, 720; *White and McCall*, not reported.

In the first of these cases, Judge Carr says, p. 738: "I think, however, the accounts have been taken wrong. The Ruffners must be treated as tenants in common with Prior, not as trespassers. They are liable for a fair share of the profits, &c."

Judge Tucker says, p. 743: "First as to rents and profits: I have no question that in the settlement of them, the Ruffners ought to be treated as tenants in common with Prior, and those claiming under him.—They claim to hold Reynold's interest at a very early period by contract with him, and, therefore, held in his right one moiety, while they wrongfully took the exclusive enjoyment and possession of the other moiety, which did not belong to them."

Here both Judges treat the Ruffners as tenants in common with Prior, and those claiming under him, and therefore were liable to a fair share of the profits.

Where a bailiff is made by contract, and not by law, he must consent to the relation. When he takes the profits to himself exclusively, being tenant in common in possession, the law makes him bailiff because of his interest and his excessive receipts.

To review all the numerous authorities cited upon this subject by the learned counsel on the other side, would be as tedious as we apprehend it would be unprofitable. We believe that when the court

28 comes to *review them, they will find them, at least many of them, inapplicable to the facts of this case.

Here is a property which cannot be occupied by more than one proprietor. It cannot be occupied jointly. It is indivisible, so the Lynchburg court held, in a suit in which all these parties were parties, and by its decree they are bound. It is productive of large profits, in the hands of a judicious agent or bailiff, rendered so principally on account of the Salt water and the Coal. Now, after the Salt water and Coal have been used until the water is nearly exhausted, and has receded fifteen or eighteen hundred feet; and the Coal is diminished in quantity, rendered more difficult of access, if not literally consumed, an account of profits is inadmissible in a Court of equity.

It may not be amiss to ascertain who a bailiff is in legal contemplation: A bailiff is one who has the administration and charge of lands, goods and chattels, to make the best benefit for the owner. *Coke Litt*, 172; 1 *Story's Eq.*, § 446. "And against whom, therefore, an action of ac-

count would lie for the profits which he had made, or might by his industry or care, have reasonably made, his reasonable charges and expenses being deducted." 2 Fonb Eq., B 2, ch. 7, § 6, and note n.

The remedy in equity in cases of account, is generally more complete and adequate than it is or can be at law. *Mitford by Jeremy*, p. 120; *Corporation of Carlisle v. Wilson*, 13 Ves., R. 275; 1 *Story's Eq.*, § 450, 451.

In all cases of joint interests, where one party receives all the profits, he is bound to account to the other parties in interest for their respective shares, (deducting the proper charges and expenses) whether he acts expressly by authority, as bailiff, or only by implication, as manager without dissent, *jure domino* over the property. 1 *Story's Eq.*, § 466; *Strelly v. Winson*, 1 Vern., R. 297; *Horn v. Gilpin*, Amb., R. 255.

29 *Before the statute of 4 Anne, ch. 16, § 27, a tenant in common had no remedy for profits against the tenant in possession receiving the profits. *Coke Litt.* 199, b, 200 b; but this statute gave a remedy by giving an action of account.

The case of *Bennet v. Whitehead*, 2 P. Wms., R. 644, referred to by Mr. Robinson, is not deemed a very conclusive authority, to establish anything in this case against us. The account in that case was directed, and the only question of any difficulty, was as to the time at which the account should commence. It was ordered to commence with the plaintiff's title.

There is as little to our prejudice in the case of *Morgan v. Morgan*, 1 Atk., R. 489. The party entering and holding the estate of an infant was held to account.

And so in 1 *Story's Equ.* § 511, cited by Mr. Robinson, where several of the authorities referred to by him are cited, it is stated that where a stranger enters into an infant's lands, he shall account to the infant for rents and profits. This is so at common law, and also where there is even no unity of estate.

The same may be said of the cases of *Newburgh v. Beckerstaffe*, 1 Vern., R. 295, and *Cary v. Bertie*, 2 Vern., R. 332.

After treating these authorities with the utmost respect, it cannot be said that they have any controlling influence upon this case.

One tenant in common, as between himself and a stranger, is in possession of the whole. This is the effect of *Russell v. Allen*, 3 Kernan's, R. 173; but, we will add, being in possession and taking the whole of the profits, his co-tenant can compel him to account as bailiff. *Code*, § 14, p. 586.

Sargent v. Parsons, 12 Mass., R. 149, decides that rents and profits cannot be recovered at common law, and that whether

30 *in Massachusetts or not, is immaterial, as the case was not brought under that statute; but see note (a) at the

end of the case, for the doctrine we contend for.

In *Jordan v. Wilkins*, 2 Wash. Cl. R., 482, the plaintiff failed because of a misdescription. He claimed that the money sued for had been received for him, when it appeared that it had been received for a Company.

It is supposed that the case of *Henderson v. Eason*, 9 Eng., L. & E. R., 339, which is referred to and commented on in the 3rd vol. *Rob. Prac.*, (new) page 173, has shed a flood of light upon this subject. We think, however, that case differs widely from this. There the profits were taken as the Court said, not received, so as to bring the case within the operation of the statute of 4 Anne. Here the profits were received; there the subject of the profits was a farm which had been cultivated by the defendant; no waste was alleged; here the use of the property necessarily impaired its value in perpetuity; the water was exhausted and the coal consumed. These injuries were irreparable. The receipts grew out of the use which necessarily injured the property. To use was to injure and exhaust.

Thus this case is clearly distinguishable from *Henderson v. Eason*, and in sustaining the plaintiff here, the Court need not interfere with that case. Were it no so, the Court might not feel bound to follow that case, in disregard of many others of at least equal respectability. It might not see the substantial difference, as the English court thought it did, between the words receive and take, and upon that criticism, it seems the case turned.

In *White v. McCall*, the court uses this language: "The court is, therefore, of opinion that there is no error in the decree affirming the right of the complainant to call for an account of the rents and profits, or in ascertaining *the extent of their interest, under the devise of James King, and the determination of the bequest to Carson, to be four twenty-sevenths of the whole amount of the rents and profits, and to require said White to account, as tenant in common, holding possession of the whole subject, and appropriating the whole profits to his own use."

Here the court expressly decides that one tenant in common has the right to call on his co-tenants for an account of rents and profits.

It would be vain to say that that was a suit against White as receiver of the court, and, therefore, distinguishable from this. It was a suit against him both as receiver and tenant in common, and his liability as tenant in common, not as receiver, is expressly affirmed.

It would be equally vain to attempt to distinguish that case from this, by saying that White had been tenant of the property, and had held over, without contract, after his term expired, and for that reason he was liable to an account; for such was also the case in this as to the Friends, and Early and wife. Indeed, we think it would be difficult to distinguish that case from this,

upon any ground calling for a different principle of settlement; except in this case the court can ascertain with tolerable certainty the amount of profits, which in that case it could not do; and thus, in this case it can do what in that it would have done if it could.

The point most labored in the very elaborate and learned argument of Mr. Robinson, is his position, founded mainly on the decision of the court of the Exchequer chamber, in the case of *Henderson v. Eason*; that no account of rents, issues and profits, lay in favor of one tenant in common against his co-tenant, who has had the sole occupation of the estate, and taken or received the issues and profits exclusively.

As a general proposition in regard to 32 real estate, we hold that such a *decision is not, and, at least since the statute of Anne, has not been law in Virginia. The practice in our inferior courts has been uniform and unvarying. The view of the profession, as to the existence and universality of the right, has been general; and the decisions of the court of Appeals, wherever the point has arisen, whether directly or incidentally, have been clear and strong—maintaining the right and enforcing the remedy to the fullest extent, wherever the circumstances of cases rendered the account possible; and where it was not to be attained for want of proper evidence, giving the utmost annual value justified by the known facts of the cause. So much for the known and recognized rule of decision in Virginia, on this most interesting question. It appears to us, that if we be right as to the existence of such a course of practice, and such an uniform course of decisions in Virginia, as we submit has obtained in our courts, it must settle this question in our favor. We submit that such would be the result in regard to real estate, merely employed and cultivated for agricultural purposes. But the case of salt estates is different and peculiar; and even under a different course of adjudication, would have necessarily worked out a new and juster rule for itself from the very necessity of the case.

Such an estate is generally impartible from its physical nature, yet more from difficulties which are inseparable from the subject and its mode of use and enjoyment. It is a fact forming part of this case, and conclusive between these parties, that this salt property is not capable of partition. If this had not been so declared in this case by the decision of the court at Lynchburg; yet the fact is apparently and incontrovertibly true in itself. How, then, stood this estate when the Friends first, and Joseph Friend subsequently, obtained the sole occupation, which they afterwards held, and which, in its consequences, is now 33 the subject of the *present controversy? It was a single tenement, improved with the well, furnace and fixtures, (including a coal mine,) necessary for the manufacture and sale of salt. It was incapable of being divided amongst

the heirs according to their interests therein. It was capable of large production; but that product must be the result of a single operation of the work. These works must be carried on as a unit; separate, disunited, several, working of this estate at the same time by several tenants in common, is manifestly impossible. No one proprietor could be forced to work the estate. But whenever he elected to enter, occupy, and operate the estate, the legal consequences arising from his own act, and from the interests and rights of his co-tenants in the estate, became the inevitable and inseparable conditions of his act.

Why should not interest be allowed? In *Ruffner's v. Lewis' ex'rs*, 7 Leigh 720, there were large accounts on both sides, rendering it uncertain on which side the balance would fall. They also occupied as owners, and believed themselves to be so. They had employed their skill, capital and enterprise on the property in good faith as owner. Not so here. The Friends knew they were not owners. They knew they must account for receipts, and when they received the money, which ought at least at the end of the year to have been paid over, why should they not pay interest? He who has another's money and uses it, must pay interest on it. *Jones v. Williams*, 2 Call, 102; *Graham v. Woodson*, 2 Call, 249; *Dow v. Adam's admr.*, 5 Munf. 21; *Mickie v. Lawrence*, 5 Rand. 571.

A trustee retaining money must pay interest. *Lomax v. Pendleton*, 3 Call, 538; *Miller v. Beverly* 4 Hen. & Mun. 541.

Executors must pay interest on the profits of slaves. *Quarles' ex'r. v. Quarles*, 2 Munf. 321.

34 *For the Appellees it was insisted—It is not pretended that Thomas or Joseph Friend was appointed bailiff, and accepted the appointment. All that is pretended by the plaintiff or by Early is that T. and J. Friend have enjoyed more of the benefit of the subject, or made more by its occupation, than the plaintiff. And the question is, whether, on this naked ground, the claim can be maintained?

Lord Macclesfield was clearly of opinion that "where one has title of entry, and neglected to enter or to bring his ejectment, but sleeps upon it for several years, that as he has no remedy at law for the mesne profits, so neither has he in equity; for it was his own fault that he did not enter: and he shall never come into a court of equity for relief against his own negligence, or to make the tenant in possession, who held over his lease, to be but his bailiff or steward, whether he will or not." *Duke of Bolton v. Deane*, Prec. Ch., 516. It may be otherwise where fraud has been used to conceal the title from the plaintiff, or in case of an infant, for whom the common law provides.—*F. N. B.*, 118; *Co. Lit.*, 89b, 90a; 1 *Tho. Co. Lit.*, 168, 338; *Newburgh v. Bickerstaffe*, 1 *Vern. R.*, 295; *Cary v. Bertie*, 2 *ib.*, 332; *Bennet v. Whitehead*, 2 *P. Wms.*, 644. "When," says Lord Hardwicke, "any person, whether a father or a

stranger, enters upon the estate of an infant, and continues the possession, this Court will consider such person entering, as a guardian to the infant, and will decree an account against him." *Morgan v. Morgan*, 1 Atk. R., 489; 1 Story Eq., § 511.

In the present case the person sought to be charged "was entitled to the possession of the whole, until a division between the parties." For one "tenant in common has a right to the possession of the whole, as well as each part." *Russell v. Allen*, 3 Kernan R., 179. And the claim is for an account of profits received not
35 *when the plaintiff was an infant, but when he was an adult.

The suit is not in a State like Connecticut, where there is a statute giving the action of account, "where two persons hold any estate as joint tenants, tenants in common, or coparceners, and one of them receives, uses, or takes benefit of such estate, in greater proportion than the amount of his interest in the principle estate. *Lacon v. Davenport*, 16 Conn. R., 331. But it is in a State where, as in England, the common law gives the rule, except so far as a change has been made by the statute of 4 Anne, c. 16, § 27.

There is no doubt as to the common law. See Co. Lit., 200b; 1 Tho. Co., 787, Am. ed. 910. The liability to account for the profits of an infant's lands was an exception to the general rule requiring a contract to be shown to support the action of account. *King of France v. Morris*, cited in 3 Yeates R., 251; *Thouren v. Paul*, 6 Whart. R., 620. The general rule applied to every tenant in common who was an adult; to every one who was competent to enter on the land or bring an action if he was disaffected thereof; to every one who was competent to make a contract with his cotenants in common, or to decline making such contract. "If," says Parke, B., "one tenant in common occupied and took the whole profits, the other had no remedy against him whilst the tenancy in common continued, unless he was put out of possession, when he might have his ejectment, or unless he appointed the other to be his bailiff as to his undivided moiety, and the other accepted the appointment, when an action of account would lie as against a bailiff of the owner of the entirety of an estate. Until the statute of Anne this state of the law continued." 17 Adol. & El. n. s. 718; 79 Eng. C. L.; 9 Eng. L. & Eq. That statute, besides allowing an action of account

36 against executors or administrators of a guardian, bailiff *or receiver, gives such action to one joint tenant or tenant in common against the other as bailiff, for receiving more than comes to his just share or proportion. 1 R. C. 1819, p. 509, § 81. The effect of this statute is now to be determined in Virginia.

It is well established that there is a material difference between the common law liability of a bailiff, and the statutory liability of one receiving more than his just share: the bailiff at common law may be subjected

for what he might have made without his wilful default; whereas the liability under the statute is only for so much as the party actually received beyond his just share. *Walker v. Holladay*, Comyn. R., 272; *Wheeler v. Horne, Willes*, R., 208; *Sturton v. Richardson*, 13 M. & W., 21; *Irvine v. Hanlin*, 10 Serg. & R., 221. In a case under the statute, the declaration must allege not only such receiving, but from whom the money was received. *McMurray v. Rawson*, 3 Hill's R., 59. And this is a material allegation, with which the proof must correspond. *Jordan v. Wilkins*, 2 Walsh. C. C. R., 482.

These cases—even those upon common law pleadings—are illustrative upon the important question, What is "receiving" of more than comes to his just share within the meaning of the statute? They show that the action of account against a tenant in common lies only in respect of what he has received from another, and gives support to the position that the action does not lie unless the defendant be charged with having received rents and profits otherwise than by his occupancy; a position for which there is the authority of the Supreme Court of Massachusetts. *Sargent v. Parsons*, 12 Mass. R., 149; of the Lord Chancellor of England (*Lord Cottenham*). *McMahon v. Burchell*, 2 Phill. R. 134, 22 Eng. Ch. R. 127; and the Court of Exchequer chamber. *Henderson v. Eason*, 17 Adol. & El. n. s. 718, 79 Eng. C. L. 701, 9 Eng. L. & Eq. 339; 3 Rob. Pract., 173-4-5.

37 *It may be that sometimes when a court makes a decree for partition, it may, if either of the co-owners has been actually receiving rents reserved from others, decree an account of the rents so received by him from others, and of the plaintiff's share of such receipts.—But we say that the mere fact of his having occupied the property will not of itself make him liable for an occupation rent; for the effect of such a rule would be that one tenant in common, by keeping out of the actual occupation of the premises, might convert the other into his bailiff, and prevent him from occupying except upon the terms of paying rent. *Adams' Eq.*, p. 232 of Eng., p. 525 of Am. ed.

It is not enough to show that the land was of a certain value a year to let. That was shown in *Henderson v. Eason*; it was proved there that the yearly value of the farm was £300, but such proof was of no use there, and should avail no more here.

In respect of the salt property, it is not enough to say that profits were made and actually taken by the Friends; it does not follow—it is impossible to say—that they have received more than their just share. The evidence authorizes the conclusion that if there be any enterprise uncertain and hazardous in the extreme, it is that of the manufacture of salt; and that to such a case as that before the court, the application of the principle of *Henderson v. Eason* is peculiarly proper. What the Exchequer Chamber deemed just with respect to the

very uncertain and expensive crop of hope, cannot be less just with respect to the more uncertain and more expensive product of salt wells. If Joseph Friend has taken the whole of the salt that he raised, "is he to be accountable in such a case, when it is clear that if the speculation had been a losing one altogether, he could not have called" on the plaintiff or Early for a share of the losses, as he would have been enabled to do if the property had

38 *been worked "by the mutual agreement of the co-tenants?" Having employed his capital and his industry in this hazardous enterprise, without the co-operation of the plaintiff or Early, they have no right now to subject him to another hazardous operation—that of ascertaining, from the various statements and conflicting views of witnesses, and the uncertain judgment of a commissioner upon unsatisfactory evidence, whether or no he made a profit and what was the amount of that profit. Although he has taken the proceeds of all the salt that he raised, "he cannot be said to receive more than this just share and proportion to which he is entitled as a tenant in common. He receives, in truth, the return for his own labor and capital, to which his co-tenants has no right."

It may well be that a Court of Equity had jurisdiction in *Ruffners v. Lewis' ex'ors*, 7 Leigh. 720, without its following that there was jurisdiction to decree an account of profits in this cause. It may be considered clear, as Judge Story says, (1 Story's, Eq. § 512), "That if there is a trust, and the cestui que trust comes into equity upon his title to recover the estate, he will be decreed to have the further relief of an account of the rents and profits." But, in our case there is no such equitable ground for interference. It is the case of a legal right asserted—asserted by one who is not an infant—and who has no remedy in equity for any thing beyond what he is entitled to recover at law. "There being no trust nor infant in the case," an account of rents and profits should be refused here, as it was refused in *Hutton v. Simpson*, 2 Vern. R. 722, 1 Eq. Cas. Abr., Tit. Account, p. 7.

Lord Hardwicke says it is difficult to go through with an action at law, in case of an account of the profit of coal mines; and, therefore this court would go further than in other cases. But it is the same as

39 a bill for an *account of rents and profits of an estate which cannot be maintained entirely on a legal title, unless infancy or something else is in the way. *Sayear v. Pierce*, 1 Ves. sen. 232.

There is, we insist, nothing in this cause to distinguish it from *Henderson v. Eason*, or to prevent the principle of that decision from being applied to it. On the contrary, that principle is strikingly vindicated by what is found in this record.

Where an authority be found for holding that the Friends, standing merely to the plaintiff and Early as tenants in common, are to be bound to the same care, diligence

and accuracy, and subjected to the same rigor, as actual bailiffs? Such a proposition is directly opposed to numerous decisions hereinbefore mentioned. And yet, upon this wholly untenable ground, the conclusion is arrived at, that as they had not kept books, &c., such as bailiffs should have kept, all presumptions are to be made against them!

The authorities referred to by the other side sustain no such position in reference to a case like this.

In *White v. Lady Lincoln*, 8 Ves. 363, Jackson, who after the death of the Duke of New Castle, was clothed with duties as his executor, had, in his lifetime, stood to him as solicitor, and not merely as solicitor, but as general agent, auditor, land-steward and manager. With reference to these latter characters, the court laid down as a rule, that a man standing in that relation is bound to keep regular accounts of his transactions on behalf of his employer.

Lady Ormond v. Hutchison, 13 Ves. R. 47, was a call for an account from a steward.

In *Lupton v. White*, 15 Ves. R. 432, the defendants stood before the court upon the faith of an express undertaking; they were bound to make it good, and could not be allowed to defeat it by contrivance.

40 *There is an utter want of application of these authorities to a case like this; the doctrine applies to an agent, and is so laid down in 1 Story's Equ. § 568. The Friends stood in no such relation to the plaintiff or to Early; they occupied, not as agents or trustees of others, but in their own right, and were under no obligation to any body to keep any account at all of what they received or what they spent in the business. The court is induced first to commit the error of treating the Friends as bailiffs of the plaintiff and of Early, and then this error is made the basis and the only basis—the only justification—for still greater errors—still greater injustice.

In a case wherein Lord Eldon overruled a motion for a receiver, he considered the defendant as having a charge for all the expenditure he had incurred, and said, "it is impossible to remove him from the possession without reimbursing him all he has laid out," and is liable to, with reference to both the present and the old concerns." *Norway v. Rowe*, 19 Ves. R. 144. So when a bill is filed for partition, if it appear that the defendant has been at expense in improving the premises, a court of equity will not interfere for the plaintiff but on the terms of his making an allowance for such expenditure. *Swan v. Swan*, 8 Price's R. 518. And in cases in which the working being by agreement between the parties, an account is allowed of the profits, it is also directed to be of the expenditure and of the sums contributed. The plaintiff must undertake to bear his share of the expenditure; he will not be allowed to dispute any bona fide expenditure of the defendants, and he must allow to the defendants interest upon the excess of their expendi-

ture beyond their proper proportion. *Hart v. Clarke*, 27 Eng. L. & Eq., 567-8. This rule accords with what the Friends contended for, but is different from what was contended for by the plaintiff and Early.

41 *If the part owner in possession, is to be charged with any rent, it surely cannot be more than the rent would be, on the principle adopted in South Carolina and Kentucky, that is with reference to the condition the premises were in at the time he took possession. If, says Chancellor Harper, the tenant out of possession is not to be charged for a share of the improvements, it would be plainly inequitable that he should be allowed to claim the enhanced rent produced by means of such improvements. *Thompson v. Bostick*, 1 McMullen, R. 75; *Holt v. Robertson*, ib. 475; *Hancock v. Day*, ib. 69. When the estate at the commencement of the tenancy in common yields no rent, or profit, and one of the tenants enters and by improving the estate renders it productive, the other co-tenant cannot come in and claim a share of the profit from one who had neither dispossessed the plaintiff nor resisted partition. *Nelson v. Clay*, 7 J. J. Marsh. R. 138.

MONCURE, J. The first question to be disposed of in this case is one of jurisdiction, which was raised in the argument before this court. It was not raised by any of the defendants in the court below by plea, answer, or otherwise, so far as the record shows; but on the contrary, the answers of the principal defendants, in effect, admitted the jurisdiction of the court. The only notice which seems to have been taken of the subject in that court is contained in the decree of the 22d day of February, 1853, in which an opinion is expressed by the court that it had jurisdiction of the case. upon the principles declared by the court of Appeals in the case of *Ruffners v. Lewis' ex'rs*, 7 Leigh 720. If the defendants, Joseph and Thomas R. Friend, are bound to account with the plaintiff and their other co-tenants in common for rents and profits of the common property, while

42 it was solely occupied and enjoyed by the Friends, *as claimed by the bill, then, undoubtedly, a court of equity has jurisdiction of the case. It involves the settlement of an account of rents and profits in which, according to that supposition, the plaintiff and defendants have a common interest in different proportions, and some of the parties concerned are infants. I will, therefore, proceed to consider the case upon its merits.

The appellees, the Friends, by their counsel, contend that they are not bound to account at all for such rents and profits to their co-tenants in common, at least to such of them as were adults when the property was occupied and enjoyed as aforesaid; and that, therefore, the bill ought to have been dismissed. They insist that, as tenants in common, they had a right to occupy and use any part, or all of the common property, without being accountable, in any

form or to any extent, to their co-tenants, unless they contracted with them for such accountability, or ousted or excluded them from the possession, or unless they destroyed or wasted the common property; none of which they say, did they do.

This would certainly have been the case at common law. "If one joint-tenant, or tenant in common of land," says Coke, "maketh his companion his bailiff of his part, he shall have an action of account against him, as hath been said. But, although one tenant in common, or joint tenant, without being made bailiff take the whole profits, no action of account lieth against him: for in an action of account, he must charge him either as a guardian, bailiff, or receiver, as hath been said before; which he cannot do in this case, unless his companion constitute him his bailiff. And, therefore, all those books which affirm that an action of account lieth by one tenant in common or joint-tenant against another, must be intended, when the one maketh the other his bailiff, for otherwise, never his bailiff to render an account, is a good plea." 1 Tho. Co.

43 787 marg. And in *a note by the editor, it is said: "At common law joint-tenants and tenants in common had no remedy against each other, where one alone received the whole profits of the estate, since he could not be charged as bailiff or receiver to his companion, unless he actually made him so." Id. 788, note (R.)

But the statute 4 Anne c. 16, § 27, was passed in England to remedy this defect of the common law. And a similar statute was passed in this country at an early period, and has ever since continued in force. In the Code, p. 586, ch. 145, § 14, it is in these words: "An action of account may be maintained against the personal representative of any guardian, bailiff, or receiver, and also by one joint-tenant or tenant in common, or his personal representative, against the other as bailiff, for receiving more than comes to his just share or proportion, and against the personal representative of any such joint-tenant or tenant in common."

But it is contended that this statute makes a joint-tenant or tenant in common liable to account to his co-tenants only where he receives money, or something else given or paid by another, which all the tenants are entitled to in proportion to their interests as such, of which one receives more than his just share, according to that proportion; and not where he merely has the sole occupation and enjoyment of the property, even though, by the employment of his own industry, skill and capital, he makes a profit by such occupation and enjoyment, and takes the whole profit to his own use: and that, therefore, the Friends, not having received any rent from others for which they are accountable, but having only occupied and enjoyed the property as aforesaid, are not liable to account to their co-tenants for any profits which may have

been made by such occupation and enjoyment, nor for any rent or other compensation whatever.

44 *In support of this position a very important case, decided in 1851 in the Exchequer chamber, *Henderson v. Eason*, 17 Ad. and El. N. S. 701, 79 Eng. C. L. R., is cited and much relied on by the counsel of the Friends; and it must be admitted that it fully sustains their position, and, if it were a binding authority, might be conclusive of this case. The question came fairly up for decision in that case. It was an action of account founded on the stat. 4 Anne c. 16, by Robert Eason against the executor of his cotenant in common, Edward Eason. The pleadings were in proper form. On the trial of the issues, evidence was given that the two Easons were tenants in common of a farm from November, 1833, to November, 1838, during which time Edward Eason occupied the whole on his own account; that he cultivated the same on his own account solely, and appropriated the produce to his own use; that he cropped the farm in the usual way, kept the usual quantity of live and dead stock, and farmed well; and that he received all the produce of the farm, and sold it on his own account. Verdict was found for the plaintiff, and upon an account thereafter taken the sum of £900 was found to be due to him, for which judgment was accordingly rendered. The case was brought by error from the Queen's Bench to the Exchequer chamber, where it was fully and ably argued. Parke, B., in delivering the judgment of the court lays great stress on the word "receiving" in the statute. "Every case," he says, "in which a tenant in common receives more than his share is within the statute; and account will lie when he does receive, but not otherwise." "He is to account when he receives, not takes, more than comes to his just share." What, then, is a "receiving" of more than comes to his just share, within the meaning of that provision of the statute of Anne? It appears to us that, construing the act

45 according to the ordinary meaning of the words, *this provision of the statute was meant to apply only to cases where the tenant in common receives money or something else, where another person gives or pays it, which the co-tenants are entitled to simply by reason of their being tenants in common, and in proportion to their interests as such, and of which one receives and keeps more than his just share according to that proportion. The statute therefore includes all cases in which one of two tenants in common of lands leased at a rent payable to both, or of a rent charge, or any money payment or payment in kind, due to them from another person, receives the whole or more than his proportionate share according to his interest in the subject of the tenancy. There is no difficulty in ascertaining the share of each, and determining when one has received more than his just share; and he becomes, as to that excess, the bailiff of the other, and

must account. But when we seek to extend the operation of the statute beyond the ordinary meaning of its words, and to apply it to cases in which one has enjoyed more of the benefit of the subject, or made more by its occupation, than the other, we have insuperable difficulties to encounter." The learned Judge proceeds to enumerate these difficulties, and concludes by reversing the judgment of the Queen's Bench. See 3 Rob. Prac. 173 (new ed.), where this case is fully stated, and other cases on the subject are referred to.

This decision certainly settles the construction of the statute in England. But it is somewhat remarkable that its construction had not there been settled long before. And it would seem that until that decision was made the current, or at least the preponderance, of judicial opinion in that country was the other way. That was the opinion of Vice Chancellor Wigram in *McMahon v. Burchell*, 3 Hare 97, 25 Eng. Ch.

46 R. decided in 1843; though afterwards reversed by Lord Chancellor Cottonham, 2 Phill. 127, 22 Eng. Ch. R., upon the ground that mere occupation by one of several tenants in common of an estate, if unaccompanied by the exclusion, does not make him liable for rent to his cotenants, and that the nature of the occupation in that case did not amount to such exclusion. That was the opinion also of Vice Chancellor Shadwell in *Henderson v. Eason*, 15 Simons 303, 38 Eng. Ch. R., decided in 1846; though Lord Cottonham doubted, on appeal, whether the claim allowed by the V. C. could be maintained, and directed an action to be brought. 2 Phill. 22 Eng. Ch. R. 308. And that was also the opinion of the Court of Queen's Bench in *Eason v. Henderson*, 12 Ad. & El. N. S., 64 Eng. C. L. R. 966, decided in 1848, on a case stated for the opinion of the court by order of a judge after issue joined in an action brought by direction of the Lord Chancellor as aforesaid. Lord Denman, C. J., in delivering the opinion of the court, said: "The case stated that he (the defendant) had occupied and received the whole profits, but no part was underlet; he received no rent, nor anything but the profits derived from the culture of the lands, to the expense of which the plaintiff in no way contributed. It was contended that the defendant was not liable as bailiff, because it appeared that he had not received rent, and because it did not appear that he had received more than his just proportion.—But we think that the words, 'rents, issues and profits,' include the proceeds of the land, whether in money or in kind; &c." The Lord Chancellor, it appears, being dissatisfied with that proceeding for some cause, directed another action to be brought; which was accordingly brought, and was finally decided in the court of Exchequer Chamber as before mentioned.

If the decision of that court, instead of being made in 1851, had been made before the statute of 4 Anne C. 16, S. 27 was adopted by us, the construction which

47 that *decision settles in England, would have been adopted by implication along with the statute. But as at the time of the adoption of the statute by us there had been no English decision construing it, we are left free to construe it according to its apparent meaning and the probable intention of the legislature, without being controlled by subsequent decisions in England or elsewhere, other than in our own State. Though certainly we will always pay due respect to decisions out of our State, and none are entitled to more respect than those of the English courts, and especially the court of Exchequer Chamber.

What then is the meaning of the words in our statute, "for receiving more than comes to his just share or proportion"?

What did the legislature intend by the use of those words? Did they only intend to make a tenant in common accountable of his co-tenants for receiving from a stranger on account of rents and profits of the property more than the just share or proportion of such tenant? Or did they intend to make him accountable for receiving more than his just share or proportion of the rents and profits, whether paid by a stranger or derived from his own occupation and enjoyment of the property? I think they intended the latter. The former construction may be a reasonable one in England, where the ordinary mode of deriving profit from real estate is by renting it out; but not in this State, where real estate is generally occupied and used by the owner. With all deference to the court of Exchequer Chamber, I think the construction they put upon the word "receiving" is too technical and narrow, at least for our country; and if it be a just one in England, it is because of circumstances existing there which do not exist here. I do not see the force of the distinction drawn by that court between the words "receive" and "take" in this connection. I think the word "re-

48 ceiving" in the statute *literally means a receiving of profits as well by use and occupation as by renting out the property. At all events there is, in substance, no difference between them, and the former is as much within the reason and the meaning of the law as the latter. If a tenant in common rent out the property and receive more than his just share of the rent, he is accountable for the excess to his co-tenants. Why should he not be alike accountable when, instead of renting out the property, he solely occupies and uses it, and thus receives more than his just share of the profits? Why should he be told: "If you rent out the property and receive the rent, you must share it out with your co-tenants. But if you solely occupy and use it and take all the profits, you will not be accountable to them?" Would he hesitate between these alternatives?

I think the same principle precisely applies to the two cases. And the only difficulty which exists is, in the application of the principle to one of the cases. That

difficulty was much commented on by the court in the case decided by the Exchequer Chamber; and was one of the causes, if not the chief cause, of that decision. —In the case of rent received from a stranger, "there is no difficulty" the court said "in ascertaining the share of each and determining when one has received more than his just share." But in the case in which one has enjoyed more of the benefit of the subject, or made more by its occupation than the other, "we have insuperable difficulties to encounter." The court then proceeded to enumerate the difficulties.

I readily admit the existence of difficulty, but not that it is insuperable; certainly not in all cases. It consists in the fact, that the occupying tenant has rights as well as his co-tenants, which two classes of rights must, if possible, be reconciled. The statute was not designed to take away or impair the rights of the occupying 49 tenant, *but to require them to be so used as not to interfere with those of his co-tenants. Each tenant has a right to occupy and use the common property, but not to the exclusion of his co-tenants. The occupation of one, does not necessarily exclude the occupation of the others. — They cannot, by remaining out, make the occupying tenant their bailiff against his will. He can be made their bailiff only by contract with them; or, under the statute, by receiving more than comes to his just share or proportion. It is often difficult to determine, when, by mere occupation and use of the property, he receives more than his just share. And it is still more difficult to lay down any general rule on the subject. This rule at least may be laid down, that whenever the nature of the property is such as not to admit of its use and occupation by several, and it is used and occupied by one only of the tenants in common, or wherever the property, though capable of use and occupation by several, is yet so used and occupied by one as in effect to exclude the others, he receives more than comes to his just share or proportion, in the meaning of the statute, and is accountable to the others.

This rule is of easy application to this case, and is I think sufficient for its solution. The salt property, of which the rents and profits are the subject of controversy here, if capable of use and occupation by several, which is at least extremely doubtful, has certainly been so used and occupied by the Friends as in effect to exclude their co-tenants therefrom. The Friends have solely occupied and used it and derived all the benefit which they could have derived from it had they been the sole owners. And they so occupied and used it is plainly to indicate that they considered themselves, and must have been considered by the other parties concerned, as renters of the property and not as tenants in common merely. They actually held the 50 dower interest *of Mrs. Cabell, being one undivided third of the property,

and the interest of Mrs. Early, being one undivided fourth of the other two-thirds, under a lease for ten years, dated the 19th day of December, 1835, at a certain annual rent for each interest. These interests, with others which they owned, made them proprietors of almost the entire subject. After the determination of the lease they continued to occupy and use the property as before. Indeed, they never, until recently, denied their accountability to their co-tenants in some form or to some extent, for a participation in the rents and profits, but seem to have admitted their liability to Early and wife, or her trustee, for the same annual rent of her interest after she became of age as before, on the ground that they continued to hold that interest under an implied contract, on the terms prescribed by the expired lease; and to the proprietors of the other outstanding interests for the yearly value thereof in the condition in which the property was when it came into the hands of the Friends. They only denied the right of their co-tenants to participate in issues and profits which may have arisen alone from their labor, skill and capital in the use of the property, without being accountable for the losses of the operation.

The construction of the statute for which I contend is, I think, the same which has always been acted upon in this State. It was acted upon without question in the only case on this subject decided by this court; I mean *Ruffners v. Lewis' ex'rs*, 7 Leigh 720; which was argued by counsel of great experience and ability. The question in that case was, not whether the defendants were liable at all, but on what principle and to what extent. Carr, J., said: "The Ruffners must be treated as tenants in common with Prior, not as trespassers. They are liable for a fair share of the profits, and entitled to full compensation for their expenses fairly and
51 *reasonably incurred, as well those attending their abortive efforts to find water, as their more fortunate ones." The opinion of Tucker, P., was to the same effect, and the other judges concurred therein.

The same construction has also been adopted and well established in South Carolina. In *Thompson v. Bostick*, 1 McMul-lan's Equ. R. 75, before Chancellor Harper in 1830, the defendants, who were tenants in common with the plaintiffs of a tract of land, had taken possession of it and cultivated all the cleared land. They also cleared and cultivated another portion of the land, and made improvements; and the question was, whether and to what extent they were chargeable? "I am of opinion," said the chancellor, "that defendants ought to be charged with the rent of land estimated as it was when they took possession of it, and are not to be charged with the rent of the newly cleared land, or credited for improvements. There is nothing, I think, in the objection, that the defendants did not receive rent, but cultivated the lands

themselves. To cultivate and have the use of lands, is to receive the rents and profits, though the occupier is his own tenant." This decision, (at least as to the rents and profits of the cleared land, the other part of the decree not having been appealed from,) was afterwards affirmed on appeal. In *Holt, &c., v. Robertson*, Id. 475, before chancellor Desaussure, in 1831, and afterwards in the court of Appeals, the decision was to the same effect. And so also was it in *Hancock, &c., v. Day*, Id. 69, decided by the Court of Appeals in 1840.

The case of *Sargent v. Parsons*, 12 Mass. R. 149, decided in 1815, was cited and much relied on as being to the same effect with the decision of the Exchequer Chamber before referred to. But the action in that case was a common law action of account, and not an action upon the statute 4 Anne c. 16; and most of the remarks of Parker

C. J., refer to the common law, and 52 not the *statute. The property in that case consisted of houses, lands and wharves, and though they were for a period in the sole possession and occupancy of the defendants, it does not appear that their occupation of the property was of such a nature as to exclude their co-tenants therefrom. In a note to that case, it is stated, "that it does not seem to be necessary that the defendant should have received profits otherwise than by his occupancy, in order to give a cause of action to the plaintiff upon the statute. It is sufficient if he have any way received more of the issues or profits than comes to his just share and proportion;" for which is cited Dane's Ab. ch. 8, art. 3, § 13.

I, therefore, think the Friends are accountable for rents and profits to their co-tenants in common, and the question next to be considered is, in what manner and to what extent are they so accountable? Are they accountable for issues and profits actually made by the application of their labor, skill, and capital, to the property; or are they accountable for the fair yearly value of the property in the condition in which it was at the time it came to their possession?

I think the latter is the just and true measure of accountability, and one that is perfectly consistent with the statute. There is a very material difference between the nature of a liability of a bailiff at common law, and of a tenant in common who is a bailiff under the statute. The former is a fiduciary, bound to manage the estate to the best advantage and make all the profit he can for the owners, and to keep and render to them a full and fair account of his transactions; and he is liable, not only for rents and profits actually received, but also for such as might have been received without his default: while the latter is accountable only for rents and profits actually received, more than his just share and proportion. He is bailiff only by virtue

53 of his receiving *more than his just share, and in an action of account against him, it is an essential averment

of the declaration that he has received more than his share. *Wheeler v. Horne, Willes, P. 208; Sturton v. Richardson, 13 Mees. and Welsb. 17; 79 Eng. C. L. R. 718.* He is not a fiduciary nor a trespasser, but has a right to occupy and use the property. When he rents it out and receives the rent there is no difficulty in ascertaining the amount for which he is accountable. When, instead of renting it out, he occupies and uses the whole to the exclusion of his co-tenants, and thus, in effect, becomes himself the renter, there is more difficulty; but it seems to me that the just and true rule is, to charge him with a reasonable rent for the use and occupation of the property in the condition in which it was when he received it, and to hold him accountable to his co-tenants for their just shares of such rent. This rule does justice to all parties concerned, and gives the same just measure of compensation to the co-tenants whether the property be rented out by one of them, or be occupied and used by him to the exclusion of the rest. It does not make the compensation in the latter case depend upon the accident of his being a good or a bad manager, a prudent and cautious person, or a wild and reckless speculator.—It is just to the occupying tenant, who having occupied and used the property instead of renting it out, ought to be accountable to the same extent as if he had rented it out and received the rent. It is just to his co-tenants, who are entitled to a share of the rent of the property, but not of the issues and profits of his labor, skill and capital applied to its use. They do not share in the risk and ought not to share in the profit of the operation.

The rule is not inconsistent with any authority that I have seen. In *Ruffners v. Lewis's ex'ors*, supra, an account was taken of rents, profits, &c., but no question was raised in that case as to the correct mode of

54 adjustment, *and the one adopted may have been more favorable to the occupying tenant, than to have charged him with a rent; especially as he was allowed by the express terms of the decree, not only for permanent improvements, and for his expense and actual services in his successful operations, but also for his expenses, labor and services in the course of his unsuccessful experiments. In *Thompson v. Bostick*, supra, the rule in question was adopted. "If the whole estate," said Chancellor Harper, "were let to tenants, and certain rents reserved, as is commonly the case in England, there would be little difficulty. But what rule shall be adopted when one tenant in common has occupied part of the premises himself? I know of no other than to estimate the rent of the whole premises, and then to value the rent of that portion of the premises occupied by the tenant in possession, with reference to the condition they were in at the time he took possession." 1 *McMullen's Equ. R.* 77.

There may be peculiar circumstances in a case making it proper to resort to an ac-

count of issues, profits, &c., as a mode of adjustment between the tenants in common; and that was perhaps the case in *Ruffners v. Lewis's ex'ors*; but such cases would merely be exceptions to the rule I have laid down which, I think, is properly applicable to most, if not all cases.

It applies, I think, with peculiar propriety to this case; in which the occupying tenants, the Friends, had themselves a large interest in the subject as tenants in common, and were lessees (or one of them at least a lessee) of other large interests therein of other tenants in common, and embarked and were for many years engaged in a most hazardous operation upon the property, requiring, for its successful result, the expenditure of a vast amount of labor and of capital, and the exercise of the greatest skill and prudence. During

55 all this period the *proprietors of the outstanding interests stood aloof, and did not offer to join in the adventure, to contribute to the means of its prosecution, to run the risk of its failure, and take the chance of its successful issue. They cannot now come forward and say, the operation has been successful and they are entitled to a share of the profits. The most they are entitled to is their share of a reasonable rent. The Friends are accountable for that. Being themselves proprietors of some, and lessees of other interests in the subject, and occupying and using the whole of it, it is just and right, and what they must have expected and intended, that they should pay a reasonable rent for the outstanding interests. But upon no principle of justice are they bound to account for issues and profits. Nor could such an account now be settled so as even to approach a correct result. It is no easy matter to keep an account of transactions so extensive, and running through so long a series of years, and be prepared with proper vouchers for a settlement—and the Friends were under no obligation to do so. Then they are accountable only for a reasonable rent and the next question is, How is the amount of such rent to be ascertained?

In regard to the appellants, I think there can be no difficulty. Mrs. Early's interest of one-fourth of two-thirds of the property, was leased by her guardian to Thomas R. Friend, at an annual rent of three hundred dollars, for a term of ten years, subject to be determined, after her arrival at age or marriage, at the election of her or her husband. She arrived at age in 1843, and married in 1846, but, as it is averred in the answer of Joseph Friend and not disproved nor denied, neither she nor her husband has "ever expressed any wish to change the terms of respondent, holding under the lease aforesaid, and hence he has always hitherto regarded himself as holding

56 *rent reserved." The lease commenced December 25, 1836, and of course expired, if not determined before by election as aforesaid, December 25, 1846. There was no such election to determine it

before, and therefore, by its terms, it continued in force until the last mentioned day. And Joseph Friend having after that day continued to hold and use the property as before, without any objection on the part of Early and wife or her trustee, he might be considered holding, on the terms of the previous lease; according to the authorities cited by his counsel, to wit: 2 Rob. Prac. 378-9 (new ed.); Hyatt v. Griffiths, 79 Eng. C. L. R. 505; Humphreys v. Franks, 36 Eng. L. & E. 429. In McKay v. Mumford, 10 Wend. R. 351, it was held that the presumption of law, that a tenant who holds over after the expiration of his lease continues to hold under the landlord and on the terms of the lease, does not apply to a tenant in common who leases the undivided interest of his co-tenant. "The fact of his not leaving possession," said the court, "does not authorize the inference that he still intends to hold under the lease; on the contrary the presumption is, that he holds under his own title, which gives him a right to the possession and enjoyment of the whole estate, liable however to account to his co-tenants at law, 1 R. S. 90, or in equity 8 Cow. R. 304. This presumption of possession by virtue of his own title may undoubtedly be rebutted, and then he would hold, as to the moiety of his co-tenant, as any other tenant and subject to the same rules of law." If there be any such presumption it is rebutted in this case by the express admission of Joseph Friend that after the expiration of the lease "he always regarded himself as holding and occupying under the original rent reserved." I therefore think that the rent for the interest of Mr. Early during the whole period of the use and occupation of the property by the Friends ought to be at the rate paid by the lease.

57 *In regard to the proprietors of the other outstanding interests, there may be more difficulty. But I think it ought to be presumed, as to them, that the rent agreed to be paid to Mrs. Early, that is three hundred dollars, was a fair and reasonable rent for her interest of one-fourth of two-thirds; which would make the annual rent of the whole property, while in the use and occupation of the Friends, eighteen hundred dollars; and that they ought to be charged with rent at that rate, unless it be proved that a reasonable rent would be more; in which case they ought to be charged with such reasonable rent. I think the Friends ought to pay at least the same rate of rent for the other outstanding interests as for that of Mrs. Early. They derived the same benefit, in proportion, from those interests as from hers; and the fact that they made no contract for the use of the former, is certainly no reason for paying less rent for them than for the latter. They must have expected and intended to pay the same rate of rent to all the other parties interested in the property with themselves as they agreed to pay for the interest of Mrs. Early, except the dower interest for which an annual rent of five

hundred dollars was agreed to be paid.—Why less rent in proportion was agreed to be paid for the dower interest than for that of Mrs. Early, does not appear. It may have been because the former interest was determinable at any time by the death of the dowress, while the latter was more permanent. At all events I think the agreed rent of the latter is a fairer criterion than that of the former for the ascertainment of the amount of rent to be paid for the other outstanding interests. I think the proprietors of those interests having made no contract with the Friends or either of them, ought to have the liberty of showing if they can, especially as most of them were infants during the use and occupation of the property by the Friends, that it 58 was "reasonably worth more rent in proportion than what was agreed to be paid for the interest of Mrs. Early.

The Friends being accountable to their co-tenants for a reasonable rent of the property, and not for the issues and profits of their operations thereon, ought to pay interest on the rent of each year from the end of such year until payment.

Upon the whole I think that so much of the decrees of the Circuit court as is in conflict with the foregoing opinion is erroneous and ought to be reversed, with costs to the appellees, the Friends, as the parties substantially prevailing, and the cause remanded to the Circuit court, to be proceeded into a final decree according to the principles above declared.

The other judges concurred in the opinion of MONCURE, J.

Decree reversed in favor of the appellees.

59 *Blankenpickler v. Anderson's Heirs.

July Term, 1860, Lewisburg.

1. Land Patents.—Grantee Dead When Issued.—Void.*—If the grantee in a patent for land was dead at the time the grant issued, the patent is void; and this may be shown on a trial in ejectment in which one party claims under the patent.

This was an action of ejectment in the Circuit court of Smyth county, brought by John Anderson against A. J. Blankenpickler. Pending the action Anderson died, and it was revived in the name of his heirs. There was a verdict and judgment for the plaintiffs; and the tenant obtained a writ of error.

On the trial of the cause the tenant filed two bills of exceptions; the first to the refusal of the court to give an instruction to the jury; and the second to the refusal to grant a new trial, in which the facts were set out.

The first bill of exception was taken on the second day of the trial, and sets out—That on the trial of this cause the tenant asked the court to give the following instruction, viz: "If the jury shall believe from the evidence that the patent dated the

*See 2 Min. Inst. (4th Ed.) 987, 990.

6th day of May, 1787, from the Commonwealth of Virginia to Joseph Cole, for two hundred and fifty-nine acres, under which the plaintiffs claim, was issued after the death of Joseph Cole, the grantee named therein, then said patent is void, and the jury must find for the defendant; unless they believe from the other evidence that the plaintiffs have right to the land in controversy"—but the court refused to give the instruction. To which opinion of the court the defendant excepts. The bill of
60 exception to the refusal *of the court to grant a new trial shows that the plaintiffs claimed under the patent to Cole.

Campbell and John W. Johnston, for the appellant.

J. W. Sheffey and B. R. Johnston, for the appellees.

ROBERTSON, J. The first assignment of error is for the refusal of the Court to give the following instruction, viz:

"If the jury shall believe from the evidence, that the patent dated the 6th day of May, 1787, from the Commonwealth of Virginia to Joseph Cole, for 259 acres, under which the plaintiffs claim, was issued after the death of Joseph Cole, the grantee named therein, then said patent is void, and the jury must find for the defendant; unless they believe from the other evidence that the plaintiffs have right to the land in controversy."

On behalf of the defendants in error it is insisted, that the bill of exceptions is too imperfect to enable this court to say that the instruction ought to have been given, even if it shall be of opinion that the proposition of law stated in it is correct; because there is nothing to show that it was relevant to the matter in issue.

This objection we think is not well founded. It is true that the bill of exceptions contains no direct recital that the patent referred to had been introduced and relied on by the plaintiffs, or that evidence had been offered showing, or tending to show that the grantee in the patent was dead at the time it was issued; but the necessary inference from the statements of the bill is that such was the case.

It sufficiently appears, therefore, on the fact of the bill of exceptions, that the instruction asked for was relevant and material; so that it ought to have been given if it stated the law correctly.

To every grant it is essential that
61 there should be a *grantee, as well as a grantor; and the grantee must, when the grant is made, be in esse and capable of receiving; otherwise the grant is void. Comyn's Dig. Tit. Grant, A. B.

It seems to be quite clear, therefore, that a patent for land is void, if the patentee is dead at the time it is issued.

In Kentucky a statute was passed in 1792 reciting that "Whereas in some instances grants have been issued in the names of persons who were dead prior to the date of the grant, and case of the same nature may

happen in the future," and enacting, "that in all such cases the land shall descend to the heir, heirs or devisees in the same manner as it would do if the grant issued in the lifetime of the decedent." Stat. Laws of Ky. p. 779; 1 Lit. 160. And it has been held in that State that a patent issued to a dead person prior to this act of 1792, conferred no right until the passage of the act; and that, where in the interval between the issuing of such patent and the passage of the act, a patent had been issued to another, the title of the grantee in the last patent was good against the heir or devisee of the grantee in the prior patent, who was dead when it issued in his favor. *Lewis v. McGee*, 1 A. K. Marsh. R. 199.

No such statute has ever been passed in Virginia.—Section 12, Ch. 144 of the Code, p. 582 (which re-enacts the law of February 24th, 1820—acts 1819-20, ch. 28 § 2) does not make valid a patent issued to one dead at the time, or give to his heirs and devisees the benefit of it. It manifestly applies to personal contracts and obligations merely, and the remedy given by it is confined to the personal representatives. As to patents therefore the rule of the common law is still in force with us.

But it is insisted that, admitting this to be so, yet the instruction ought not to have been given, because a patent cannot, in an action at law, be avoided or defeated

62 by *matter dehors: that a patent, being record evidence that a title has passed from the commonwealth, cannot, as long as it remains in force and it is not vacated or annulled by some direct proceeding calling in question its validity, be collaterally impeached for any matter not appearing on its face.

There has been much conflict of opinion, and no little contrariety of decision upon the question how far a patent may be impeached, in an action at law, for causes not apparent on its face. The better opinion seems to be that while its validity cannot be questioned in a suit at law, but is impeachable in equity only, for causes anterior to its being issued which render it voidable merely; it may be impeached at law, for any matter which makes it absolutely void: as where the State has no title to the thing granted, or where the officer had no authority to issue the grant. *Polk's Lessee v. Wendal*, 9 Cranch's R. 87; Same case, 5 Wheat. R. 293; *Patterson v. Winn*, 11 Wheat. R. 380; *Whittington v. Christian*, 2 Rand. 353; *Warwick v. Norvell*, 1 Rob. R. 308.

In the case now under consideration, there was no effort to impeach or set aside a patent. The design was to show that the paper purporting to be a patent, did not really possess that character. The defence set up was not that a patent relied on by the plaintiffs ought to be vacated, but that the paper produced by them, as and for a patent, was in truth no patent—that it was an utter nullity. Of course therefore the rules protecting patents from assault, in a court of law, can have no application. A matter like this is, to use the language of

Judge Marsh in *Polk's Lessee v. Wendal*, "necessarily examinable at law." Accordingly in the case, already referred to, of *Lewis v. McGee*, 1 A. K. Marsh. R. 199, the patent was held void in an action of ejectment; there being no suggestion even that it was necessary to resort to a scire facias, or other proceeding, for the purpose of vacating it.

The refusal to give the instruction asked for, constitutes error for which the judgment must be reversed, and the cause remanded for a new trial. This renders it unnecessary to express an opinion upon any of the other question in the case, inasmuch as upon the next trial they may not arise.

The other judges concurred in the opinion of ROBERTSON, J.

Judgment reversed.

64 *Parsons v. Harper.

July Term, 1860, Lewisburg.

1. **Pleading—Statute—Joinder of Counts—Trespass—Case.**—Since the act, Code, ch. 148, § 7, p. 580, counts in trespass may be joined to counts in case in an action on the case.†

2. **False Imprisonment—Motive—Immaterial to Maintenance of Action.**—In an action on the case for suing out a *capias* and imprisoning the plaintiff, in an action of slander in which he was defendant, it is not necessary to aver malice or want of probable cause in suing out the *capias*.

3. **Same—Damages—Fees of Counsel.**—In an action on the case for suing out a *capias* and imprisoning the

***Pleading—Statute—Joinder of Counts—Case—Trespass.**—At common law, the joinder of a count in trespass with a count in case is a misjoinder of causes of action and fatal on general demurrer. But, in Virginia, by statute, it is provided, that, "in any case in which an act of trespass will lie, there may be maintained an action of trespass on the case." Code 1849, ch. 148, sec. 7; Code 1873, ch. 145, sec. 6; Code 1887, sec. 2901. This section of the statute has been construed as intended to remove the difficulties at common law growing out of the nice distinctions between the cases in which trespass was the proper action and those in which the remedy was case, and as abolishing, in effect, the distinction between these different causes of action in a declaration in case. The joinder, therefore, of a count in trespass with a count in case is admissible under the statute.

The principal case is cited as authority for one or more of the above laid down propositions in *Ferrill v. Brewis*, 25 Gratt. 767; *Womack v. Circle*, 29 Gratt. 186; *N. Y. P. & N. R. Co. v. Kellam*, 83 Va. 854, 3 S. E. Rep. 708; *Grubb v. Burford*, 98 Va. 556, 37 S. E. Rep. 4; *Beckwith v. Molloyhan*, 2 W. Va. 481; *Lirely v. Ballard*, 2 W. Va. 490. See also, as to this statute, *Fechhelmer v. Bank*, 31 Gratt. 656; *Daingerfield v. Thompson*, 33 Gratt. 141; 4 Min. Inst. (3rd Ed.) 446, 447.

†The act says: "In any case in which an action of trespass will lie, there may be maintained an action of trespass on the case."

‡**False Imprisonment—Motive—Immaterial to Maintenance of Action.**—See principal case cited in *Davis v. Johnson*, 101 Fed. Rep. 955.

§**Same—Damages—Fees of Counsel.**—In *Burruss v. Hines*, 94 Va. 490, 26 S. E. Rep. 875, the court said:

plaintiff, in an action of slander in which he was the defendant, he may prove as damage sustained by him, the amount of the fee paid by him to counsel for a motion to quash the *capias*.

4. **Evidence—Motives of a Party.**—Where the motives of a party are a material enquiry in a cause, any evidence which tends in any degree to throw light upon them, is not to be rejected, though the court may think it not entitled to much weight with the jury.

5. **Same—Record—Exception Must Be Specific.**—If a record is offered in evidence, a part of which is objected to by the other party, he must specify the part objected to, or the objection may be properly overruled.

6. **Action on the Case—False Imprisonment—Evidence.**—In an action on the case for false imprisonment, the whole record of the case in which the imprisonment occurred is competent evidence for the plaintiff.

7. **Same—Same—Defence—Motives.**—In an action on the case for false imprisonment, if the defendant has unlawfully sued out process of arrest against the plaintiff, and has caused him to be imprisoned upon it, and the process has been afterwards set aside because illegally issued, it constitutes no defence to the party: but the plaintiff is entitled to recover damages for the wrong done him, without regard to the motives of the defendant, or the circumstances attending the doing of the wrongful and unlawful act.

65 *8. **Same—Same—Elements of Recovery.**—In such a case, though the act complained of was done without malice, yet, being unlawful and in violation of the plaintiff's right, he is entitled to recover not only for the costs he has incurred, but for the loss of time, interruption to his business, and the suffering, bodily and mental, which the act may have occasioned.

9. **Formation of Juries—Irregularities—When Objection Should Be Made.**—An irregularity in forming a jury must be objected to before the jury is sworn, unless the party is shown to have been injured by it.

This was an action for trespass on the case in the Circuit court of Randolph

"The general rule is that counsel fees are not recoverable as damages; but on the trial of an action for malicious prosecution or false imprisonment, where exemplary damages are recoverable, the fees paid or incurred to counsel for defending the original suit or proceeding may be proved, and, if reasonable and necessarily incurred, may be taken into consideration by the jury in the assessment of damages. 2 Greenleaf on Ev. 456; *Parsons v. Harper*, 16 Gratt. 64; *Marshall v. Betner*, 17 Ala. 522; *Lawrence v. Hagerman*, 56 Ill. 68; *Zeligler v. Powell*, 54 Ind. 173; *Closson v. Staples*, 42 Vt. 209; *Eastin v. Bank of Stockton*, 66 Cal. 123; *Magner v. Renk*, 65 Wis. 364; *Gregory v. Chambers*, 78 Mo. 294." See the principal case cited, as to this point, in *Ogg v. Murdock*, 25 W. Va. 147. See also, *Bolton v. Veilines*, 94 Va. 303, 26 S. E. Rep. 847; monographic note on "Damages" appended to *N. & P. R. R. Co. v. Ormsby*, 27 Gratt. 455; 12 Am. & Eng. Enc. Law (2nd Ed.) 785.

†**Evidence—Exception Must Be Specific.**—See footnote to *Trogdon v. Com.*, 31 Gratt. 862, for a collection of cases in point.

‡**Formation of Juries—Irregularities—When Objection Should Be Made.**—See monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 733.

county, brought in August, 1856, by William J. Harper against Solomon Parsons. The declaration contains eleven counts, the first of which is as follows:

Virginia, Randolph county to wit: William J. Harper complains of Solomon Parsons, who hath been summoned in a plea of trespass on the case.

First count.—For that the said Solomon Parsons, on the 29th day of October, 1855, at the county aforesaid, had pending in the Circuit court of Randolph county, an action of trespass on the case in his favor against the said William J. Harper, for words alleged to have been spoken of and concerning the said Solomon Parsons by the said Wm. J. Harper. That the said Solomon Parsons, on the day and year aforesaid, at the count aforesaid, maliciously, falsely, and without probable cause, made complaint before Wm. C. Chenoweth, a justice of the peace for the county of Randolph aforesaid, under oath, that he, the said Solomon Parsons, believed that the said Wm. J. Harper was about to quit this State unless he, the said Wm. J. Harper, be forthwith apprehended. That the said Solomon Parsons, on the day and year aforesaid, maliciously and without probable cause, procured the said justice to, and the said justice then and there, by reason of the procurement by the said Solomon Parsons aforesaid, did then and there

66 direct *that the said Wm. J. Harper should give bail in said action in the sum of two thousand dollars; and that the said Solomon Parsons thereupon, on the day and year aforesaid, maliciously and without probable cause, sued out of the clerk's office of the said court in which the said action was pending, a writ of *capias ad respondendum* against the said William J. Harper, reciting the orders of the justice aforesaid, directed to the sheriff of said county of Randolph, whereby the said sheriff was commanded to take the said William J. Harper and him safely keep until he gave bond and security in the sum aforesaid, or until he be otherwise discharged by law. That the said Solomon Parsons, on the day and year aforesaid, placed the said *capias ad respondendum* in the hands of George McLean, sheriff of the said county of Randolph, and procured him by virtue thereof, and he, the said George McLean, sheriff as aforesaid, on the 30th day of October, 1855, by reason of the said procurement by the said Solomon Parsons, and under color of the said *capias ad respondendum*, did assault and arrest the said William J. Harper, and commit him to the jail of the said county of Randolph, and kept him, the said William J. Harper, in the said jail and close confinement for a long space of time, to wit, two days. That the said *capias ad respondendum* was, by the said court, on the 28th day of May, 1856, quashed; and the plaintiff, in fact, says, that by means of the premises he is greatly injured and damaged, and has been put to great charges in freeing himself from said imprisonment, and forced to undergo grievous pains of

body and mind; and during his imprisonment was hindered from exercising his lawful employment, trade and business, and whereby the plaintiff's reputation was thereby greatly impaired in his business.

The fourth, fifth, and eighth counts were in the form of counts for trespass 67 *vi et armis*. The others varied *from the first, some of them in omitting the charge that the *capias* was sued out maliciously and without probable cause; others alleged that the bond which the plaintiff was required by law to file in suing out the *capias*, had not been filed; and others averred special damage.

The defendant appeared and demurred to the whole declaration and each count thereof; and the plaintiff joined in the demurrer. The defendant also filed the general plea of "not guilty;" and also three special pleas, upon which issues were joined. But, as no questions arose on the special pleas, they need not be further noticed. Subsequently the demurrer to the first and ninth counts were withdrawn, that to the third count was sustained, and the demurrers to the whole declaration, and to the other counts were overruled.

The action came on to be tried at the October term of the court for 1858, when the plaintiff, having introduced in evidence to the jury the judgment of the court quashing the *capias* and bond taken in pursuance thereof, issued in the case of the defendant against the plaintiff, and referred to in the plaintiff's declaration, offered to prove by his counsel in that case, that the plaintiff had paid him at least ten dollars for his services in making the motion to quash said *capias*. To the introduction of this evidence the defendant, by his counsel, objected; but the court overruled the objection; and the defendant excepted.

In the progress of the trial, the plaintiff introduced a witness named Phillips, who, after stating that in October, 1855, he lived seven miles from the defendant and eight from the plaintiff; and that the plaintiff was making improvements on his farm, and his credit was considered good, said: "That he was at the defendant's about the 1st of October, 1855; said defendant then said that Harper, the plaintiff, penned up 68 some of his, defendant's, cattle in a pen, where they had nothing to *eat or drink, and had kept them there for some time. That his, defendant's, religion would not bar him from going to work on said Harper, and that he would make use of it at the next Circuit court. That defendant seemed to be somewhat in a passion." To the introduction of this evidence, except the last sentence, the defendant objected as irrelevant and improper; but the court overruled the objection; and the defendant excepted.

In the further progress of the cause, the plaintiff introduced in evidence the deposition of David Gibson, who, after stating, in answer to interrogatories, that he was slightly acquainted with the plaintiff and defendant, living eighty miles from them;

that he was president of the Bank of the Valley, at Romney, and had been connected with it as president or director for thirty-five years; that the plaintiff had some years previous, but not for years past, frequently borrowed money at said bank; and that he knew of no communication from the defendant or anybody else, as to the credit of the plaintiff, being received by the bank or any of its officers in the fall of 1855 or 1856, but that he understood from common rumor, about that period, that the plaintiff was in jail in Randolph county, and that it grew out of a suit between the plaintiff and defendant; the plaintiff put to him the following: "State whether or not the rumor of the imprisonment of complainant affected his credit at said office; and if so, to what extent?" To which he answered, that he could not say. He did not remember that he ever asked for a loan that was refused, if the bank was in a condition to make it; or that he had asked for a loan since the rumor had been heard. And then the witness stated: "In the fall of the year 1854 or 1855, I think it was in 1855, I came down Clover run and crossed Cheat river, and as I passed the house of Dr. Parsons, he

69 came out and *walked some distance with me, and I was enquiring as to the ownership of property as we passed; and when I enquired as to the ownership of a tract on the opposite side of the river, he said it belonged to the complainant; and I then said that the father of the complainant owned a long string of lands on Clover run. He replied yes, the Harpers hold a good deal of property, but they are very much involved." The witness stated, that when he returned home, he shortly afterwards told James Parsons what Dr. Parsons had told him of the embarrassment of the Harpers, he having been an endorser on their paper; but it did not seem to have had any effect upon him, for he endorsed for them afterwards. That plaintiff did not have a note in bank at that time or since, but his father or brother had.

The defendant, by his counsel, moved the court to exclude so much of said deposition as is above given in plaintiff's own words; but the court overruled the motion, and admitted the evidence; and the defendant again excepted.

In the further progress of the trial, the plaintiff offered in evidence the whole of the record in the case of the defendant against the plaintiff, in which the capias referred to in the declaration was sued out. In this case a trial had been had, and there was a verdict and judgment for the defendant; and it does not appear that Parsons had executed the bond required by law upon obtaining the order of the justice to hold Harper to bail. To the introduction of this record, (except so much as related to the issuing of the capias and the disposition thereof by the court,) and particularly to the reading of the declaration and the finding of the jury, the defendant objected as irrelevant, there being no charge in the declaration that the suit for slander was

improperly, or maliciously, or without probable cause, prosecuted. But the court 70 overruled the objection, and *allowed the whole record to go in evidence; and the defendant again excepted.

After the evidence hereinbefore referred to had been introduced, and the plaintiff had introduced evidence tending to prove that no bond had been given by Parsons before suing out said capias as required by law, and also evidence that the capias had been quashed; and had also introduced evidence tending to show want of probable cause, and malice on the part of the defendant in suing out said capias; after the case had been argued by counsel and before the jury had retired to consider of their verdict, the plaintiff moved the court to instruct the jury,—That if they believed that the case of Parsons against Harper was pending on the 29th of October, 1855, in the Circuit court of Randolph county; that Parsons by himself or his counsel sued out the capias which had been read in evidence; that on the 30th of October Parsons caused said capias to be placed in the hands of George McLean, Sheriff of Randolph county, and procured him and he did, under color of said capias, take and imprison the said Harper; and that on the 28th of May, 1856, the court ordered the said capias to be quashed, "no matter whether there was probable cause to believe that the plaintiff was about to quit this State or not; no matter whether the conduct of Parsons was malicious or not; no matter whether a justice directed the plaintiff to be held to bail or not; no matter whether the said capias was issued under the advice of counsel or not; no matter whether the failure to file a bond was the result of mistake or not; no matter whether the plaintiff might have obtained his release from the said imprisonment sooner than he did or not; no matter whether there is other proof of damage or not; if neither the said Parsons nor any other persons for him filed in the clerk's office a bond, the plaintiff, Harper has a right to recover damages, and the jury 71 must find for the *said plaintiff."

Which instructions the court gave to the jury: And the defendant again excepted.

In the progress of the trial the defendant introduced the evidence of Jacob Bush which tended to prove that the plaintiff during the summer and fall of 1855 contemplated going to California; but there being no evidence tending to prove that the defendant had any information of this supposed contemplated going to California, except that the said Bush had told the same to the bank officers at Weston, in Lewis county; and the plaintiff having offered other evidence part of which tended to prove that the defendant sued but the said capias maliciously, the court refused to instruct the jury on the motion of the defendant—"That if from the evidence they believed the defendant had probable cause to believe and did believe at the time he sued out the capias, and had the plaintiff arrested, as set forth in the declaration, that the plain-

tiff was about to depart from Virginia, that then the jury should find only nominal damages for the plaintiff, including his reasonable expenses in quashing said capias. And the defendant again excepted.

There was a verdict and judgment for the plaintiff for one thousand dollars, with interest from the day of trial; and thereupon Parsons applied to this court for a superseas; which was awarded.

Price, for the appellant.

Sheffey and Hoffman, for the appellee.

LEE, J. The first point made for the plaintiff in error is upon the demurrer to the whole declaration for alleged misjoinder of counts. Some of the counts are upon causes of action for which trespass could certainly be maintained, and these, it is said, could not be united in the same declaration with the others which are strictly appropriate to the action of trespass on the case.

72 *That this would be so at common law, there is no doubt, and such misjoinder would be fatal on general demurrer. Our statute however in relation to the action of trespass on the case, has, I think, materially modified the rule as to misjoinders. By ch. 148 of the Code of Virginia, section 7, (at p. 589) it is provided that in any case in which an action of trespass will lie, there may be maintained an action of trespass on the case.—Thus, then, upon the several causes of action in this declaration for which trespass would lie, case may be maintained; and as the action is case, and the declaration purports in its introduction, to be wholly in case, those counts for the matters of which it is said trespass would lie, may be considered counts in case with as much propriety, as counts in trespass. And being for matters which are made the subjects of counts in case by the statute, there can be no reason why they may not be properly united with others which are appropriate at common law to the same action. That the object of the legislature was to remove the difficulties at common law growing out of the nice distinctions between the cases in which trespass was the proper action and those in which the remedy was case, may be true, but in carrying out this object, they have abolished in effect the distinction between these different causes of action in a declaration in case; for that they may be united in such a declaration, is, as it seems to me, a necessary corollary from the provision which authorizes case to be maintained where the action of trespass would lie also.

I think there is nothing in the objection, and that the demurrer was properly overruled.

Upon the separate demurrers to the several counts in the declaration, the counsel for the plaintiff in error has forborne to insist except as to those in which there is no averment of malice or want of probable cause; and very properly, as all those

73 counts are clearly good. And as *to those in which neither malice nor want

of probable cause is averred, I think no serious doubt can be entertained. If the party had given the bond required by law upon suing out the capias, in a suit upon it for the damages sustained by the defendant in the action by reason of his arrest and imprisonment through the act of the plaintiff or otherwise, no averment of malice or want of probable cause would be necessary; and the plaintiff cannot be less liable nor can more be required to be averred where the capias is unlawfully sued out without giving the bond. For if one be arrested and imprisoned upon a capias sued out by another unlawfully, or without complying with the condition upon which it might lawfully be issued, and which is afterwards set aside, he is clearly entitled to recover damages for the injury he has sustained without reference to the particular motive by which the party suing out the capias may have been prompted, though where the suing out the process was through malice and without any reasonable cause, the damages would doubtless be aggravated because of the motives by which the party was actuated. 2 Stark. Ev. 261; 3 Rob. P. 619; Parsons v. Lloyd, 3 Wils. R. 341; S. C. 2 Wm. Bl. R. 845; Turner v. Felgate, 1 Lev. R. 95; 1 Sid. R. 272; T. Ray. R. 73; Barker v. Braham, 3 Wils. R. 368; Codrington v. Lloyd, 8 Ad. & El. 449 (35 Eng. C. L. R. 433); Curry v. Pringle, 11 John. R. 444; Bissell v. Gold, 1 Wend. R. 210. And even in case of a misnomer in the capias though the right party be arrested, yet he can maintain trespass against the plaintiff, and the process will be no justification. Shadgett v. Clipson, 8 East's R. 328; Mead v. Hawes, 7 Cow. R. 332; Griswold v. Sedgwick, 6 Cow. R. 456; Same v. Same, 1 Wend. R. 126.

I think there was no just objection to the proof of the fee paid by the plaintiff in the action to counsel to set aside the process under which he had been arrested, and

74 *procure his discharge from imprisonment. Several of the counts in the declaration allege that the plaintiff was put to great charges and costs in obtaining his release from imprisonment, and the fee paid for that purpose to counsel might be given in evidence to the jury. Bull. N. P. 13; Sandback v. Thomas, 1 Stark. R. 306; 2 Greenl. Ev. § 456, and authorities cited in note n, 1 and 3.

The whole fee paid would not necessarily be allowed by the jury, for they would judge of its reasonableness, and in their estimate would allow only what they thought just and proper on that account; but there could be no objection to its being proven that the fee was paid.

In reference to the subject of the second and third bills of exceptions it may be remarked that whilst it is not at all times easy to see the exact bearing of evidence offered upon the issue between the parties, it is sometimes difficult to say that it is so utterly irrelevant that it may mislead the jury and should for that cause be excluded. Evidence may seem not to bear immediately

and directly upon the contested matters of fact in the cause, yet it may serve to illustrate the conduct of a party by throwing light upon the motives by which he may have been prompted; and where this is a material inquiry if the evidence tend to do this in any degree, it ought not to be rejected although the court may think it not entitled to great weight with the jury. Now the evidence of both Phillips and Gibson was of this character. A short time before the capias was sued out, the defendant spoke to the witness Phillips in an angry and excited manner about the plaintiff, complained of an alleged injury that he had received from him, and intimated a determined purpose "to go to work" upon him, and to make some use of the matter against him at the next Circuit court. The feeling which he manifested was of any thing but a kind and friendly character.—The witness

Gibson was the president of a branch bank *at which the plaintiff had been a borrower, 'in the town of Romney, some distance from the residence of these parties; and being on a visit to Randolph county, he fell in with the defendant; and in conversation, the latter very unnecessarily introduced the subject of the indebtedness of "the Harpers," (no doubt including the plaintiff,) and made a remark plainly calculated to impair their credit at bank, and which appears to have had its effect upon the mind of the witness. If the testimony of these witnesses did not bear directly upon the subject of the capias sued out by the defendant, it certainly tended to show the mind and feeling of the defendant towards the plaintiff, and with the other circumstances of the case might serve to make out the malice imputed to him.—Chambers v. Robinson, 1 Str. R. 691; 2 Stark. Ev. § 64; 2 Greenl. Ev. § 453, and authorities cited. I cannot undertake to say that the Circuit court erred in permitting it to go to the jury to have such weight as they might think it entitled to.

The fourth bill of exceptions was to the introduction of the record of the case in which the affidavit was made and the capias complained of sued out. It is conceded that so much of the record as disclosed the suing out of the process, and that it was quashed by the court, might properly have been in evidence, but it is insisted that all the rest was inadmissible.

In general, when a record is to be given in evidence, the whole record should be produced. Thus it is said where any record is exemplified, the whole record must be exemplified; for the construction must be taken from the view of the matter taken together. 3 Inst. 173; 3 Bac. Ab. by Bouvier (Phil. Ed. 1852) "Evidence," F. p. 536; and Chief Baron Comyn says "the whole record which concerns the matter in question ought to be produced," 4 Com. Dig. "Evidence," A, 4, p. 89; 2 Phil. Ev.

188. There may be cases doubtless in which by way of exception to the general rule, parts of the record have been held sufficient for the purpose for

which they were introduced; but in them there could be no objection to the production of the whole. And although it might have been sufficient in this case, if the party desired only to prove the suing out of the capias and that it was quashed, to read so much of the record as went to that extent, yet I conceive, the party had a right to read the whole. If there was any portion of it not proper for the consideration of the jury, the party should have pointed it out distinctly, and asked the court to instruct the jury to disregard it. See *Buster's ex'or v. Wallace*, 4 Hen. & Munf. 82; *Harriman v. Brown*, 8 Leigh 697. The objection therefore was too broad and not made in the proper mode. But I do not perceive why the whole record was not proper for the jury. All the facts and circumstances connected with or surrounding the transaction in issue are proper to be considered for its more perfect elucidation; 1 Greenl. Ev. § 108 et seq., 2 Ibid. § 89. The record offered was of the case in which the affidavit and capias complained of occurred, and the facts which it disclosed were closely connected with the wrongful act complained of. It showed that the defendant had instituted an action against the plaintiff for malicious defamation, claiming a large amount of damages, and had caused the plaintiff to be unlawfully arrested and imprisoned to answer this demand.—It further showed that his allegations were unfounded, that he had no cause of action, and that he had not the slightest ground on which to sue out the capias. All this, as it seems to me, was strictly germane to the issue between the parties, and was matter which the jury might well consider on the question of malice in connection with the other circumstances of the case, and in making their estimate of the damages which the party was entitled to recover. 2 Greenl. Ev. § 89; Ibid. § 267; *Merest v. Harvey*, 6 Taunt. R. 442; *Bracegirdle v. Orford*, 2 Maule & Sel. 77; *Tullidge v. Wade*, 3 Wils. R. 48; *Shafer v. Smith*, 7 Har. & John. 67; 2 Greenl. Ev. § 272. Upon both grounds, I think the court properly permitted the record to be read.

The fifth bill of exceptions related to the instruction given by the court to the jury, on the motion of the plaintiff below, and is much complained of by the plaintiff in error here. The instruction was given after the case had been argued before the jury; and it may be inferred, from its peculiar character, that it was drawn up by the plaintiff's counsel, with a view to meet various arguments urged by the defendant's counsel, which they deemed unsound. It is certainly not a model of judicial brevity or skillful generalization; and the court might well have declined giving it in the precise terms demanded, and have modified it so as to propound the law in more succinct and general terms. As it did give it, however, in the terms of the bill of exceptions, the only inquiry here is what proposition of law it announces, and whether it be correct or otherwise. And it seems to amount

simply to this: That if the jury believed the defendant had unlawfully sued out process of arrest against the plaintiff, and had caused him to be imprisoned upon it, and the process was afterwards set aside because illegally issued, it constituted no defence to the party, but that the plaintiff was entitled to recover damages for the wrong done him, without regard to the motives of the defendant, or the circumstances attending the doing of the wrongful and unlawful act. Thus construed, the instruction involves no other question than what has been already considered upon the demurrers to the several counts in the declaration; and I will not repeat what has been said as to them. I think there is nothing in the instruction for which the judgment should be disturbed.

78 *With regard to the instruction moved for by the defendant, the refusal to give which by the court constitutes the subject of his sixth bill of exceptions, it may be remarked, that as it does not appear that any evidence was offered tending to show that he had probable cause to believe, and did believe, when he sued out the *capias*, that the plaintiff in the action was about to depart from the State, the instruction asked for was of so abstract a character that the refusal of the court might be justified upon that ground. But even if the party had probable cause to apprehend his departure, yet if he sued out the process unlawfully, and caused the plaintiff to be imprisoned, the recovery of the latter was not to be restricted to merely nominal damages and the costs of setting aside the process. For, although if the act were done without malice, the party might not be liable to exemplary and vindictive damages; yet, certainly, the act being unlawful, and in violation of the plaintiff's right, he was entitled to recover for the loss of time, interruption of his business, and the suffering, bodily and mental, which the act might be shown to have occasioned. I think, therefore, the instruction was properly refused.

Another and the last ground of error alleged, is that the jury was not legally constituted. This was probably assigned through inadvertence. The 8th section of chapter 162 of the Code, which requires twenty-four jurors to be summoned, where a special jury is allowed, of whom eighteen are to be chosen by lot, has been replaced by the twenty-seventh section of chapter 27 of the Sessions Acts of 1853, (p. 46,) which requires the panel to be twenty, and sixteen to be chosen therefrom by lot. So that the jury was constituted strictly in the manner prescribed by the existing law. But if it had been otherwise, and there had been irregularity in forming the jury, unless

79 the party is shown to be injured by *it, the objection should have been made before the swearing of the jury. Sess. Acts 1852, ch. 27, § 25. Certainly it would come too late when made for the first time in this court.

I am of opinion to affirm the judgment.

The other judges concurred in the opinion of Lee, J.

Judgment affirmed.

80

*Hogan v. Wilmoth.

July Term, 1860, Lewisburg.

1. *Slander—Common Law—Charge of False Swearing—Declaration.**—To maintain an action at common law for a charge of false swearing, the declaration must show not only the judicial proceeding in which the evidence was given, but that the charge of the defendant had reference to the evidence of the plaintiff given in that case.

2. *Same—Statutory—Declaration.*—In an action of slander, if the plaintiff proceeds under the statute, he must in his declaration aver that the words from their usual construction and common acceptance are construed as insults, and tend to violence and breach of the peace, or else employ some other equivalent averment to denote that the words are actionable under the statute.

3. *Same—Same—Same.*†—Where the declaration does not show by the proper averments, that the action is under the statute, it may be demurred to as defective, unless it sets out properly, and in substantial compliance with the rules of pleading, such a charge as constitutes defamation at the common law.

4. *Same—Same—Common Law—Joinder.*‡—The common law and statutory causes of action cannot be blended in one count.

This was an action of slander, brought in April, 1858, in the County court of Rockbridge, by William Wilmoth against John Hogan. The declaration contained two counts. In the first, after the usual colloquium of the good character of the plaintiff, and that he had never been guilty, or until the grievances thereafter complained of, been suspected to have been guilty, of per-

**Slander—Common Law—Charge of False Swearing—Declaration.*—In *Shroyer v. Miller*, 3 W. Va. 160, the court, citing the principal case to sustain the proposition, said, that it was not aware that it had ever been held in an action for slander at common law, upon a charge of perjury, that it must be averred in the declaration that the facts sworn to by the plaintiff were material to the proceedings pending at the time of the alleged false swearing; or that it was indispensable to set out and charge all the facts constituting such offence with the same technical strictness as would be required in an indictment for the same offence.

†*Same—Statutory—Declaration.*—In *Sweeney v. Baker*, 18 W. Va. 210, the court cited the principal case as authority for the proposition that where a count in an action for libel is not based on the statute, it is bound to set out such a charge as constitutes a defamation at common law. See also, *Moseley v. Moss*, 6 Gratt. 534.

‡*Same—Same—Common Law—Joinder.*—It seems to be a well-settled principle of law that the common law and statutory causes of action for slander cannot be blended in one count. See the principal case cited as authority on this point in *Chaffin v. Lynch*, 88 Va. 115, 1 S. E. Rep. 808; *Payne v. Tancil*, 98 Va. 266, 35 S. E. Rep. 725.

jury or any such crime, it alleged that before the committing of the alleged grievances complained of, a certain action had been depending before Samuel Johnston and Andrew J. Hamilton, justices of the peace for the county of Rockbridge, wherein the said Wilmoth was plaintiff, and the said Hogan was defendant, and which said action had been lately tried before the said justices; and on the trial the plaintiff had been examined on oath, and had given his evidence by the desire of the defendant. Yet the defendant, well knowing the premises, &c., and maliciously intending and contriving to injure the plaintiff in his good name, &c., and to cause it to be believed by his neighbors, &c., that the plaintiff had been and was guilty of perjury, and to subject him to the pains and penalties by the laws of this commonwealth made and provided against and inflicted upon persons guilty thereof, and to vex, &c., the plaintiff heretofore, to wit, on the day of , in a certain discourse which he, the defendant, had with the plaintiff, of and concerning him, the plaintiff, in the presence and hearing, &c., then and there, falsely and maliciously spoke and published to and of and concerning the said plaintiff, these false, scandalous, malicious, and defamatory words following, that is to say: "You (meaning the plaintiff) swore to a lie for one dollar and twenty-five cents."

The second count, without any colloquium or reference to the action at law, stated that on the day of April, 1857, in a conversation between the plaintiff and defendant, in the presence of divers citizens, the defendant, in the course of said conversation, falsely and maliciously spoke and published to and of the plaintiff, these false, scandalous, malicious, defamatory, and insulting words, that is to say: "You (meaning the plaintiff) swore to a lie for one dollar and twenty-five cents;" thereby then and there meaning that the plaintiff was guilty of perjury.

The defendant appeared and pleaded "not guilty," and also demurred to the declaration and each count *thereof, 82 and the plaintiff took issue on the plea, and joined in the demurrer.

The cause came on for trial in June, 1859, when the court overruled the demurrer; and there was a verdict and judgment for the plaintiff for five hundred dollars. To this judgment the defendant, Hogan, obtained a supersedeas from the Circuit court of Rockbridge; but when the cause came on to be heard in that court the judgment was affirmed: and thereupon Hogan applied to this court for a supersedeas; which was awarded.

There were several exceptions to rulings of the court in the progress of the trial in the County court; but they were not noticed in this court.

D. E. Moore and Baldwin, for the appellant.

Michie, for the appellee.

DANIEL, J. Neither of the counts in the declaration is good as a common law count in slander. To say of a party that he swore to a lie is not of itself actionable at common law. Such a charge does not necessarily imply perjury. In case of a charge of forswearing, unless, from the accompanying words, it be clear that a judicial forswearing was meant, the plaintiff must show upon the record, that the defendant alluded to some particular forswearing which amounted to perjury. 1 Starkie on Slander, 355; Hopkins v. Beedle, 1 Caines R. 347.

The first count in the declaration, whilst it sets out in its prefatory or introductory statements, that the defendant in error, before the speaking of the words by the plaintiff in error, had been examined on oath, and had given his evidence as a witness in an action depending before two justices of the peace, has no allegation or averment that the words complained of were spoken in relation to said evidence. In the colloquium, no allusion even is made either 83 to the action aforesaid or to the *evidence, of the plaintiff in error, given therein. The defect was fatal. Hawkes v. Hawkey, 8 East's R. 427; 3 Strobb. R. 455; Sanderson v. Hubbard, 14 Verm. R. 462.

The insufficiency of the second count is still more obvious. It is without any of the introductory averments of the first count. The averment in the innuendo, that the plaintiff in error, in speaking the words meant to charge the defendant in error with perjury, cannot serve to supply the want of previous statements showing that the words were spoken in reference to sworn evidence given by the defendant as a witness on examination in a judicial proceeding. An innuendo is explanatory of subject matter sufficiently expressed before; and it is explanatory of such matter only; it cannot extend the sense of the words beyond their own meaning, unless something is put on the record for it to explain. Vanvechten v. Hopkins, 5 John. R. 211; Sheely v. Briggs, 2 Har. & John. 363; Porter v. Hughey, 2 Bibb's R. 232; Mosely v. Moss, 6 Gratt. 534.

It seems to me quite clear, also, that, unless certain provisions in the Code, which will be presently noticed, are to be construed as having altered the rules of pleading in the particular under consideration, neither of the counts can be sustained as a sufficient count for insulting words. In the case of Mosely v. Moss, (just cited) this court held that the legislature did not design, by the act then in force, to interfere with the common law actions for defamation; that a party aggrieved might still proceed at the common law as if the statute had never been made, or might avail himself of the statutory remedy when applicable to his case. That if he proceeded under the statute he should declare under the statute; and that if he did not declare under the statute his declaration, to be good, should properly charge words amounting to slander at 84 common law; that *he could not blend

charges for the statutory and the common law grievance in the same count; and that when, therefore, the plaintiff, on the face of his declaration, treated the grievance as a common law defamation, he should be held to his own construction of the words, and required to make out such a case by his pleading and evidence; and, failing to do so, could not recover for an insult under the statute.

It is true, there is some apparent conflict between the decision of the court in *Mosely v. Moss* and its previous decision in the case of *Brooks v. Calloway*, 12 Leigh 466; inasmuch as the court, in affirming in the last mentioned case the judgment of the Circuit court, rejecting the plea of justification to the first count of the declaration—which, whilst it averred the words complained of to be slanderous, was plainly defective as a common law count for defamation—proceeded on the assumption that said count might be relied on, under the statute, though it neither averred that the words were insulting, nor made any reference to the statute, to indicate that the action was founded on it. It is to be observed, however, that in *Brooks v. Calloway* there was no demurrer to the declaration; and that the main question discussed and considered, was, whether treating the first count as a count for insulting words under the statute, a special plea of justification to part of the words charged in said count ought to have been rejected by the Circuit court; whilst in *Mosely v. Moss* there was a demurrer to the declaration, in passing upon which, the question how far the mode of declaring, in actions for defamation, had been regulated or affected by our legislation, was distinctly presented to, and fully considered by, the court; and that, of the four judges composing the court in the last mentioned case—all of whom concurred in

sustaining the demurrer—three were also members of the court in *Brooks v. Calloway*, and had united in rendering the decision made in that case.

The case of *Mosely v. Moss* is, therefore, I think, entitled to be treated as furnishing the rule on the subject, as matters stood under our former statute. Such a rule is, as I conceive, in strict accordance with the general principles of pleadings, it being well settled, as a general rule, that in a statutory action, the offence or act charged to have been committed or omitted by the defendant, must appear to have been within the provision of the statute, and all the circumstances necessary to support the action must be alleged, or in effect appear on the face of the declaration. 2 Saunders on Pl. & Ev. 410. The propriety of the rule, too, it is worthy to be noticed, has been strongly vindicated by the decisions of one of our sister States. The State of Mississippi, at an early period, adopted our act of 1810, and in cases arising under the statute there, the Supreme court, in repeated decisions, have uniformly held that, in counting under the statute, the declaration must contain an averment, that the words, according to the

common acceptance, were insulting and calculated to lead to violence and breach of the peace, or some other averment of like import. *Scott v. Peebles*, 2 Smeedes & Marsh. 546; *Davis v. Farrington*, Walker's R. 304; *Warren & wife v. Norman & wife*, Ib. 387.

It is argued, however, that the change in the law, as it was enacted in 1810 and in 1830-31, made by the second section of the one hundred and forty-eighth chapter, and the introduction into our system of the new provisions to be found in the forty-fourth section of the one hundred and seventy-sixth chapter, of the Code, were designed by the legislature to effect, and should be treated by the courts as affecting, an entire abrogation of the rule in question, as declared

in *Mosely v. Moss*; and that now, whether the plaintiff proceeds *as for defamation at common law, or charges words that could be actionable only under the statute, no demurrer to the declaration is to preclude the jury from passing on the case. It is said that the main reason on which the rule was rested, was the alleged necessity of informing the defendant distinctly whether he was proceeded against for common law defamation, or merely for insulting words; a necessity (as was supposed) arising out of the consideration that, as the law formerly was, the character of the defence allowable was dependent on the nature of the accusation; a plea of the truth of the words being admissible in cases of common law defamation, and not in cases of words actionable only by the statute, that the Code now allows the defendant in each class of cases to plead the truth of the words, and that, consequently, there no longer exists (if there ever existed) any necessity for or propriety in the rule requiring the plaintiff to show by his declaration whether he imputes to the defendant a slander or merely an insult.

It must be conceded, I think, that the effect of the legislation under consideration, is to extend the plea of justification to words made actionable by the statute. The language of the 44th section of the 176th chapter of the Code is general: "In any action for defamation the defendant may justify by alleging and proving that the words spoken or written were true." It is true that the word defamation has a technical sense as a generic term, comprehending the two species of words slanderous at common law, spoken and written slander, and nothing more. When it is considered, however, that though in some of the earlier cases Lord Hardwicke and other English judges, denied that in suits for libel the defendant could plead the truth of the words in justification; yet that it has been long and well settled, as well in England as in

this country, that the plea of the truth of the words is a good justification in actions for either species of slander, it is very hard to suppose that the legislature used the word in question in its restricted technical sense, and designed, by the new provision under consideration,

merely to confer upon parties a right which it was the well known uniform course of the courts to accord, in the absence of legislation. It is to be observed, too, that in the clause of the section allowing the defendant to give in evidence, in mitigation of damages, that he made and offered an apology to the plaintiff for the defamation, &c., the term in question is used in the identical sense in which it is employed in the clause allowing the defendant to justify, &c.; and that there is no conceivable reason why the legislature, in allowing proof of an apology, should restrict the privilege to proceedings for words defamatory at the common law; such proof being quite as appropriate to suits for insult. When, in addition to these considerations, it is further observed that the legislature, whilst re-enacting, in the second section of the 148th chapter, the law making actionable all words which, from their usual construction, &c., are considered as insults, have left out of the second clause of the section so much of the former law as declared that no plea or exception should preclude the jury from passing on the words, and have restricted the inhibition to the sustaining of a demurrer only, it is, I think, impossible to avoid the conclusion that the legislature designed, by the new provision on the subject, to extend to defendants in suits for insulting words, the right to plead and prove the truth of the words. Whether the extension of this privilege is to be construed by the courts as free from all exception or qualification, is a question about which I deem it unnecessary to express any opinion. In *Brooks v. Calloway*, Judge Allen, in the course of his opinion, supposed many instances of insults—"allusions to personal

88 defects, family misfortunes, and the like,"—in which the words would be the more insulting because of their truth; and if in such cases the plea of justification were allowed, "the law, (as he said) which proffered redress for insult, would furnish the opportunity of aggravating the outrage, and be itself an insulting mockery." In *Mosely v. Moss*, also, Judge Baldwin, after reasoning to show that the truth of the insulting words in actions founded upon the statute, should be admitted in mitigation of damages, as a general rule, remarked that such a rule was not free from exception. "On the contrary, (he observed) cases may doubtless occur in which, from their very nature, the truth of the words would be irrelevant, impertinent, and scandalous." After citing certain instances of the kind, he concluded that "it was competent for the courts to exclude evidence wholly irrelevant to the merits of the controversy, especially when absurd or indecent in its character, or wantonly offensive to the feelings and reputations of third persons." In this connection it is proper to add, that the rule which, at the common law, allows the truth of the words to be pleaded in actions for defamation, considers the plaintiff as having excluded himself from the protection of the law by his own

misconduct. The reason assigned by Mr. Starkie for allowing the plea of justification is, that "when a plaintiff is really guilty of the offence imputed, he does not offer himself to the court as a blameless party, seeking a remedy for a malicious mischief; his original misbehavior taints the whole transaction with which it is connected, and precludes him from recovering that compensation to which an innocent person would be entitled."

In cases of the kind just alluded to, it is obvious, there is an entire absence of all the reasons on which the right on the part of the defendant to plead and prove the truth of the words can be supposed 89 to be founded. The *words, however insulting, or however well calculated to injure the feelings of the parties aggrieved, impute no fault or misconduct to him; proof of the truth of the words would not, therefore, even tend to show that there was anything in his conduct or character worthy of blame or reproach, and the only tendency of the proof, as was said by Judge Baldwin, in *Mosely v. Moss*, "would be to gratify the malice of the defendant."

There is, as I conceive, therefore some room for the argument, that, broad as are the terms in which the right to justify in actions for defamation is given, the statute is still to be construed in reference to that general power and discretion in the courts, adverted to by Judge Baldwin, as before mentioned, so to control the pleadings before them as to prevent their being used as mere vehicles of scandal. Whilst, therefore, conceding to the defendant in error that the Code does according to its fair construction, allow of the plea of justification in actions for insulting words, I do not wish to be understood as thereby expressing the opinion that the privilege is wholly free from exception.

As already stated however, the counsel for the defendant in error is, I think, correct in assuming that, as the law now is, the defendant may (as a general rule) plead and prove the truth of the words in all actions for words, whether slanderous at common law or made actionable by our statute. But I cannot think that the argument which he seeks to found on such assumption is sound.—The effect of the new provision on the subject is to destroy the force of some of the reasoning on which the rule in *Mosely v. Moss* was rested, but not of all. The decision in that case was based not merely on the difference in the character of the pleas appropriate to the common law, and the statutory proceeding, but also, on well settled general principles of pleading; and there still exist, as I conceive, substantial reasons for keeping 90 up *the distinction established in that case, between the several modes of declaring for slander and for insulting words. It may be still a matter of very grave importance to the defendant to be distinctly apprised of the precise nature of the accusation against him. Though entitled to a plea of justification in either

case, it by no means follows that a defendant would make the same defence to words proceeded for as insulting merely, which he would make to the same words construed and treated by the plaintiff as slanderous. On the contrary the extent to which the defendant's own character may be involved in the controversy, and the mode and measure of the resistance to the action which he may consequently feel it incumbent upon him to make, may depend on the construction placed by the plaintiff in his declaration on the words complained of. Of this the case in hand itself furnishes one of the best illustrations. Whether the words, for the speaking of which the action is brought, do or do not import a charge of perjury depends on whether they were spoken in connection with and in reference to certain extrinsic facts and circumstances, or not. Notwithstanding a plea of justification is now allowable in either aspect of the case, the character and the quantum of evidence to sustain this plea would be very different in the former view of the case from what they would be in the latter. It seems to be well settled, that when the defendant justifies to a charge of perjury he must prove all the particulars which constitute the crime of perjury; viz: the deliberate deposition, the lawfully administered oath, the judicial proceedings, the absoluteness of the matter testified to, its materiality to the point in question direct or collateral, and its falsity. *Hopkins v. Smith*, 3 Barb. S. C. R. 602; *Clark v. Dibble*, 16 Wend. R. 601. And the falsity of the words must be proved either by two witnesses or by one witness and strong circumstances conducing to that end. The oath of the *accused, who is presumed innocent until proved guilty, is held to stand as the oath of a disinterested witness.—A single witness poises the scale of evidence; and some evidence, material, independent and corroborative of the testimony of the accusing witness, either positive or circumstantial, is required to turn the scales and prove the charge. Same cases; and *Steinman v. McWilliams*, 6 Barr's R. 171; *Woodlick v. Keller*, 6 Cowen's R. 118.

On the contrary, if the declaration be treated as imputing to the defendant merely that he had charged the plaintiff with having sworn to a lie, not on oath in a judicial proceeding, the testimony required to support a plea of justification would depend on the general rules of pleading and evidence.

It seems to me obvious, therefore, that if when the declaration has nothing on its face to show that the plaintiff treats the words as insulting and actionable under the statute, the defendant is not to be allowed to test by a demurrer whether the declaration is good as for a defamation at common law, he may, in many cases, labor under embarrassments and difficulties, in determining on his defence, to which it is not just and fair, that the plaintiff should be allowed to subject him. In actions, whether criminal or civil, our laws of pleading generally recognize and proceed upon

the propriety of notifying the defendant fully of the precise nature of the offence or grievance for which he is held to answer. In actions of the kind under consideration where the estate and character of the defendant are both involved in the controversy, it seems to me eminently proper that he should have such notice. The language used by the legislature in respect to the demurrer in the 2d section of ch. 148, Code, is still the same that it was in the former law; and in *Mosely v. Moss* this court decided that the inhibition, in respect to allowing the demurrer, was restricted to cases where the suit was for words, made *actionable by the statute. If the legislature had designed in 1849 to take away from the defendant the right to demur to a declaration counting as for a common law defamation, it is difficult to suppose that they would not have done so by the simple declaration, that in no action for defamation shall a demurrer preclude a jury from passing on the case. They would hardly have resorted, instead, to the awkward stratagem of an implied repeal of the right to demur in one class of cases, to be deduced from a clause giving the defendant a right to justify in the other.

I think that the rules in respect to the declaration stand, in the particular under consideration, as they did before the Code; that when the plaintiff proceeds under the statute, he must in his declaration aver that the words from their usual construction and common acceptance are construed as insults, and tend to violence and breach of the peace; or else employ some other equivalent averment to denote that the words are actionable under the statute; that when there is no averment of the kind in a declaration, it may be demurred to as defective, unless it sets out properly, and in substantial compliance with the rules of pleading, such a charge as constitutes defamation at the common law; and that it is not competent for a plaintiff to blend the common law and statutory causes of action in one count.

Tested by these rules each count is clearly insufficient. They have been shown to be defective as counts for slander at common law. They are equally so as counts for insulting words. The first count uses no expression whatever, to show that the plaintiff is relying on the statute. In the second count it is true the words are alleged to be false, slanderous, malicious, defamatory and insulting, but they are followed by the innuendo, that the defendant meant by the words, that the plaintiff was guilty of perjury. This count is plainly in violation of *the third rule just announced. On the other questions presented by the petition I deem it unnecessary to express an opinion, as they may not again arise in the court below.

I am of the opinion that the Circuit court erred; that instead of affirming it ought to have reversed the judgment of the County court with costs, and to have set aside the verdict of the jury, and to have rendered

a judgment for the plaintiff in error, unless the defendant in error on leave obtained from that court, had amended his declaration. It is therefore considered that the judgment be reversed, &c., with costs, and the cause remanded for further proceedings in accordance with the principles herein declared.

The other judges concurred in the opinion of DANIEL, J.

Judgment reversed.

94 *Mills & al. v. The Central Savings Bank.

July Term, 1880, Lewisburg.

Debt on Negotiable Note—Maker Incompetent Witness to Prove Usury.—In an action of debt against maker and prior endorers of a negotiable note, they plead jointly *nil debet* and usury. Before the trial the maker confesses a judgment, and there is final judgment against him: and the two prior endorers release him from all liability to them. As the maker is liable to the two last endorers, under the act, Code, ch. 146, § 6, p. 587, for five per cent. damages for any amount of the debt they may have to pay, he is not a competent witness for the defendants to prove usury.

The facts of this case are stated by Judge Allen in his opinion.

Fultz, for the appellants.

Hugh W. Sheffey and Baldwin, for the appellees.

ALLEN, P., delivered the opinion of the court:

The defendant in error, the holder of a protested negotiable note, instituted an action of debt against R. A. Hogshead the maker, and the plaintiffs in error, and Harman and Snapp who are endorers.

The action was a joint one under the act of assembly, and the defendants in the court below united in the pleas of "*nil debet*" and usury. By the record it would seem that issue was joined on the plea of *nil debet* only, but the bill of exceptions shows that on the trial the defendants offered the testimony which was objected to in support of both pleas. It has been conceded in argument here that issues were made up, and the case tried on both pleas; and that the plaintiffs in error are 95 entitled *to the benefit of their exceptions, if the evidence offered and rejected was legal and relevant to either of the issues.

After issues had been joined as aforesaid, and various proceedings had, the maker confessed judgment in the clerk's office for the debt in the declaration mentioned, with interest thereon till paid, the charges of protest, and the costs of suit; and final judgment was thereupon entered against him separately.

On the trial, after the plaintiff had given

in evidence the negotiable note and protest, the defendants, in support of the issues joined on the pleas of *nil debet* and usury, gave in evidence the said confession of judgment by the maker, and then proposed to read as evidence the deposition of the maker, with a release to him by the two prior endorers who are the plaintiffs in error here.

The reading of this deposition was objected to upon the ground, that the maker was an incompetent witness on the score of interest in the event of the suit, as the two last endorers, Harman and Snapp, had not released him. The court excluded the deposition from the jury, and the correctness of this decision is the only question for consideration here.

It was decided in Taylor v. Beck, 3 Rand. 316, that a party to a negotiable instrument was a competent witness to invalidate it. In that case, the witness was an endorser, and was offered to invalidate the note by proving usury. The conflicting decisions of the English courts in Walton v. Shelley, 1 T. R. 296; and Jordaine v. Lashbrook, 7 T. R. 601; were reviewed by the judges, and the rule adopted in the last case was approved, and has ever since been recognized and followed in this State. But in the case of Taylor v. Beck, the witness was rejected, not because he was a party to the negotiable note, but because, owing to the proceedings there, he had a certain interest in the event of the cause to be 96 *effected by the verdict being given in evidence against him. There, as here, suit was brought against the several parties to the negotiable instrument jointly under the act of assembly. The endorser, offered as a witness, confessed judgment. The court held that his confession, as the law then stood, could only be received and entered as an interlocutory judgment dependent on the final judgment to be rendered in the cause; that the confessing defendant must receive the same judgment as his co-defendants; he was therefore interested in the final judgment, and as costs might be incurred after his confession, he was interested to that extent, and was thereby rendered incompetent. Conceding for the purposes of this case, as it has been insisted on by the plaintiffs in error, that by the Code, p. 651, ch. 171, § 41, it was proper to take a confession of judgment in the clerk's office, after the case was upon the trial docket, and that by the Code, p. 653, ch. 171, § 49, such a confession in a joint action by one of the joint-defendants is final; that he thereupon ceases to be a party to the record as to all subsequent proceedings, not responsible for any further costs incurred by the other defendants thereafter in continuing to defend the cause, and therefore not interested in the final judgment; a new provision, introduced since the case of Taylor v. Beck was decided, materially effects the question of competency in this case.

By the Code, p. 587, ch. 146, § 6, it is provided, "that if any person liable as bail,

surety, guarantor, or endorser, &c., shall pay in whole or in part any judgment, decree, or execution rendered or awarded on account of such liability, the person having right of action for the amount so paid may by motion in the court, in which the said judgment, decree, or execution was rendered or awarded, obtain judgment or decree against any person, against whom such right of action exists, for the

97 *amount so paid with interest from the time of payment and five per centum damages on said amount."

Notwithstanding the release of two of the endorsers to the maker, he still continued responsible to Harman and Snapp, late endorsers, who were jointly sued, not only for the amount that they might be compelled to pay on the judgment, with interest from time of payment, but also for the five per centum damages on said amount. This liability to these damages is a liability over and beyond the amount for which he is liable under the judgment confessed by him, and a verdict and judgment thereafter rendered against his endorser, would be conclusive evidence against the maker of the right of the endorser to recover in such motion the five per centum damages on the amount paid. The words, "may by motion, &c.," do not, as was insisted in argument, show that the liability for these damages is contingent, depending upon the mere discretion of the court. These words refer, not to the court, but to the party.

The remedy given by the statute is cumulative. He has his common law right of action, or he may proceed by motion. If he does resort to the latter remedy, the court has no more discretion to refuse to give judgment for such damages, than it has to refuse to give judgment for the amount paid with the interest.

The witness, therefore, was directly interested in the event of the suit against his endorsers, an interest to be effected by the verdict and judgment being given in evidence against him upon a motion to recover the amount paid by any such endorser, with interest and the five per centum damages: and, therefore, in the absence of a release by any endorser who was a defendant in said joint action, and had united in the joint pleas of *nil debet* and usury, the maker was an incompetent witness to invalidate the instrument by proof of usury.

This conclusion is not in conflict

98 with the case of **Steele v. Boyd*, 6 Leigh 547. That was an independent motion by the security in a delivery bond for an exoneratur, on the ground of an agreement between the creditor and principal, to give the latter time. The principal had no interest in the result of this motion; his liability for the debt would not be effected by the discharge of his surety, or the failure of the surety to be exonerated from it; for, as judge Tucker observed in that case, "if this were so, then in all cases where the surety is discharged by the creditor's conduct, the principal will be discharged also, which

cannot be pretended." In that case, therefore, the witness stood indifferent. He continued liable for the debt, whatever might be the result of the surety's motion, he was no party to the proceeding, was not liable for the costs, and the judgment therein, if against the surety, could not be evidence against the principal in any other proceeding. In this case the judgment against the endorser is the foundation upon which the motion rests to recover from him the amount paid by the endorser, with the interest and five per centum damages.

I think the court properly held the maker to be an incompetent witness in this case to invalidate the note, and that the judgment should be affirmed.

Judgment affirmed.

99 *Hogshead & als. v. Baylor.

July Term, 1880, Lewisburg.

1. *Debt on Negotiable Note—Maker Incompetent Witness to Prove Usury.*—In an action of debt against maker and four endorsers of a negotiable note, they plead jointly *nil debet* and usury. Before the trial the maker confesses a judgment, and there is final judgment against him, and the three prior endorsers release him from all liability to them. The maker is still liable to the fourth endorser, and is not a competent witness for the defendants to prove usury.

2. *Same—Same.*—An agreement by the plaintiff not to take a judgment against the last endorser unless he recovered against all, did not release him so as to render the maker a competent witness when released by the prior endorsers.

3. *Same—Interrogatories.*—In an action against the maker and endorsers of a negotiable note, they plead jointly *nil debet* and usury; and file interrogatories to the plaintiff. 1. From whom did you get the note in suit? 2. If from defendant C, what did you pay him for it? He answers to the first: I received the note from C, who, so far as I had any knowledge, was the owner of it. He declines to answer the second question. Defendants move to strike out last part of answer to the first question. **Held:**

1. *Same—Same.*—The only object of the question was to ascertain the character in which C. endorsed the note; and the answer is therefore, responsive to the question. If that was not the object, the answer was immaterial.

2. *Same—Same.*—The pleas being joint, defendants were not entitled to an answer to the second question to reduce the amount of recovery against C.; nor were they entitled to the answer whilst they relied on the defence of usury.

4. *Continuance—Surprise of Counsel.*—The fact that counsel believed that a case had been removed from the County to the Circuit court, and was, therefore, taken by surprise, and had not prepared himself by examining the papers

100 *and the law of the case, the original counsel being present and prepared, is not cause for a continuance.

*See generally, monographic note on "Continuances" appended to *Harman v. Howe*, 27 Gratt. 676.

5. Removal of Causes—When Right Lost.*—After cause is called for trial in the County court, and continuance refused, a party is not entitled to have it removed to the Circuit court though it has been pending more than twelve months.

This was an action of debt in the County court of Augusta, instituted in January, 1857, by George Baylor against Robert A. Hogsett, as maker, and John W. Hogshead, J. M. Mills, D. G. Hogsett, and John Crawford, as endorsers of a negotiable note for one thousand dollars. The defendants joined in the pleas of "nil debet" and usury, on which issues the case was tried.

When the cause was called for trial, the defendants asked for a continuance until the next term, on the ground that one of their counsel, from the belief that it had been removed with the next preceding case of Mills & als. v. The Central Savings Bank, to the Circuit court, both of them being pending in court when the one was removed; and that, therefore, he had made no preparations for the trial, and, from the complicated character of the case, it would be impossible for him to prepare for trial at that term. The counsel stated, further, that he would be compelled to be engaged in some very important business of his own on that day and the next, which could not be deferred, and to force a trial on that day was to compel him to withdraw from the cause. But the court overruled the motion, and directed the trial to proceed: whereupon the said counsel withdrew from the cause. It appeared that the original counsel for the defendants in the cause was in court, and alleged no want of preparation for the trial, though he expressed a desire to have the assistance of the other counsel. And it appeared that the want of preparation of the counsel was merely that he had not examined the papers, or considered the
101 questions of law involved; *and it did not appear that any witness or other evidence was absent.

After the motion to continue the cause had been overruled, the counsel for the defendants moved the court to reconsider the motion, and also to remove the cause to the Circuit court, upon the ground that it had been pending in the County court more than twelve months. But the court refused to reconsider the motion to continue, or to remove the cause, and required the defendants to go to trial. And to the opinion of the court overruling the motion to continue the cause, and refusing to remove the cause, the defendants excepted.

Some time before the term of the court at which the cause was tried, the defendants filed the following interrogatories to the plaintiff: 1. "From whom did you get the note in suit?" 2. "If from the defendant John Crawford, what did you pay him for

it?" And to these interrogatories the plaintiff answered to the first. "I got the note in suit from John Crawford, who, so far as I had any knowledge, was the owner of it." As to the second question propounded, I respectively decline to answer." After the motion to continue the cause had been overruled, and before the jury were sworn, the counsel for the defendants moved the court to strike from the answer of the plaintiff to the first interrogatory the words, "who, so far as I had any knowledge, was the owner of it," on the ground that they were not called for by or responsive to the interrogatory; and also moved the court to compel the plaintiff to respond to the second interrogatory. The counsel, in submitting this last motion, avowed their purpose to be to ascertain what the plaintiff had paid Crawford for the note, in order to fix the measure of his recovery against Crawford, and not to force the plaintiff to discover usury in the transaction. This motion
102 was opposed by the counsel *for the plaintiff, and was overruled by the court. And the defendants again excepted.

The defendants further offered in evidence the deposition of Robert A. Hogsett, the maker of the note sued on; and to show that he was not interested, they produced the record of his confession of judgment in the office, and the final judgment thereon, and also a release to him by all the defendants except Crawford; and they produced a paper executed by the plaintiff, in which he says: "In the case of Baylor v. Rob. A. Hogsett and others, I have propounded interrogatories to the defendant John Crawford, with a view of disproving the evidence of Robert A. Hogsett, tending to show that I procured the note from said Robert A. Hogsett at a greater rate of interest than six per cent. My object is not to fix a liability on John Crawford alone; and if I cannot obtain judgment against him and his preceding endorsers, I will not take judgment against him alone; he being willing to waive all objections to answering said interrogatories on this condition. To the introduction of the deposition as evidence, the plaintiff, by counsel, objected, on the ground that the witness was interested in the event of the suit: and the court sustained the objection. And the defendants again excepted.

There was a verdict and judgment in favor of the plaintiff for the debt, interest, damages, and costs: and thereupon the defendants applied to the judge of the Circuit Court of Augusta county for a supersedeas, which was awarded; but, upon the hearing of the case, the court affirmed the judgment. And then the defendants obtained a supersedeas from this court.

Fultz, for the appellants.

Hugh W. Sheffey and Baldwin, for the appellee.

103 ALLEN, P. This case presents the same question as to *the competency of the maker to be examined as a wit-

*See Spengler v. Davy, 15 Gratt. 385 et seq. In Jelenko v. Coleman, 23 W. Va. 227 the court said that the true interpretation of V. C. 1849, ch. 174, § 1 must be regarded as settled by the case of Spengler v. Davy, 15 Gratt. 385, and Hogshead v. Baylor, 16 Gratt. 108.

ness, which was raised in the case of *Mills v. The Central Savings Bank*. The circumstances being alike in every particular, as to this matter, the cases were argued together. For the reasons assigned in the other case I think the deposition of the witness was properly excluded.

In this case however there are other questions presented which must be considered.

The first exception taken by the defendants in the court below, was to the refusal of the County court to continue the cause when regularly called, in consequences of the surprise of one of the counsel of said defendants, and the personal inconvenience to which he would be subjected if the trial was then pressed. The original counsel of the defendants was in court and alleged no want of preparation. It was not alleged that any witness or other evidence was absent. And the want of preparation as to one of the counsel was merely that he had not examined the papers or considered the questions of law involved.

The cause assigned furnished no legal grounds for a continuance. It was a question between the counsel and the clients, and addressed itself to the courtesy of the bar, but did not authorize the court to continue against the consent of the other party.

After the motion to continue was overruled, a motion was made to remove the cause to the Circuit court because it had been pending in the County court more than twelve months. The court properly refused to remove the cause at that time, as has been decided in the case of *Spengler v. Davy*, 15 Gratt. 381.

From the second bill of exceptions it appeared that two interrogatories had been propounded to the plaintiff in pursuance of the Code p. 667, ch. 176, § 38.

The first interrogatory was in these 104 words, "From *whom did you get the note in suit?" To which the plaintiff had responded in the following words—"I got the note in suit from the defendant John Crawford, who, so far as I had any knowledge, was the owner of it."—The defendants' counsel moved to strike from the answer, the last clause as not responsive. I think there was no error in overruling this motion. The object of the interrogatory would seem to have been to ascertain not so much from what person the holder obtained the note, for that appeared by the endorsements and was alleged in the declaration, which averred the endorsement by John Crawford the last endorser to the plaintiff, but to ascertain in what character he endorsed, whether as a mere accommodation endorser or agent for the maker or some previous endorser, or as owner for value. In this view the clause was directly responsive to the substantial purport of the interrogatory. If that was not the object of the interrogatory, it does not appear how the clause objected to was material, and if immaterial it does not appear how it could have injured the defendants.

The second interrogatory required the plaintiff to say if he got the note from Crawford, what did he pay him for it.

Although the record does not show that issue was made up upon the plea of usury after the cause was remanded to the County court, yet it appears from the bills of exception and has been conceded in argument here, that the case was tried on both pleas. And as the defendants below got the benefit of the defence, the decisions of the court must be construed with reference to these joint pleas in which all the defendants below united, and upon which the cause was tried.

The plaintiff having refused to answer the second interrogatory propounded, the defendants moved the court to compel him to answer it, avowing, in submitting 105 their *motion, their purpose to be to ascertain what the plaintiff had paid to Crawford for the note, in order to fix the measure of his recovery against said Crawford; and not to force the plaintiff to discover usury in the transaction. The motion to compel him to answer was overruled and the defendants excepted. In one aspect of this interrogatory a question might arise as to the measure of recovery, whether the amount of the face of the note or the sum actually paid by the holder.

The cases in this State of *Whitworth v. Adams*, 5 Rand. 333; *McNeil & Turner v. Baird*, 6 Munf. 316; *Wilson v. Lazier*, 11 Gratt. 477; would seem to establish that the bona fide holder, the question of usury being out of the case, is entitled to recover from all the parties the amount of the face of the note. So that if the case stood alone upon the plea of nil debet the answer to the interrogatory would have been immaterial, and the defendants were not injured by the refusal to compel the plaintiff to respond to the interrogatory.

The interrogatory was objectionable on another ground; the discovery sought was of a matter personal to the last endorser. The previous endorsers, there being no question of usury, would be liable for the amount of the face of the note. The action and plea were joint, and a joint judgment must have followed. If the last endorser had desired to raise the question, and it could have availed him, there should have been a separate plea. But there is still another and decisive objection to the motion, an objection made at the time as appears from the bill of exceptions; that is that the said defendants should have withdrawn their defence of usury, before the plaintiff should have been required to answer the interrogatory.

The Code ch. 176, § 38, p. 667, authorizes the court to require answers to interrogatories such as the person to whom they are propounded would be bound to answer upon a bill of discovery. The bill of discovery 106 referred to, means the pure bill of discovery as understood in equity practice; *McFarland v. Hunter*, 8 Leigh 489; and not a bill for discovery and relief. And the party to a cause is not

bound to answer interrogatories which may subject him to a penalty or forfeiture. Under the general provisions of the law, a bill for the discovery of usury could not be maintained even if the plaintiff expressly waived any right to the penalty or forfeiture. For by the Code p. 577, ch. 141, § 11, the penalties and forfeiture go to the commonwealth and informer, were not vested in the plaintiff seeking the discovery and could not be released by him. So no disclosure could be enforced. The 3rd section of the act of 1819 compelled a discovery at the suit of a borrower; and if it appeared there was usury, obliged the creditor to accept his principal money without any interest, and pay costs; and discharged him from all other penalties of the act. The Code p. 577, ch. 141, § 7, authorizes a similar bill, compels a discovery, and provides that the lender shall recover where there is more than lawful interest reserved, only his principal money without interest, and pay the costs; but does not like the act of 1819, in express words discharge him from the other penalties of said act. And it may be a question, in consequence of this omission, whether the party may not be compelled to answer notwithstanding the penalties are not released. Such construction would not conform to the spirit of the common law, which as judge Baldwin remarked in *Poindexter v. Davis*, 6 Gratt. 481, 490, jealous of the liberty of the citizen protects him from being made his own accuser, or forced to give evidence against himself. In conformity with these principles I should be inclined to construe the act in the Code as not having changed the rule; and that where a discovery was made under the 7th section before referred

107 *to, the party would not be subjected thereby to the other penalties of the act.

Be this as it may, the bill authorized by the Code, ch. 141, § 7, is not a pure bill of discovery, referred to by the law authorizing the propounding of interrogatories; but a bill for discovery and relief, and for relief of a peculiar kind, which can alone be administered in a court of equity, and for which the machinery of a court of law is not adapted. The relief given is to be administered by a court of equity according to its own mode, and the remedy is given by statute only upon bill filed to be relieved from all but the principal money. The provision being one by which upon the discovery all interest is forfeited, should be strictly construed, and restricted to the mode and the tribunal referred to in the statute. I think therefore as long as the defendants in the court below insisted on their defence of usury, the plaintiff in the action was not bound to answer the interrogatory, and so give evidence which on the plea of usury might invalidate the note.

The paper referred to in the last bill of exceptions, executed by the plaintiff in the court below to John Crawford, was intended to operate as a release to Crawford only upon the contingency that the previous

endorsers were discharged. It reserves the right to proceed against him with the previous endorsers; and therefore did not dispense with a release from Crawford to the maker to render him competent.

Unless all the endorsers could be discharged by his testimony invalidating the note, the prior endorsers would be liable to the last endorser. The release could not enure to the benefit of the last endorser until all were so discharged, and until such discharge the maker continued liable for the five per cent. damages on the amount paid by any endorser on a judgment recovered against him.

108 *I think there is no error in the judgment to the prejudice of the plaintiffs in error, and that the same should be affirmed, with damages according to law, and costs.

The other judges concurred in the opinion of Allen, P.

Judgment affirmed.

109 *Hoover v. Calhoun & als.

July Term, 1860, Lewisburg.

1. *Contract for Sale of Wife's Land by Husband—Case at Bar.*—C contracts to sell to H a house and lot of ground in a town, and an out lot, the first constituting much the most valuable portion, and C sells the property as his own; and H is put in possession. C dies before the contract is executed, and the property in the town is in fact the property of C's wife. **HOLD:**

1. *Same—Specific Performance by Wife.*—C's widow and children cannot enforce the contract against H.

2. *Same—Same.*—H expressing his wish to have the whole contract rescinded, the court should decree it.

3. *Same—Same—Improvements.*—H having made permanent improvements on the property, but having offered to surrender possession; if an account is taken, the rents and profits up to the time of the decree for the surrender of the property, are to be set off against the said improvements; but H is not entitled to a decree for any balance on account thereof.

**Specific Performance—Compensation.*—In *Stearns v. Beckham*, 31 Gratt. 379, the court, at page 423, cited the principal case: *McComas v. Easley*, 21 Gratt. 23; *Hendricks v. Gillespie*, 26 Gratt. 181, as cases in which the court, though having refused specific execution, decreed compensation to the proper parties, upon the ground that the court, being in possession of the case, would put an end to the controversy by giving complete relief. See also, *Anthony v. Leftwich*, 3 Rand. 228; *Payne v. Graves*, 5 Leigh 561; *Bowles v. Woodson*, 6 Gratt. 78; *foot-note* to *Stearns v. Beckham*, 31 Gratt. 379; *foot-note* to *Hendricks v. Gillespie*, 26 Gratt. 181; *Nagle v. Newton*, 22 Gratt. 814, and *foot-note*.

Same—Want of Mutuality.—In *Wood v. Dickey*, 90 Va. 163, 17 S. E. Rep. 818, the court said: "A court of equity in Virginia will not decree specific execution of a contract when there is not *mutuality* in both *obligation* and *remedy*. Both parties must, by the

This was a bill for the specific performance of a contract for the sale of land filed in April, 1858, in the Circuit court of Augusta county, by Margaret S. Calhoun and others against Henry L. Hoover. It appears that in April, 1857, George A. Calhoun, the husband of the plaintiff Margaret S. and the father of the other plaintiffs, entered into a written contract with the defendant, by which Calhoun sold to Hoover his property in and around West View, consisting of a brick house upon a lot of ground containing seven acres and twenty poles in the town of West View, and a lot of land on the Parkersburg road containing six acres, in consideration of the sum of \$3000, to be paid as follows: Fifteen hundred

110 dollars to be paid on the 16th of April, 1858, and fifteen hundred dollars on the 15th of April, 1859. The said Calhoun agreeing to make a good and legal deed to the property when Hoover made the first payment of \$1500, and gave bond with approved personal security for the second payment. And Calhoun was to give possession of the property on the 1st of August, 1857, reserving the crops growing on the land.

Hoover was put into possession of the property in pursuance of the contract; and in February, 1858, George A. Calhoun died, leaving his wife Margaret S. and two children surviving him.

It appears, that the lot in the town of West View, on which the house was located, was the property of Margaret S. Calhoun in her own right. And she with the two children of George A. Calhoun filed the bill to enforce the contract, she expressing her willingness to convey the land owned by her dower and her interest in the other lot, upon being allowed to receive the price contracted to be paid for it. And the plaintiffs file with their bill a deed conveying the whole property, which they proffer to the defendant upon his complying with the contract.

agreement itself, have a right to compel specific performance of it, else equity will not execute it. *Moore's Administrators v. Fitz Randolph and others*, 6 Leigh 175-185; *Hoover v. Calhoun*, 16 Gratt. 112; *Chilhowie Iron Co. v. Gardiner*, 79 Va. (Hansbrough) 305-311; *Cheatham v. Cheatham, etc.*, 81 Va. (Hansbrough) 395-403; *Ford v. Euker*, 86 Va. (Hansbrough) 75, 9 S. E. Rep. 500; *Shenandoah Valley R. R. Co. v. Dunlop, etc.*, 86 Va. (Hansbrough) 316-349, 10 S. E. Rep. 239; *Edichal Bullion Co. v. Columbia Gold Mining Co.*, 87 Va. (Hansbrough) 641-645, 13 S. E. Rep. 100; *Graybill v. Brugh*, 89 Va. 895, 17 S. E. Rep. 558."

But, in *Central Land Co. v. Johnston*, 95 Va. 223, 28 S. E. Rep. 175, suit was brought to enforce a contract for the sale of land signed by the defendant but not by the complainant. The court, at page 226, said: "In Virginia, while there have been expressions indicating a tendency of the judicial mind to the view that the contract must be signed by both parties, as in *Hoover v. Calhoun*, 16 Gratt. 112, the question has remained an open one up to this time, with the exception of the case of *Wood v. Dickey*, 90 Va. 160, 17 S. E. Rep. 818, which is now relied on in support of the contention of appellant. In that case a rehearing was allowed, and, pending the re-

Hoover answered the bill, and refused to execute the contract. He insisted that the contract was made with George A. Calhoun, for land which Calhoun undertook to sell as his own, and which the defendant supposed belonged to him, and that Mrs. Calhoun could not enforce the contract as for a sale of her land; and especially as she only proposed to confirm the contract upon the terms of receiving the whole of the purchase money, when one of the lots purchased was admitted to be the property of her late husband. And he insisted further that the improvements were upon the part of the property belonging to Mrs. Calhoun; and that property constituted almost the whole value of the purchase. He therefore

111 objected to an execution of the contract, stated that soon after taking possession he had expended some three or four hundred dollars in permanent improvements; but that after the death of George A. Calhoun he had offered to surrender the property, and that he was still ready to give it up.

In June, 1858, the cause came on to be heard, when the court decreed a specific execution of the contract; and after some details for carrying out the decree, directed one of the commissioners of the court to report an account showing the rights of the several parties plaintiff in the money arising from the sale. From this decree Hoover applied to this court for an appeal, which was allowed.

Fultz, for the appellant.

Baldwin, for the appellees.

ROBERTSON, J. The question presented for decision in this case is, whether a wife has a right, after the death of her husband, who has contracted for the sale of her land, describing it as his, to enforce specific performance by the purchaser, for her own benefit.

hearing, the case was settled and dismissed without a final decision. It cannot therefore be accepted as controlling authority in this case. Regarding the question, therefore, as still an open one in this State, the court is of opinion that it was not necessary for the contract, under consideration, to be signed by appellee to entitle him to its specific performance in equity. It was sufficient that it was signed by appellant, the party to be charged thereby; that when appellee instituted his suit to enforce specific performance of the contract he thereby in writing consented to it, and made the remedy as well as the obligation mutual."

Same—Common-Law Lands of Married Women.—In *Nalle v. Farish*, 98 Va. 132, 34 S. E. Rep. 985, the court said: "Mrs. Nalle, being a married woman, was not competent to make a valid contract of sale of the land, and the court was without power to decree a conveyance to the heirs of Shadrach founded upon any contract made for its sale to him by her, or by her husband as her agent. *Chilhowie Iron Co. v. Gardiner*, 79 Va. 305; *Hoover v. Calhoun*, 16 Gratt. 100; *Shenandoah Valley R. Co. v. Dunlop and Wife*, 86 Va. 346, 10 S. E. Rep. 239; *Wynn v. Louthan*, 86 Va. 946, 11 S. E. Rep. 878."

It is admitted that she is not bound by the agreement; and it is also admitted to be the general rule that specific performance will not be enforced unless the contract is mutually obligatory. But it is insisted that she has a right to adopt the contract of her husband, and that by filing her bill asking for its specific execution, she makes the remedy mutual, and thus satisfies the rule.

It was at one time held that a contract made by a husband for the sale of his wife's land, might be specifically enforced against him; or rather, that he might be imprisoned until she united with him in making the title. But the weight of recent authority is against this practice, which is now almost universally regarded as 112 *impolitic and absurd. See, Story's Eq. Jur. § 731 to § 735; 1 Bright on Husb. & wife p. 183, and the cases cited.

Upon the question whether husband and wife can enforce against a purchaser specific execution of a contract made with them for the sale of her land, much diversity of opinion exists. See, Note to § 287 of Fry on Spec. Perfor. (Law Lib. vol. 100): *Salisbury v. Hatcher*, 2 Younge & Collyer 54 (21 Eng. ch. R.); Note to Howell v. George, 1 Madd. ch. R. 13; *Flight v. Bolland*, 4 Russ. R. 298, (3 Cond. Eng. ch. R. 675); and *Watts v. Kinney*, 3 Leigh 272.

It will also be found not to be free from doubt, whether the mutuality requisite to authorize the court to enforce specific performance must exist when the contract is made, or whether it is sufficient if it can be shown to exist at the hearing of the cause: though the preponderance both of authority and reason seems to be in favor of the proposition that a contract to be specifically enforced must be mutually binding at the time it is entered into. See, *Batten on Contracts* 61, (Law Lib. vol. 67); *Fry on Spec. Perfor.* p. 133, (Law Lib. Vol. 100); *Duval v. Myers*, 2 Maryland ch. R. 401; *Moore's adm'r v. Fitz Randolph*, 6 Leigh 175.

But it is not necessary for the decision of this case to enter upon an examination of these questions, and no definitive opinion is expressed upon them.

It may, for the sake of the argument, be conceded that husband and wife can enforce a contract entered into with them for the purchase of the wife's land; and that the rule as to mutuality is satisfied if it is made to appear on the hearing that mutuality then exists, although it may not have existed previously; and it will by no means follow that a wife be permitted, after her husband's death, to adopt and enforce, for her own benefit, his contract for the sale of her land.

113 *The general rule, unquestionably, is that there can be no decree for specific performance, except between the parties themselves, or those claiming under them in privity of estate, or of representation, or of title; for a contract can only be enforced between the parties themselves, or their representatives in interest. *Dart on Vend. & Purch.* p. 461.

We have not been referred to, nor have we been able to find, any authority tending to show that an exception to this rule exists in favor of a widow. That she does not come within it is manifest; for it cannot be said that, as to her own land, she is in any sense the representative of the deceased husband, or that she claims title to it under him, or in privity with him. She cannot be compelled to perform any contract he may have entered into respecting it, and it is difficult to perceive the grounds on which she should be allowed to enforce such contract for her own benefit. The court has no right to change the parties to a contract, and give to a person, who is neither party nor privy, the benefit of it. Nor can it substitute a new or modified contract in the place of that entered into by the parties, and require such substituted contract to be performed. Its proper province is to cause contracts to be executed as they are made, and by the parties making them, or their representatives in interest.

In this case the contract was made by the husband. The wife was no party to it, and was not even referred to in it. The land was described as the land of the husband; and to him the purchaser looked for his conveyance and warranty. Nor is the wife seeking to enforce the agreement as it was made. According to its terms, the purchase money should be paid to the husband, or his personal representative; while she asks that the purchaser shall be compelled to pay it to her, for her own use.

114 *For these reasons the contract ought not to be enforced against the purchaser as far as it relates to the land of the wife. And this being the case, it will not be proper to enforce it as to the portion of the land which belonged to the husband. The two parcels were embraced in one entire contract, and there is nothing to induce the belief that the purchaser would have contracted for the part belonging to the husband, if that belonging to the wife, which was the larger and more valuable portion, had not been included with it.

The decree must be reversed and the cause remanded. If the appellees desire it, an account of the rents and profits since the purchaser has been in possession under the contract, and of the value of the permanent improvements placed by him upon the property before the death of his vendor, may be taken. But it would be inequitable to render a decree in favor of the appellant for any excess of the value of such improvements over the amount of the rents and profits with which he is chargeable; because the owners of the property were willing to convey it to him upon his paying the price stipulated for with his vendor, and he refused to accept the conveyance. On the other hand, as the owners refused to agree to his proposition to rescind the contract, and to retake possession of the property, they must allow him credit by the value of his improvements to the extent of the rents and profits during the whole time of his possession.

Whether an account is asked for or not, possession should be surrendered to the

widow and heirs according to their respective rights. And the purchaser having expressed his willingness to have the contract rescinded, an order should be made to that effect.

Each party should pay his own costs in the Circuit court up to the rescission of the contract, a suit being proper to adjust the rights of the parties. But if an
115 *account shall be asked for, any costs which may be thereafter incurred must be paid by the party from whom a balance shall be found to be due.

The other judges concurred in the opinion of Robertson, J.

Decree reversed.

116 *Haseltine & Walton v. Brickey & als.

July Term, 1860, Lewisburg.

1. Interpleader—When Garnishee Cannot File a Bill of.*

—An attaching creditor and an assignee both recover judgments against a debtor of an absent defendant, without objection on his part, although he had notice of the assignment before the judgment in the attachment suit. He cannot after the judgments are obtained file a bill of interpleader against them to require them to litigate their respective rights to the fund; but is liable to pay both judgments.

This was a bill of interpleader filed in the Circuit court of Scott county by John C. Brickey against Haseltine & Walton, E. A. Millard and others. Haseltine & Walton had brought two actions of debt against Nathaniel M. Hicks in the County court of Scott county; and pending these actions Hicks removed to the State of Tennessee. The plaintiffs then sued out attachments in their actions, and on the 29th of January, 1856, Brickey was summoned as a garnishee. At the March and June terms of the court

*Equitable Relief—Fraud—Surprise.—“Where a party has had a day in which he could make his defence in the proper form, before a verdict and judgment against him, equity will not entertain him and grant relief after such verdict and judgment, unless in cases of fraud, accident or surprise, or some adventitious circumstance, unmixed with negligence on his part, which shall sufficiently account for the omission to seek its intervention before judgment.”

These words used by LEE, J., in the principal case, were quoted and approved in *Ayres v. Morehead*, 77 Va. 588; *Corey v. Moore*, 86 Va. 738, 11 S. E. Rep. 114; *McNeel v. Auldridge*, 84 W. Va. 768, 12 S. E. Rep. 856. See also, *Holland v. Trotter*, 22 Gratt. 136, and *foot-note*; *Wallace v. Richmond*, 26 Gratt. 67, and *foot-note*.

In *Green v. Massie*, 21 Gratt. 360, the principal case, *Faulkner v. Harwood*, 6 Rand. 125; *Norris v. Hume*, 2 Leigh 334; *Slack v. Wood*, 9 Gratt. 40; and *Allen v. Hamilton*, 9 Gratt. 255, are cited as establishing the proposition that a court of equity will not entertain a bill of discovery after a judgment at law unless the party seeking relief shall show some satisfactory excuse for his failure to apply for the discovery during the pendency of the action at law.

he appeared and declared on oath that he was indebted to Hicks in the sum of \$725, payable on the 1st day of January, 1857; and the court made an order directing him to pay into court to the clerk the amount of the plaintiffs' demand, when the same becomes due and payable. At the same June term the plaintiffs recovered judgments as against Hicks.

Brickey having failed to pay the money into court, at the December term 1857, an order was made directing executions to issue against him in favor of the plaintiffs.

It appears that Brickey owed Hicks
117 for land purchased *of him, and on the 19th of January, 1856, he executed to Hicks his bond, with his son as his surety, for \$725 payable on the 1st of January, 1857. At the time he executed this bond he had been told that Hicks proposed to sell it to E. A. Millard; and on the 20th of February following he received a written notice from Millard dated on the 12th, that he held the bond and should look to him for payment. The assignment on the bond bears date on the 21st of January, 1856. On this bond an action was brought in the Circuit court of Scott county, in the name of Hicks for the benefit of Millard, and judgment was recovered therein at the Spring term of the court for 1858: Brickey not appearing to have made any defence to the action, or to have mentioned in either this action or the attachment cases, the claim of the other party to the money due from him on his bond to Hicks.

After both parties had obtained their judgments against him, Brickey filed his bill of interpleader, asking that they might be required to contest their right to the fund. And they appeared, and each insisted that their judgments were valid against Brickey.

When the cause came on to be heard the court below held that Millard's right to the fund was better than that of Haseltine & Walton; and therefore dissolved the injunction as to Millard, and perpetuated it as to Haseltine & Walton. And from this decree Haseltine & Walton obtained an appeal from one of the judges of this court.

Kane, for the appellants.

John W. Johnston and Campbell, for the appellees.

LEE, J. The only question which in my view of this case is material to be considered, is whether the bill was filed in due time to entitle the complainant to the
118 interposition *of the court of equity by requiring the adversary claimants of the fund in his hands to interplead.

The debt due from Brickey to Hicks was created on the 19th of January, 1856, and was payable on the 1st of January, 1857. The note by which it was evidenced was assigned to the appellee Millard by an endorsement thereon, dated the 21st of January, 1856. On the 29th of January, 1856, Brickey was summoned as a garnishee under the attachment sued out in the actions of the

appellants against Hicks. At the March term following and again at the June term, he appeared and admitted that he owed Hicks the amount of the note, saying nothing about the assignment to Millard; and he was ordered to pay the amount into court when it became due; and subsequently at December term, 1857, having failed to pay the same, execution for the amount was awarded against him by the court. At the June term, 1858, in a suit brought on the note of Brickey for the same debt in the name of Hicks, for the use of Millard, a judgment was rendered against Brickey for the full amount with interest and costs; and then he filed this bill praying the court to compel the appellants and the appellee Millard to interplead, and to grant him an injunction and general relief.

The creditors named in the bill answered, insisting upon their several claims, and relying upon the judgments recovered by them respectively.

It is proved in the cause that at the time Brickey executed his note to Hicks he knew that it was to be assigned to Millard; and that on the 20th of February, 1856, a formal written notice was served upon him to the effect that it was then held by Millard, and that he would look to him for payment.

Now I apprehend that when he came to answer as garnishee in the suit of the appellants against Hicks, at the March and

June terms after this notice, he could
119 *have brought this assignment to the notice of the court, and upon satisfying the court that he then owed nothing to Hicks, by reason of the assignment to Millard, no judgment would have been rendered against him.—*Huff v. Mills*, 7 Yerger's R. 45; *Yarborough v. Thompson*, 3 Smedes & Marshall 295; *Wilson v. Davisson*, 5 Munf. 178. So if without notice of the assignment to Millard, he had been required to pay and had actually paid the amount to the attaching creditor, or if he was prepared successfully to controvert the fact of the assignment to Millard in the suit subsequently brought by Hicks for the use of Millard, he could have relied upon these matters or any other good cause of resistance to Millard's claim to the fund in his hands, by way of defence to the action. If, however, when he was summoned as garnishee, he distrusted his ability to make good these defences for want of the means the better information of the parties themselves might supply, and desired to avoid the trouble and risk of suits at law, he could have filed his bill of interpleader at once, and upon paying the money into court, or giving security to abide its decree, or complying with whatever terms might be imposed by the court, he could have obtained an injunction to stay all further proceedings on the attachment as to him, and to restrain Millard from bringing any suit upon his note, and brought the parties themselves together for a comparison of their respective rights to the money in his hands; and thus obtained ample indemnity against loss upon his pay-

ing it to the one declared by the court to be entitled to receive it. If, however, after proceedings are commenced against him, the debt to Hicks being confessedly due, and the amount of the same certain and ascertained, and with full knowledge of the conflicting claims to the money in his hands, he folds his arms, makes no defence

in the actions at law, nor seeks the
120 appropriate mode of *defence and protection offered him in the court of equity, and suffers the different claims in respect of the single debt or duty which he owes to his creditor to ripen and pass into several judgments against himself personally, in favor of the conflicting claimants, respectively, he ought not, as it seems to me, to be permitted to come with his bill to require his judgment creditors to interplead, not concerning the judgments they have recovered against him (for they are several and distinct and neither claims any interest in the judgment of the other), but concerning the right which they personally had to recover the judgments. If indeed there be fraud, or surprise, or discovery of new and material matter not known to the party before the judgments, this may serve as a substantive and distinct ground for relief, upon the general principles of the court of equity. But if the party discloses no reason for asking its intervention; and wholly fails to account for the delay to file his bill until after the judgments, he will not then be entertained, any more than a party who desires a discovery from his adversary but who delays filing his bill, asking the same until after judgment has been rendered against him in the law court. *Leicester v. Perry*, 1 Bro. C. C. 305; *Barbone v. Brent*, 1 Vern. R. 176; *Thompson v. Berry*, 3 John. ch. R. 395; *Faulkner's adm'x v. Harwood*, 6 Rand. 125.

This proposition, that the party holding the fund in his hands must wait until the conflicting claimants shall have severally recovered against him, is not only in conformity with the general principles and practice of the court of equity, but is also sufficiently supported by authority. Where a party has had a day in which he could make his defence in the proper form, before a verdict and judgment against him, equity will not entertain him and grant relief after such verdict and judgment, unless in case of fraud, accident or surprise, or some adventitious circumstances unmixed
121 with negligence *on his part, which shall sufficiently account for the omission to seek its intervention before the judgment. If we turn to the elementary writers who speak of the bill of interpleader, we find that they describe it as lying in cases where two or more persons are claiming the same thing under different titles, though derived from the same common source, or in separate interests from another person, who not knowing to which of the claimants he ought of right to render the debt or duty claimed, or to deliver the property in his custody, applies to the court of equity to resolve his doubts and protect him from the

damages of being compelled to pay the debt a second time. The terms in which they speak of the proper case for such a bill, imply that the claim is for a thing in action and not yet passed in rem adjudicatum. Several claims are made for the same thing; he is molested by an action or actions brought against him, or threats of the same; he fears that he may suffer injury from the conflicting claims of the parties, and he therefore applies to the court to protect him not only from being compelled to pay or deliver the thing claimed to both claimants, but also from the vexation attending upon the suits which are or possibly may be instituted against him. Every thing that enters into the description would seem to exclude the idea that the claimants had prosecuted their demands to judgment. See 2 Sto. Eq. § 806; Mit. Pl. 48 et seq.; Coop. Eq. Pl. 47 et seq.; Eden on Injunct. 335, et seq.; Sto. Eq. Pl. 291; 3 Danl. ch. P. 1753, 1756. And in very much the same terms with the same implication will it be found that this proceeding is characterized by the learned judges in reported cases. See *Dun-gey v. Angove*, 2 Ves. jr. R. 304, 310; *Langston v. Boylston*, 2 Ib. 107; *Angel v. Hadden*, 15 Ibid. 244; *Hoggart v. Cutts*, 1 Craig & Phil. 204; *Glyn v. Duesbury*, 11 Sim. R. 147; *Sieveking v. Behrens*, 2 Myl. & Craig 581; *Richards v. Salter*, 6 122 John. ch. R. 445; *Badeau v. Rogers*, 2 Paiges R. 209. And whilst I have as yet seen no clear authority for the proposition that the party may delay his action until after judgments are recovered against him by the several claimants, several are to be found which are directly opposed to it. Thus in 3 Danl. ch. Pr. 1753, it is laid down that a claim made upon a party affords ground for filing a bill of interpleader, though no legal proceedings have been actually commenced against him; and (at p. 1755) that a bill of interpleader ought to be filed before or immediately after the commencement of proceedings at law, and should not be delayed until after a verdict or judgment had been obtained. In *Cornish v. Tanner*, 1 Younge & Jer. 333, a bill of interpleader was filed after a verdict had been obtained by one of the claimants, and an injunction was granted on the money being paid into court. One of the defendants filed his answer and moved the court to dissolve the injunction, and although the other defendants had not filed their answers, the court dissolved the injunction because the plaintiff had failed to account satisfactorily for his delay in filing the bill. In *Yarborough v. Thompson*, 3 Smeedes & Marsh. 291, the controversy was (as in the case before the court) between an attaching creditor who had obtained judgment against the garnishee and the assignee of the note given by the latter, and who had sued upon the same and recovered judgment also. After the judgment had thus been recovered, the party came with his bill to compel the judgment creditors to interplead concerning their right to the debt which he owed. Held, that he came too late after

judgment, and his bill was accordingly dismissed. This case is in all its circumstances like the case in judgment, and must be considered as authority directly in point. Judge Clayton in declaring the opinion of the court, referred to a remark made by the judges who delivered the opinion in the case of *Oldham v. Ledbetter*, 123 *1 How. Miss. R. 43, 47, to the effect that the case put, (being one in which a judgment had been recovered), the plaintiff might have protected himself by bill of interpleader, and says that it was thrown out without sufficient consideration; that it was not a point for decision, and that the cases cited did not bear upon that proposition. In the case of the *Union Bank of Maryland v. Kerr, &c.*, 2 Maryland ch. Dec. 460, the bill was filed by the bank to compel the defendants, Kerr and Glenn, to interplead as well as to a sum of money for which Kerr had recovered judgment against the bank in an action of assumpsit, as also as to certain promissory notes and bills of exchange for which Kerr had commenced an action of trover which was still pending; it was held that the joinder of the subject of the action of assumpsit in the same bill with that of the action of trover could not preclude the complainant from the right to compel the defendants to interplead as to the latter, although as to the former they could not be required to interplead because the bill was filed after the judgment had been obtained. In declaring his opinion, Chancellor Johnson states it as well settled doctrine, that a bill of interplead must not be delayed until after a verdict or judgment, and that such was conceded to be the rule by the counsel; and this is several times repeated in his opinion. It is true that as an appeal had been taken from the judgment in the action of assumpsit, the party was put to his election to proceed with his appeal or in that court, but evidently the relief which the party was permitted to seek if he abandoned his appeal, was not by way of requiring the defendants to interplead touching the subject of the action of assumpsit, as the right to do so had been expressly declared to be lost by reason of the delay until after judgment.

The case of *Hamilton v. Marks*, 19 Eng. Law & Eq. R. 321, might seem at first 124 view to be an authority the *other way, but upon examination it will be found that the general rule referred to is recognized, but the particular case distinguishing from those to which it applies. It was the case of conflicting claims to the proceeds of a policy of insurance on property damaged by fire. An action was brought in the court of exchequer by the party insured for compensation for the damages sustained, and a verdict was found for £700 damages in respect of the furniture with liberty to move to increase the damages by a sum not exceeding £1200 in respect of injury to the buildings. The party insured being insolvent, notice was given to the insurance office of several different claims to and liens upon the money,

and the creditors' assignee of the estate of the insolvent having previously to the judgment given notice to the insurance office of his appointment and desired the office not to pay the insolvent the moneys recoverable under the policy, the treasurer of the company filed a bill of interpleader. Objection was made that there had been a verdict in an action at law, and *Cornish v. Tanner* was relied on. The Vice-Chancellor without questioning the authority of that case, said "the present case differs from that. Here the dispute at law was confined to the question of demand which could only be settled at law; and there is no rule of this court to preclude a defendant at law who has done that from obtaining relief on an interpleader suit." This case then, as it seems to me, in no wise impugns the general rule applicable to cases in which not the mere amount due from the party holding the fund and which must be ascertained at law, is in controversy, but also the rights of the conflicting claimants to demand the same and to appropriate it to their use by obtaining a personal judgment against the holder of the fund.

Bills of interpleader may, it is true, on many occasions be advantageously resorted to, but we are told that the
125 *court does not look very favorably upon them; and Lord Hardwick expressed himself unwilling "to allow new inventions in the bringing of such bills." 1 Madd. ch. 181; *Metcalf v. Harvey*, 1 Ves. R. 248. And I cannot but think that where the existence of the debt or duty is admitted and the amount fixed and ascertained, if there be conflicting claims to the proceeds on behalf of third persons claiming under the party to whom the debt or duty is due, between whom the party owing the same is unwilling to decide, it will be in better conformity to the analogies of the law and the rules of the court of equity to require the party seeking the protection of the court to come with his bill before the several claimants shall have carried their respective claims into personal judgments against himself, unless this delay be satisfactorily accounted for. And as in this case, the party offered no excuse for failing to file his bill until after both the judgments were rendered against him, I think the court should have refused to interfere.

I am of opinion therefore to reverse the decree.

DANIEL and MONCURE, Js., concurred in the opinion of Lee, J.

ALLEN, P., and ROBERTSON, J., dissented.

Decree reversed.

126 *The Freeman's Bank v. Ruckman.

July Term, 1880, Lewisburg.

1. *Conflict of Laws—Notes—Character of—Lex Loci Solutionis.**—A note made in Massachusetts, payable at either of the banking houses in Wheeling,

**Conflict of Laws—Notes—Character of—Lex Loci Solutionis.*—In *Corbin v. Planters' National Bank*, 87

Va., is to have its character determined by the law of Va., and is not a negotiable note.

2. *Pleading and Practice—Non-Negotiable Paper—Assignment of Assignment.*†—The declaration avers that the payee of a note endorsed and delivered it to the plaintiff; the note not being negotiable but assignable; this is a sufficient averment of its assignment.

3. *Same—Same—Same.*—The declaration averring that the note sued on was made in Boston, and on the same day and year was endorsed and delivered to the plaintiff, a banking corporation under the laws of Massachusetts, upon demurrer, the court will consider the assignment made in Massachusetts, where it might legally be made.

This was an action of debt in the Circuit court of Pocahontas county, brought by The President, Directors and Company of the Freeman's Bank, an institution incorporated by the laws of Massachusetts, endorsers of Emery, Haughton & Co., against John H. Ruckman, to recover the sum of \$2500. The first count in the declaration sets out that the defendant, on the 13th of January, 1857, at Boston, by his certain promissory note negotiable by the laws of Massachusetts where the contract was made, promised to pay, five months after the date thereof, to Emery, Haughton & Co., or order, at either of the banking houses in Wheeling, Virginia, twenty-five hundred dollars for value received; and that Emery,

Va. 665, 18 S. E. Rep. 98, the court said: "It is a general rule that every contract as to its validity, nature, interpretation and effect, is governed by the law of the place where it is made, unless it is to be performed in another place. Accordingly, it was decided in *Freeman's Bank v. Ruckman*, 16 Gratt. 126, that whether a note is negotiable or not is a question which relates to its nature and effect, and is, therefore, to be governed by the *lex loci contractus*, although the remedy is governed by the place where the suit is instituted." But, in the principal case, the court said: "The note in this case being payable in Virginia though made in Massachusetts, its negotiability therefore depends on the law of Virginia, and not on the law of Massachusetts."

In *Heflebower v. Detrick*, 27 W. Va. 24, the court said: "The general rule is that all the instruments made and executed in a country, take effect and are to be construed, as to their nature, operation and extent, according to the laws of the country where they are made and executed. But where the contract is either expressly or tacitly to be performed in any other place than where the same was made and executed, the general rule is in conformity to the presumed intention of the parties, that the contract as to its validity, nature, obligation and interpretation is to be governed by the law of the place of performance. Story's Conflict of L. 280, 286."

See the principal case cited as to this point in *Union Life, etc., Co. v. Pollard*, 94 Va. 152, 26 S. E. Rep. 421.

See also, *Wilson v. Lazler*, 11 Gratt. 482, where it is laid down as a well settled rule that a negotiable note, made in a particular country, is to be deemed a note governed by the law of that country whether it is expressly made payable there or is payable generally, without naming any particular place; since at most, under the latter circumstances, it is as much payable in that country as elsewhere.

†*Pleading and Practice—Non-Negotiable Paper—Alle-*

Haughton & Co. afterwards, viz: on the day and year aforesaid, for value received, endorsed and delivered the said promissory note to the plaintiffs, of which defendant then and there had notice.

127 *The second count after setting out the facts substantially as in the first count, added, that the plaintiffs after the endorsement and delivery of the note and before the same became payable, filed the note in the North Western Bank of Virginia at Wheeling for collection; and when the note became payable, viz: on the 15th day of June, 1857, it was presented at said bank for payment, and not having been paid was then and there duly protested for non-payment; of which the defendant then and there had notice. And the complaint was that the defendant had not paid the said twenty-five hundred dollars or any part thereof.

The defendant appeared and demurred to the declaration, and to each count thereof, and pleaded payment; and the plaintiffs joined in the demurrers, and took issue upon the plea. And thereupon the court sustained the demurrers, and rendered a judgment for the defendant. Whereupon the plaintiffs obtained a writ of error from this court.

Price, for the appellants.

Dennis and Fry, for the appellees.

MONCURE, J. It is a general rule that every contract as to its validity, nature, interpretation and effect, or, as they may be called, the right, in contradistinction to the remedy, is governed by the law of the place where it is made, unless it is to be performed in another place; and then it is governed by the law of the place where it is to be performed. Story's Conf. of Laws §§ 242, 260, 263 & 280. The form of the remedy is governed by the law of the place where the suit is instituted. Id. § 556.

It is often difficult to determine, whether a matter relates to the right or to the remedy, and whether it is governed by the *lex loci contractus*, or the *lex fori*, as 128 *they are called. Id. § 563; Andrews v. Herriot, note, 4 Cow. R. 528;

gation of Assignment.—In *Welsh v. Ebersole*, 75 Va. 658, the court said: "That case (*Bank of Marietta v. Pindall*, 2 Rand. 475), however, and the case of *Freeman's Bank v. Ruckman*, 16 Gratt. 126, seem to establish fully the doctrine that endorsement of the obligee's name upon the bond accompanying the transfer may be declared on as common-law assignment, and that an averment that the instrument was endorsed and delivered is in effect an averment that it was assigned. Both of these cases were, however, decided upon a demurrer to the declaration. They do not establish that such an endorsement may not be treated as a guaranty if such was the agreement of the parties."

Negotiable Paper—Intention.—In *Brown v. Hull*, 33 Gratt. 33, the court cited the principal case as authority for the proposition that neither the intention of the parties nor their belief could make a non-negotiable instrument negotiable.

Leroux v. Brown, 74 Eng. C. L. R. 801. But the question is immaterial in this case, the place of performance and the place of the suit being the same, and the right and the remedy being therefore governed by the same law.

Whether a note is negotiable or not, is a question which relates to its nature and effect. A negotiable note is not of the same nature and effect with a note not negotiable. The rights and obligations of the parties are materially different; especially when the negotiable note is in the hands of a bona fide holder for valuable consideration, without notice of any defence which might affect it in the hands of a prior holder. Story on Bills §§ 14, 15, 17.

In *Vidal v. Thompson*, 11 Martin's R. 23, (which was much relied on by the counsel of the plaintiffs in error in this case) the court said: "An instrument, as to its form and the formalities attending its execution, must be tested by the laws of the place where it is made; but the laws and usages of the place where the obligation, of which it is evidence, is to be fulfilled must regulate the performance. The question in that case was, as to the meaning and effect of an article of the civil Code of Louisiana; and it seems to be at least doubtful, whether the rule laid down by the court is entirely correct, as a general principle of law. See Story on Bills § 159; Story on Conf. Laws §§ 260, 262, 262, a, and 318 and notes. But whether it be so or not is immaterial to this case, as the negotiability of a note is certainly not a mere matter of form, within the meaning of the distinction stated, but is of the very essence of the contract.

The note in this case being payable in Virginia though made in Massachusetts, its negotiability therefore depends on the law of Virginia, and not on the law of Massachusetts.

It can make no difference, in regard 129 to the note itself, *that it may have been (as it probably was) endorsed and delivered to the plaintiff in Massachusetts and not in Virginia. Its nature and effect and the rights and obligations of the maker must be the same in either case.—Story on Bill, §§ 158, 167, 168, 169; Story's Conf. Laws, §§ 317, 332; *Ory v. Winter*, 16 Martin's R. 277.

The only law of Virginia making notes negotiable, is that which declares, that "every promissory note or check for money payable in this State, at a particular bank, or at a particular office thereof for discount and deposit, or at the place of business of a savings institution or savings bank, and every inland bill of exchange, payable in this State, shall be deemed negotiable," &c. Code p. 144, § 7.

The note in this case was not payable at a particular bank, or at a particular office thereof for discount and deposit, or at the place of business of a savings institution or savings bank"; but was payable "at either of the banking houses in Wheeling,

Virginia''; and therefore is not a negotiable note.

But the law of Virginia further declares that "the assignee of any bond, note, or writing, not negotiable, may maintain thereupon any action in his own name which the original obligee or payee might have brought, but shall allow all just discounts, not only against himself, but against the assignor, before the defendant had notice of the assignment." Code p. 583, ch. 144, § 14.

The note in this case is therefore assignable, and an assignee thereof may maintain an action thereon in his own name.

It is averred in each count of the declaration that the payees of the note, for value received, endorsed and delivered it to the plaintiffs. This is a substantial and sufficient averment that the note was assigned to the plaintiffs; and in suing as "endorsers," they in effect sue as assignees of the note. Indorsement is a term usually, *applied to the transfer of negotiable paper, while assignment is applied to the transfer of choses in action not negotiable. But when a note is endorsed and delivered to a person, it is in fact assigned to him, whether it be negotiable or not; and an averment that it was endorsed and delivered, is in effect an averment that it was assigned, if it be not negotiable but assignable only. The ordinary form of averring an assignment of a writing not negotiable is, that the assignor, "by an endorsement on the said writing, did assign the same to the plaintiff"; but there is no peculiar virtue in this form, which is prescribed by no law, and the averment may be made in other words of equivalent import.

The case of the Bank of Marietta v. Pindall, &c., 2 Rand. 465, is not in conflict, but is in perfect accordance with what has been just said. That was an action upon a note not negotiable, brought by the assignees thereof; and one of the questions was, whether the contract of assignment was made in Virginia. The declaration sufficiently averred an assignment; but was silent as to the place where it was made. The defendants by special plea averred that the note was endorsed by the payees in Virginia. In delivering the opinion of the court, Judge Cabell uses this language: "How are these averments in the declarations" (there were three actions of the same kind) "met by the pleas? Not by the allegation that the notes were assigned to the plaintiffs in Virginia; nor even by the allegation that they were endorsed to the plaintiffs in Virginia; but simply, that they were endorsed in Virginia. The term endorse, when applied to bills of exchange, negotiable by the custom of merchants, or to papers made negotiable by our statutes, may, ex vi termini, import a legal transfer of the title. But, as to bonds and notes not negotiable, the legal title to them passes by assignment only; and as to them endorsement is not equivalent *to assignment. As to them, assignment

means more than endorsement; it means endorsement by one party, with intent to assign, and an acceptance of that assignment by the other party. The notes in question are not negotiable, according to our laws, but assignable only. The pleas therefore that they were endorsed in Virginia, tendered immaterial issues and were properly demurred to. It may have been the intention of the pleader to entrap the plaintiffs, if they took issue, by confining the proof to the mere fact of the payees writing their names on the backs of the notes; and this is rendered probable by the circumstance that the notes are not alleged by the pleas to have been endorsed to the plaintiffs. They might well be endorsed in Virginia and assigned in Ohio." Id. 475. Now if the pleas had not only alleged that the notes were endorsed by the payees, but also that they were delivered by them to the plaintiffs, in Virginia, they would certainly have been considered by the court as sufficiently averring that the assignments were made in Virginia.

The case of the Bank of Marietta v. Pindall, is a conclusive authority to show that the plaintiffs in this case, though a corporation of Massachusetts and not of Virginia, may maintain this action. In that case the plaintiffs were a corporation of Ohio, and two questions were made upon the pleadings: 1. Whether a Banking Company, not incorporated as such by any law of Virginia, but by a law of one of our sister States, can prosecute an action in Virginia in its corporate name and character, on any contract whatever? And 2. Whether they can prosecute an action in our courts on a contract made in Virginia? The court decided the first question affirmatively. And in regard to the second held, that no foreign bank could make a primary contract in Virginia by discounting notes or otherwise;

and that no right of action, therefore, could arise from the exercise *of such a power. But the court was further of opinion, and accordingly decided, that the pleadings in the cases did not show that the contracts of assignment were made in Virginia. The special pleas, as before stated, only averred that the notes were endorsed in Virginia. And though the declarations did not state where the assignments were made, yet the court was of opinion it ought to be inferred on general demurrer that they were made in Ohio and not in Virginia and therefore overruled the demurrers to the declarations. "The effect of the demurrers," said the court, "is to admit the assignments, as laid in the declaration. If these assignments were made in Ohio they were lawful, an will serve as the foundation for suits in our courts; if they were made in Virginia, as original contracts, they were null and void and can give no right of action. In the total absence of all allegations by either plaintiffs or defendants, as to the place where the assignments were made, we do not feel ourselves constrained to intend that they were made at a place where the parties had no

right to make them, and where the attempt to make them would be vain and nugatory. On the contrary we think, that on these pleadings, the assignments must be taken to have been made at the Bank of Marietta, where the notes were originally made payable, and where the appellants had a right to discount them." *Id.* 476.

The same remarks in substance, and the same course of reasoning, apply to this case. The declaration does not state where the assignment was made; but it states that the note was made in Massachusetts, and, on the day of its date, was assigned to the plaintiffs a corporation of Massachusetts; and we think it ought to be inferred, on demurrer to the declaration, that the assignment was made in that State. Therefore the plaintiffs may maintain this action.

It was earnestly, and with great appearance of the reason, *contended by the counsel for the appellants in this case of the Bank of Marietta v. Pindall, &c., (said the court in that case,) that as incidental to the right of recovering, in Virginia, a debt acquired by an original and legal contract in Ohio, they might legally make in Virginia, a secondary contract for carrying into effect a contract originally and legally made in Ohio; as for instance, that they might take from a debtor, in Virginia, the assignment of a note or other chose in action, in payment of a debt originally and legally contracted in Ohio. But as this point did not necessarily present itself in the case the court forbore to express any opinion upon it.—*Id.* 474. No such point arises on the pleadings in this case, and therefore no opinion is expressed upon it.

The breach at the end of the declaration applies to each of the counts, and sufficient though the sum is of money therein mentioned is the same sum mentioned at the commencement of the declaration and in each of the counts, to wit: the sum of \$2500 the amount of the note. The debt demanded should regularly be the aggregate of all the sums alleged to be due in the different counts; but a mistake in this respect, whether more or less be stated, will not be a cause of demurrer. 1 Chitty's Pl. 361.

Upon the whole we are of opinion that the Circuit court erred in sustaining the demurrer; and therefore the judgment is reversed with costs, the demurrer overruled, and the cause remanded to the said Circuit court to be tried upon the issue joined on the plea of nil debet and for further proceedings therein. And the parties are to have liberty to amend their pleadings if they desire to do so.

The other judges concurred in the opinion of Moncure, J.

Judgment reversed.

134 *Davis, Sheriff, v. The Commonwealth.
January Term, 1861. Richmond.
(Absent, LEE, J.)

1. Judgments by Default—Definition of—Statute.*—All judgments where there has been no appearance

by the defendant are judgments by default, within the meaning of the act. Code ch. 181, § 5. p. 681.

2. Same—Errors—Appellate Proceedings.*—If a party obtains a *supersedeas* to a judgment by default, before applying to the court in which the judgment was rendered, or the judge thereof, to correct the errors of which he complains, his *supersedeas* will be dismissed as improvidently awarded.

This was a *supersedeas* to a judgment of the Circuit court of the city of Richmond, rendered on the 25th of February, 1860, in favor of the Commonwealth against Thomas K. Davis, sheriff of Prince William county and his official sureties. The facts are stated by Judge Allen, who delivered the opinion of the court.

Morson, for the appellants.

The Attorney General, for the Commonwealth.

ALLEN, P. A notice at the instance of the Commonwealth was given to the plaintiff in error, a sheriff and the securities in his official bond, that a motion would be made for a judgment against them for a balance of license taxes. The notice having been duly proved on the day specified, the defendants were called but came not, and at the instance of the Attorney General the motion was docketed and continued to a future day of the same term. It was afterwards continued at the like

135 *instance to other days named until the 21st February, 1860, when on the motion of the Attorney General it was continued until the then next regular term of said court for the trial of civil causes. On a subsequent day of the same term the last order of continuance was set aside at the instance of the Attorney General, and on his motion the court proceeded to render a judgment against the sheriff and his securities; to which judgment a *supersedeas* has been awarded by this court.

From the foregoing statement it seems that the defendants named in the notice never appeared or made any defence to the motion, and the preliminary question arises whether this court has jurisdiction at this time to decide upon the regularity of the proceedings.

The Code p. 681, ch. 181, § 5, provides, that the court in which there is a judgment by default or a decree on a bill taken for confessed, or the judge of said court in the vacation thereof, may on motion reverse such judgment or decree for any error for which an appellate court might reverse it, if the following section was not enacted, and give such judgment or decree as ought to be given. § 6, the following section referred to in the foregoing section, directs that no appeal, writ of error or *supersedeas* shall be allowed by an appellate court or judge for any matter for which a judgment or decree is liable to be reversed or amended on motion as aforesaid, by the court which rendered it or the judge thereof, until such

*See foot-note to Goolsby v. Strother, 21 Gratt. 107.

*See foot-note to Goolsby v. Strother, 21 Gratt. 107.

motion be made or overruled in whole or in part.

These sections of the Code embrace the provisions contained in the Rev. Code of 1819, p. 512, §§ 108, 109, 110, authorizing clerical mistakes, &c., to be amended in certain cases by the court in which a judgment or decree was rendered, or the judge thereof in vacation; and also the provision contained in the act of March 12, 1838, Sess. Acts p. 74, extending the act of Jeofails, to judgments rendered in the circuit 136 courts for default of *appearance, and providing for the reversal of such judgments by the court rendering them, or the judge thereof in vacation, for certain errors which would be ground for the reversal thereof in the court of appeals. The Code applies to all judgments by default whether for want of appearance or for failing to comply with any rule, and authorizes the reversal for any error for which an appellate court would reverse.

The term judgment by default strictly and technically applies to actions at common law only, and it is argued that as under a statutory proceeding of this kind there is no judgment at rules, and no judgment can be entered in court in the absence of all proof of claim, it is not a judgment by default, but a judgment on the merits, which cannot be reversed by the court which rendered it, and therefore not embraced by the Code in the sections referred to.

There is force in this argument, but it seems to me that although not a technical judgment by default at common law, a proceeding by notice falls within the equity, and was intended to be embraced within the scope of these provisions of the Code. Claims of the Commonwealth and many claims of individuals were recoverable by motion on ten days' notice before the Code. This mode of procedure having worked well in practice, the Code p. 640, ch. 167, § 5, authorized any person entitled to recover money by action on any contract to obtain a judgment on motion after sixty days' notice.—Under these provisions of the law in regard to motions a large proportion of the recoveries for money will be obtained on motion. In dealing with the subject of errors and amendments the legislature must have had in contemplation all modes of procedure by which judgments were to be rendered. The statutes in relation to this subject of Jeofails are remedial and should receive a liberal construction. We have 137 seen that the legislature *has been gradually extending the power of the court rendering a judgment, or the judge in vacation to correct mere clerical errors and reverse judgments for errors in the proceedings at rules, &c., to which the attention of the court had not been called. Thus the Revised Code authorized the amending of judgments by correcting clerical mistakes. The act of 1838 authorized the court to reverse such judgments for illegal orders at rules or in case of any variance between the writ and declaration. And the Code still extend-

ing the remedy, gives to the court which renders the judgment or to a judge in vacation authority to reverse a judgment by default for any error for which an appellate court might reverse it. The object of the legislature was to save the parties the delay and costs of an appeal to correct such irregularities and formal errors; errors which seldom affect the merits of the controversy, and which would have been corrected at once by the court if pointed out. The case of a motion comes within the reason of the statute, and I think the term judgment by default was intended to apply to all judgments where there was default of appearance. If the error be one for which the judgment might be reversed in an appellate court, no appeal, writ of error, or supersedeas should be allowed until after motion to the court or judge has been made and overruled. In the case of *Preston v. Auditor*, 1 Call 471, there was a judgment on a motion against a sheriff's security, who failed to appear. The law then required that the property of the sheriff should be ascertained to be insufficient before proceeding against the surety. The court said that every court should state on record legal grounds for the judgment. But that it being stated that it appeared to the court that the property of the sheriff was insufficient, it was enough. That the appellate court could not inquire how 138 this was made to *appear, and that it was the default of the appellant that he did not appear and have the whole evidence stated.

In *Cunningham v. Mitchell*, 4 Rand. 189, there was a motion by a security to recover money from a person alleged to be a principal; there was no appearance for the defendant. In the report it is said judgment was rendered by default. And Judge Green, in delivering the opinion of the court, states that the defendant cannot now, after submitting to a judgment by default, object in this court to the truth of the sheriff's return; thus giving to the judgment the effect of a judgment by default, and styling it a judgment by default. I think the legislature used the phrase in the same sense in the act under consideration, and that this must be considered as a judgment by default in the meaning of the law, and that the supersedeas should not have been allowed until a motion had been made to the court in which the judgment was entered or the judge of said court in the vacation thereof, and overruled. And that the supersedeas having been improperly allowed should be dismissed.

The other judges concurred in the opinion of Allen, P.

Supersedeas dismissed.

139 **Baker v. Wise, Governor.*

April Term, 1861, Richmond.

1. *Statute—Protection of Slave Property—Valid.*—The act of March 17, 1856, Sess. acts 1855-56, p. 38, entitled "An act providing additional protection for the

- slave property of citizens of the Commonwealth," is not in any of its provisions, in violation of the constitution of the United States, or the Bill of rights and constitution of Virginia.*
2. **Same—Same—Police Regulation.**—The act is not a regulation of commerce, but of police.
 3. **Same—Valid—Distinction between Searching Vessels and Dwellings.**—In directing pilots to search vessels about to sail north of the capes of Virginia, the act is not in conflict with the 10th article of the bill of rights of Virginia; there being a distinction between the search of vessels of commerce on navigable waters, and dwelling houses or other suspected places.
 4. **Same—To Search Vessels of Non-Residents—Valid.**—In confining the search to vessels owned in whole or in part by non-residents of the State, the act does not violate the § 2, of article 4 of the constitution of the United States, securing the citizens of each State "the privileges and immunities of citizens of the several States."
 5. **Police Regulations—Constitution of United States.**—Where in the regulation of any subject of internal police, a regard to justice and the due and convenient enforcement of its laws, requires a State to adopt a different mode of proceeding, or a modification of the regulation, in respect to persons residing out of the State, in order fairly to meet and provide for the circumstance of their non-residence, the competency of the State so to act is not taken away by this § 2, article 4 of the constitution of the United States.
 6. **Statute—To Search Vessels of Non-Residents—Constitutional.**—In confining the search to vessels about to sail north and owned in whole or in part by non-residents of Virginia, the act is not in conflict with Clause 6 of § 9, Article 1, of the constitution of the United States; which prohibits the giving of preference, by any "regulation of commerce or revenue, to the ports of the one State over those of another. This provision is a restriction upon the power of Congress, and does not refer to the State governments."
 7. **Constitution of United States—Fourth Amendment—To What It Refers.**—The 4th article of the amendments of the constitution of the United States, refers to the government of the United States, not to the States.
 8. **Statute—Fee to Pilots—Valid.**—The allowance to the pilots of a fee of \$5 for the search of the vessel, to be paid by the master, is not in conflict with clause 2, § 10, Article 1, of the constitution of the United States.
 9. **Same—Seizure of Vessels—Valid.**—The seizure and forfeiture of the vessel prescribed for a violation of the act, is not in conflict with clause 8, § 8, Article 1, of the constitution of the United States, which gives to Congress the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.
- This was an action in the Circuit court of the city of Norfolk, brought in the name of Henry A. Wise, Governor of Virginia, for the benefit of the State and of Joseph V. Brough, against Levi Baker, as captain of the schooner Nymphus C. Hall, to recover from him the penalty imposed by the first section of the act of March 17, 1856, entitled "An act providing additional protection for
- the slave property of citizens of this Commonwealth," Sess. acts 1855-6, p. 38, for causing his vessel to depart from the State without the certificate of inspection required by the act. The first section of this act provides "that it shall not be lawful for any vessel of any size or description whatever, owned in whole or in part by any citizen or resident of another State, and about to sail or steam from any port or place in this State for any port or place north of and beyond the capes of Virginia, to depart from the waters of this Commonwealth until said vessel has undergone the inspection hereinafter provided for in this act, and received a certificate to that effect." And it imposes a penalty of five hundred dollars on the captain or owner of any vessel which shall depart from the State without such certificate, to "be recovered by any person who will sue for the same in the name of the Governor of the Commonwealth.
- The defendant appeared and filed the plea of "nil debet," on which issue was joined; and on the trial the jury found a special verdict as follows: "That the defendant a citizen of Massachusetts, according to the allegations set forth in the plaintiff's declaration, did on or about the 4th day of August, 1856, then being the captain and owner of the schooner Nymphus C. Hall, owned in part by citizens of Massachusetts, leave the waters of Virginia with said schooner for a port north of and beyond the capes of Virginia, without having first obtained a certificate of inspection, as required by the provisions of the statute in such cases made and provided." And they find for the plaintiff the penalty of five hundred dollars, with interest, damages and costs, if the aforesaid act is not in violation of the constitution of the United States, or the constitution and bill of rights of Virginia; but if it is in violation of any of these, then they find for the defendant. Upon this verdict the Circuit court rendered a judgment for the plaintiff; and Baker applied to this court for a writ of error to the judgment; which was awarded.
- The case was argued by Crump, Johnson, of Massachusetts, and Tazewell Taylor for the appellant, and the Attorney General for the appellee.
- Crump, for the appellant. This is a qui tam action to recover a penalty for the violation of the inspection law of Virginia. The jury have found a special verdict submitting the question of the constitutionality of the act of March 1856, to the court; and the only question in the case is, is the act in accordance with the bill of rights and constitution of Virginia, and the constitution of the United States?
- 1st. I shall first consider this ques-

*For the act see the opinion of JUDGE DANIEL.

The constitution of the United States, as we all know, arose out of a commercial necessity; and the great object of it was to settle the very difficulties between the States which this act of Virginia has again introduced.

The question has been very much debated—whether the power of Congress to regulate commerce is exclusive. In *Gibbons v. Ogden*, 9 Wheat. R. 1; and in the *Passenger* cases, 7 How. U. S. R. 283, it was held to be exclusive. It is true that the court will not look with jealousy to the action of the States in trivial matters, where no public harm can arise from the act. And such was the case of *Wilson & als. v. The Black Bird Creek Marsh Co.*, 2 Peters' R. 245. But such a case as this cannot be considered as shaking the doctrine so fully considered in *Gibbons v. Ogden*, in which the court held that where a right is given by a State which is clearly repugnant to the constitution of the United States, it is void. Here the power exercised by the State is clearly repugnant to the constitution of the United States. That gives to Congress the exclusive right to regulate commerce; and it is idle to say that this act is not a regulation of commerce. It is not only a regulation of commerce, but it is an unequal regulation, imposing burthens upon northern ships, which it does not impose upon those of the south. And though it is called an inspection law, it is not such in the sense of the constitution; nor is it a quarantine law; but it is in fact a regulation of commerce.

If a State may enact inspection laws they must operate equally upon all who come under their operation. Congress itself is forbid to give preference, by any regulation of commerce or revenue, to the ports of one State over those of another. Art. 1, § 8, clause 6. And surely a State in enacting an inspection law, is bound by the spirit of the constitution, to provide for its equal operation upon all who are subject to it. And it will be conceded that it was the purpose of this act to establish preferences.

Again: By the 2d section of the 4th article of the constitution, clause 1, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Under this provision the citizen of Massachusetts has the same rights as a citizen of Virginia, in Virginia. But the act violates this provision. A citizen of Virginia may go in his vessel to Massachusetts unaffected by this act; but a citizen of Massachusetts making the same voyage must have his vessel inspected. This provision of the constitution was considered by Justice Washington in *Corfield v. Coryell*, 4 Wash. C. C. R. 371, 380; and he lays down the principle for which we contend. That principle is—That with our own property and in our own persons to stand upon the same footing as a citizen. And it is no answer to say that we cannot carry slaves to another State. Mr. Madison said in 1788, that there was always this

restriction. To say that the owner of a ship owning everything on board of it, when stopped on his voyage, enjoys the same privileges as a citizen who proceeds on his voyage without interruption is mockery. *Chapman v. Miller*, 2 Speer's R. 769.

The act is inconsistent with the 4th Article of the amendments to the constitution. This article may not apply to State legislation; but it is in the spirit of our bill of rights, and is an amendment proposed by Virginia. And though the language of our bill of rights is not quite so broad, yet they mean the same thing; and the one was taken from the other. And so the general court held in *Murray's case*. 2 Va. Cas. 504.

The counsel referred to numerous cases to show that the court would declare an act unconstitutional. And he referred to the Code p. 759, 761, to show that in Virginia a search warrant and a warrant for an arrest, must be founded on the oath of some person. And he cited 4 Black. Com. 162 as to police powers and search warrants.

Johnson, of Massachusetts, on the same side: The question involved in this case is not of an ordinary character. This is but the third time it has come before the courts, and the first time it has arisen in Virginia. The case divides itself into two branches—one under the constitution of the United States, and the other under the constitution of Virginia. I shall confine myself to the first, and leave to my associates the task of discussing the second.

The question disturbed the country from 1781 until the meeting of the convention of 1787; and it appears in the constitution of the United States, Article 1, § 8, in the form of a regulation of commerce. It then rested until 1824, when the great case of *Gibbons v. Ogden*, 9 Wheat R. 1, settled it finally; and though there have been some subsequent cases, that decision has never been questioned.

The opinions of the men of that day afford a strong argument as to the true construction of the constitution. The resolutions of Virginia, of Dr. Witherspoon, of the Congress of the Confederation, of New Jersey and New York, all of them, went for an authority which should have the sole and exclusive power to regulate commerce.

The constitution, Article 1, § 8, clause 3, says—"Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the *Indian tribes." The language employed, the location in the sentence, the nature of the power, and the necessities of the country, show that this power was intended to be exclusive. I repudiate a strict construction of the constitution. Its framers were plain men, though great men; and the instrument was intended for the people; and the true question is, what is the plain and rational meaning of the language employed in the instrument.

What then is the meaning of the word

"regulate"? It is imperial, almost despotic. To regulate—to make a rule—to prescribe—to adjust. We hear of one regulator in machinery; not two. To regulate would therefore indicate supremacy; and so it was held in *Gibbons v. Ogden*. To be a regulator it must be supreme. In Article 4, § 3, clause 2, it is provided that Congress "may make all needful rules and regulations respecting the territories, &c." There it is clearly an exclusive power. But the doctrine of exclusiveness is found more strongly expressed in the 9th section of the 1st article in relation to the migration or importation of such persons as the States may think proper to admit. The limitation of a power in anybody implies the existence of the power if not limited. And if the power is concurrent in the States, wherefore is this limitation upon the power of Congress in the particular case? A concurrent power is a co-equal power; and if there was a concurrent power in the States to direct or control the importation of slaves, then there was no necessity for this limitation upon the power of Congress.

There are in the constitution three classes of cases: First—where a power is granted in exclusive terms.—That is not the case here. Second—where a power is prohibited to the States. That is not the case here.—Third—where a power is given in general but not exclusive terms, and is not prohibited to the States. In this class of cases

the power is to be construed according to its nature and circumstances. In the case of *Gibbons v. Ogden*, three States were contending, all claiming concurrent powers. There was therefore a necessity for the decision of the question; and it was decided, and settled the difficulty; and shut the States up to their appropriate powers.

In the case of *Gibbons v. Ogden* the court decided the following points: 1st. The power of Congress to regulate commerce, includes the power to regulate navigation.

2d. The power to regulate commerce extends to every species of commercial intercourse between the United States and foreign countries, and among the several States. It does not stop at the external boundary of a State.

3d. The power is general, and has no limitation but such as is prescribed in the constitution itself.

4th. The power, so far as it extends, is exclusively vested in Congress, and no part of it can be exercised by a State.

If this question is decided differently—if it is to be held that the States have the concurrent power to regulate commerce, then each may exercise the power in such mode as it pleases. They become practically independent of each other, and of the United States government; and we have got back to the days of Mr. Madison and the Virginia resolutions. Every State will have external commerce and internal commerce, with collector's offices and all the machinery necessarily attendant upon its regulation. He referred to *Sturges v. Crowningshield*, 4

Wheat. R. 122; *Houston v. Moore*, 5 Wheat. R. 1; 3 Madison Papers 1585, 1586; in the first of which cases the Chief Justice delivering the opinion of the court stated the rule to be—"Whenever the terms in which a power is granted to Congress, or the nature of the power, requires that it

should be exercised by Congress, the subject is as completely taken from the State legislatures as if they had been expressly forbidden to act upon it."

It will be insisted that the States have a concurrent power over the regulation of commerce. No general concurrent power can exist. I admit there are cases where it has been exercised; but it has been simply a permissive jurisdiction, or sometimes a usurped power. In the *Black Bird Creek* case it was a mere contingent exercise of the power at the will of Congress. When the convention met at Philadelphia we had a government of concurrent powers, and their object was to get rid of it; and concurrent powers are not mentioned in the constitution, nor were they alluded to in the discussions.—An argument in favor of this view of the question is to be found in Article 6, § 2, of the constitution. This provision taken by itself is a very general provision; and taken in its connections very important.

The argument of *noscitur a sociis*, operates strongly against this notion of concurrent powers, as applicable to the regulation of commerce. "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." It is not questioned that the first and the last are exclusive. The second is between them, and the conjunction "and" gives definiteness to the language used. It will be seen too that § 8, of Article 1, first states what powers Congress shall have; § 9 contains the prohibitions of the powers to Congress; § 10, gives the prohibition of powers to the States. And then comes the provision which is the great foundation of State rights, in the 4th article of the amendments to the constitution—"The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

If a concurrent power exists, does it extend over the whole Union? This is not pretended. Does the power of both sovereignties exist together in a State? If so—where—when—on what subject? I will be referred to the taxing power. But thought his power is exercised by both governments upon the same subject, it is not for the same object; and one is by indirect, the other by direct taxation. Does the State power exist until Congress exert its power? This is not a concurrent but a contingent power, and there are cases of this kind where the power has been exercised permissively by the State.—This brings me to the case of *Willson & als. v. The Black Bird Creek Marsh Co.*, 2 Peters' R. 245. This is a case in which apparently

a State might and did exercise a certain power until Congress exercised its power. It was a small and narrow creek navigable, but not used, and a dam was built across it for the benefit of the health of the neighborhood. This case is *sui generis*, and may well be referred to the police power of the States. It is the only case which authorizes the conclusion that the State may exercise a power until Congress acts, or where Congress has not acted. And of this case Judge McLean, in the Passenger cases, 7 How. U. S. R. 397, says, "It must be admitted that the language of the eminent chief Justice, who wrote the opinion, is less guarded than his opinions generally were on constitutional questions"; and on p. 398 he says—"The language of the chief Justice must be construed in reference to the question before the court. To suppose that he intended to lay down the general proposition, that a State might pass any act to obstruct or regulate commerce which did not come in conflict with an act of Congress, would not only be unauthorized by the language used, and the facts of the case before the court, but it would contradict the language of the court in *Gibbons v. Ogden*, *Brown v. Maryland*, and every case in which the commercial power has been considered." In fact it is an interpolated *doctrine, and this case is the source from whence it sprang.

Judge Tucker, the elder, 1 Tucker's Black. appendix p. 180, lays down the best classification of the powers of the government of the United States ever made. Among the exclusive powers of Congress he places the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. Among the concurrent powers he places taxation, post offices, post roads and patents. And this classification shows the doctrine is gradually becoming obsolete; as all will agree now that the States have no concurrent power over patents, post offices and post roads.

It is said that the pilot laws are embraced in the class of concurrent powers; but this is a mistake, arising from the fact that Congress at its first session, recognized the legislation of the States on this subject. And they may be regarded as internal regulations, or as an exercise of police power. As to bankrupt laws, though the States may enact such laws, they are wholly inoperative beyond the limits of the State. The power of Congress is to pass a uniform law of bankruptcy. The States have no such power. And in like manner the power of the State to punish counterfeiters of coin, is but an internal regulation not extending beyond the limits of the State.—And the power over weights and measures belongs to the police power. The power over the militia is now held to be exclusive in Congress, except as to appointing officers and training; even the uniform must be according to the Congressional pattern. If this power is not exclusive, then why this reservation of the power to the States to appoint the officers and to train the militia.

The result of the argument is that this concurrent power in Congress and the State legislatures, does not exist except in a few cases in which it may be exercised by the latter as matters of police. And this is the doctrine *of the Passenger cases, 7 How. U. S. R. 283, 390. But I mean my argument to refer to the power to regulate commerce. There may be some such powers on other subjects; but the powers vested in Congress by the 8th section of the 1st article of the constitution are exclusive.

The only remaining enquiry is—whether the act of March 1856, under which this action was instituted, is a regulation of commerce. It is an act of assembly; and therefore a regulation. Then does it regulate commerce? Commerce is the exchange or sale of articles; and here was a vessel carrying on commerce.

The act gives a preference to ports of one State over those of another State; and this is a violation of Article 6, § 9, of the constitution. Further the ports of the State of Virginia have a preference over the ports of other States; and, which is no less objectionable, the southern ports have a preference over those of the north. And the language of the act will include the case of a vessel coming from Baltimore. It says, vessels departing from the waters of Virginia.

This act is not a police or internal regulation of the State. I concede the whole doctrine that the States have a right to make their own police regulations. But what is the meaning of police? It comes from polis a city, and thus extended to the officers of the city appointed to keep the peace. The term has been subsequently extended to larger bodies—to a State—and its police regulations. But from its very nature a police regulation can have no effect beyond the State. Harbour laws, health, quarantine, and the like are merely matters of police. And so long as a regulation of this nature is limited to the State it may be police; but the moment it extends beyond the State it ceases to be police, and becomes a commercial regulation. And thus where a regulation of a State extends to property or persons beyond the State then it is a commercial regulation. New York *v. Miln*, 11 Peters' R. 102.

This was a decision on the subject of police regulations; and they were defined to be a law which relates to the whole people of the State, or some one in it; and the operation of which is within the State and upon the persons and property within it. But in our case Baker was a citizen of Massachusetts, transiently here, and the vessel was owned in Massachusetts, and here for a brief space. An act affecting it cannot therefore be a police regulation.

If this act is to be considered an inspection law, then it violates § 10 of the 1st article of the constitution; as the tax which it imposes for the inspection of the vessel is not directed to be paid into the treasury of the United States.

The act is unconstitutional because the vessel was enrolled and licensed under the laws of the United States; and under that law had a right to go into any of the waters of the United States. This point was decided in *Gibbons v. Ogden*. And the act is further unconstitutional because the proceeds, or a part of them, are to be paid into the State treasury to constitute a fund to be called the fugitive slave fund. In the *Passenger cases*, 7 How. U. S. R. 283, 412, it was held that commerce cannot be taxed for the benefit of any State institution. And the act is further unconstitutional because it affects foreign commerce, it being applicable to the British North American colonies.

Attorney General for appellee:

The record in this case presents a single question. Is the act of March 1856, constitutional?

It is a grave question—and the court upon well settled principles will not decide that a law is unconstitutional, unless it is plainly so. Ch. J. Marshall delivering the opinion of the court in the *Dartmouth College case* has said, that the Supreme court had on more than one occasion declared "that, in no doubtful case, would it pronounce a legislative act to be contrary to the constitution." 4 Wheat. R. 518, 615. Like views have been expressed by other judges—but further citations of cases are unnecessary.

The law is said by counsel to be unconstitutional on several grounds; which will be considered in their order.

First. Is the law, as it is contended, repugnant to the 4th amendment of the constitution of the United States?

I insist, that amendment has no relation to the power of the States, but is designed only as a limitation on federal power.

The history of these amendments shows this beyond doubt.

In the convention of Virginia, which ratified the constitution, by a very small majority, the minority led by Patrick Henry and George Mason, alarmed at the powers proposed to be vested in the government, insisted on the adoption of a Bill of Rights and of important amendments. The majority agreed that these should be recommended for adoption, but should not be made the conditions to ratification.

The 14th article of the Bill of Rights so proposed, is the foundation of the 4th amendment to the constitution. See *Journal of Convention*, Supp. 420.

New York, North Carolina and Rhode Island followed in like recommendations, pp. 429, 442, 456.

These amendments were born of a jealousy of federal power; and were proposed by the opponents of ratification, as restraints upon it. Such restraints had already (at least as to Virginia) been self-imposed. It is absurd to suppose, that Mason and Henry, in their zeal against unlimited federal power, should propose limitations upon the States. They were

supplemental to the previous grants of power to the federal government, and from abundant caution, sought to limit them from being made instruments of wrong by improper construction.

This is more clear from the association in which this amendment is found. The other amendments, or most of them, in terms refer to the federal government; and those associated with them, all from a common source, must be referable to the same government.

This view is sustained by many cases, but I refer only to three late cases. *Barron v. Mayor and City Council of Baltimore*, 7 Peters' R. 243; *Fox v. State of Ohio*, 5 How. U. S. R. 410; *Smith v. State of Maryland*, 18 How. U. S. R. 71.

The law cannot therefore be unconstitutional, because of its violation of the 4th amendment of the constitution of the United States, because that amendment does not restrain State power; and no State law can violate it.

But it is maintained, that the law is a violation of § 10 of the Bill of Rights of Virginia; which is like the 4th amendment already considered; and, as the latter is more comprehensive in its terms, it is argued, that the former should be deemed equivalent to the latter.

This view is untenable. The 4th amendment being fifteen years posterior to the Bill of Rights, the court would consider, that wherein it was more comprehensive, its framers sought to remedy defects, which existed in the article of the Bill of Rights.

The § 10 of the Bill of Rights was obviously framed with reference to the general warrant of the Secretary of State to search for the authors of *North Briton*, No. 45; which gave rise to the case of *Money v. Leach*, reported in 3 Burr. R. 1742, and to a resolution of the House of Commons in 1766.

Earl of Halifax, Sec'y of State issued a warrant, directed to four of his majesty's messengers in ordinary, to make search for the authors, &c., of the *North Briton* No.

45, and them having found, to apprehend and seize *with their papers, &c. The premises of Leach were searched, and he brought suit against the messengers, who plead the warrant as their authority. The court decided against the warrant upon the ground of the "uncertainty of the person, being neither named nor described."

Lord Mansfield refers to the common law, under which in many cases, arrests might be made without warrant, and to special acts, giving authority to apprehend under general warrants; as warrants to take up loose and disorderly people; and then says—"It is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge, and should give certain directions to the officer."

The whole case, decided in 1765, turned upon the uncertainty as to person and offence, which was a matter for judicial

decision, and not to be left to the discretion of the ministerial officer.

The House of Commons (Parliamentary Hist. Vol. 16, p. 207 to 210) passed a declaratory resolution—that general warrants, unless by act of Parliament, were illegal; and if served on a member of Parliament, it was a breach of privilege.

The notoriety of these proceedings, and the well known fullness of Mason's mind, in matters of constitutional learning, make it certain, that § 10 of the Bill of Rights of Virginia was framed with reference to this case. Looking to the wrong done, which was redressed in the case of *Money v. Leach*, we deduce, that the clause was intended to prevent the delegation of judicial functions to a messenger or officer, and had no reference to legislative power. The resolution of the House of Commons, expressly reserves the power to Parliament; and how then can this § 10, be regarded as a restraint upon the legislative power?

The power of the Secretary of State seems to have been conceded, to issue warrants in some cases. That power was a judicial power. The objection made was, that he delegated the judicial function to a messenger of the court.

The Bill of Rights declares, that general warrants, whereby an officer or messenger (and in the use of that term is a plain reference to the case of *Money v. Leach*), may be commanded to search places without evidence of a fact committed, or to seize persons not named, or whose offence is not particularly described, &c., are grievous, &c.

Now this section refers to warrants which are judicial forms of process. This act of 1856 is not a warrant; is not a general warrant. The restraint is in terms on judicial not on legislative power, prohibiting warrants by the judicial power, or by the executive in exercise of judicial power.

This section does not inhibit private persons to arrest a known felon. How then can it be held to forbid a law to authorize officers to search vessels for stolen or absconding slaves? or even to arrest the master of the vessel, if a slave be found on board? He would be taken *flagrante delicto*, by the officer; as at common law, a private person may arrest a known felon.

It is obvious, that had the purpose of the section been to forbid legislative action, this language would not have been used. A legislative warrant to seize or search has no meaning in our constitutional language; and the term "warrant" has no relation to the exercise of legislation; which can only speak or act by resolution or by law.

It is fair to remark, that if the section applied to the legislature, the act in question so describes the place to be inspected and its character as to admit of no mistake, and leave nothing to the discretion of the officer.

156 *The consequences of the construction insisted on would be absurd.

The patrol laws, for domestic police, authorize seizure and search contrary to this

section. Are all these unconstitutional? Our health laws require a pilot to enquire into the health aboard a vessel coming into port; and to compel her to perform quarantine, for which he shall be paid a fee, Code of Va. ch. 92, § 40. Is this inspection unconstitutional? Look at our quarantine laws. Code of Va. ch. 86, § 16 to § 24. Look at our inspection laws for flour. Ib. ch. 87-8. Are all these unconstitutional?

Where is the difference in principle between these, and the act in question? If you may inspect a vessel to keep out disease, why not, to keep a slave from escape, with or without the privity of the master of the vessel?

But it is said, this act imputes crime. But this is not the fact. If crime is ascertained action is to be taken. If not, the inspector gives the certificate, and the vessel goes upon its way. If he finds a slave on board, and it is admitted, that at common law, a private person may arrest the criminal, why may not an officer legally authorized for the purpose? Had the law authorized a justice of the peace to inspect, and to arrest on discovery of crime, that would have been legal. May not the law authorize its appointed officer to do the same? The governor may offer a reward for arrest of fugitives from justice. This law only authorizes certain officers to do the same. See 4 Black. Com. ch. 21, p. 290, 293.

Suppose an inspector of flour finds unsound flour offered for sale, would the fact that it was a criminal offence make it unconstitutional to require the inspection by which he might be enabled to discover the crime?—Wherein does this differ from the power of the inspector under this law?

The constitution of the U. S. recognizes the validity of inspection laws by the State. This law requires inspection, to prevent the improper exportation of an article from the State. And how else could it be prevented than by such a law?

This law is then not in conflict with the 4th amendment, nor with the § 10 of Bill of Rights, which is confessedly less extensive in its terms.

Under the federal law, Brightley's Dig. 142, § 17, power is vested in certain officers to search vessels for goods not properly on board; in order to execute the revenue laws, &c. This is done without warrant; and yet the argument of counsel in this case, would lead to the conclusion that these laws violated the 4th amendment, because in effect they are general warrants for search and seizure. And if these laws, which have never been contested on this ground, are not prohibited by the 4th amendment, how can this act be denounced as void under the § 10 of Bill of Rights, which is less stringent than the 4th amendment? If these federal laws are valid, this therefore is—a fortiori.

One case has recently been decided, bearing strongly on this point. In *Smith v. State of Maryland*, 18 How. U. S. R. 71, a

law of Maryland authorizing the inspection of vessels in certain cases was held valid; though it was contended it was void by reason of the 4th amendment of the constitution, and a provision of the Bill of Rights of Maryland, similar to that of Virginia.

In conclusion on this point, it may be questioned, whether the general declaration of a Bill of Rights is as operative as an article of a constitution. The former declares general principles; but does not, as the latter, specifically prohibit action; and it may be going too far, to give a special efficacy to a generality in a Bill of Rights, as if it were the more sharply defined provision of a constitution. Unless, however, the true purpose of the Bill of Rights is

158 *will not be forced into an avoidance of a law, not clearly within its terms.

Second. Is the act of 1856, unconstitutional, being, as is contended, in violation of Art. 4, § 2, clause 1, of the constitution of the United States?

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The plaintiff in error claims exemption from this law, under this provision, because citizens of Virginia and other southern States are exempt from it.

What are his rights under this provision of the constitution? The "privileges and immunities" are those which belong to the citizen, as such. Such as attach to citizenship, and to nothing else as a source of "privilege or immunity," cannot be taken away under this provision.—These indefeasible rights, which belong to a citizen, as such, which government does not bestow, it cannot take away.

There are privileges, which government bestows; and which it may qualify or take away: such as the trial by jury, an examining court privilege, habeas corpus, &c. There are privileges which a citizen of a State possesses, which one of another State has no right to; the right to vote—the right to hold office—these clearly may be given to a citizen of a State, and be denied to citizens of any other. The right to hold office is denied to any but citizens of Virginia. Surely this is not unconstitutional. The right of suffrage springs from residence and citizenship. Surely, a denial of it to a non-resident, who is a citizen of another State, is not unconstitutional. A resident citizen may sue without giving security for costs; a non-resident may be required to do so. In these cases the discrimination rests not on a distinction between citizens of the particular State, and one of another State, but rests on the further condition—that of residence.

159 *The precise object of this provision must therefore be examined.

I apprehend it means only this: It lifts from the citizen of other States, the incubus of alienage. He cannot be treated as an alien—he must be treated as a citizen. All disability that attaches to alienage, is forbidden; all privilege that attaches to citi-

zenship (merely), is secured. When in other respects the citizen of another State stands on the same platform, with a citizen of Virginia, she cannot deny the citizen right to the one, which she allows to the other. If a citizen of Virginia, resident in Virginia, may enter land in the land office of Virginia, she does not violate the constitution to deny the right to a citizen of Massachusetts, non-resident in Virginia. A personal service in case of a citizen resident in Virginia, is essential to a judgment, upon which there may be execution. In case of a citizen of another State, non-resident of Virginia, an attachment, without personal service, may be issued and property sold without personal judgment.

These are all cases, where the constitution is not violated, because, the discrimination is based on the condition of residence, and not of citizenship.

The error in the reasoning on the other side, is in the assumption, that all "privileges and immunities," issue from citizenship; whereas, many issue from residence, some from the intention of a citizen in doing a particular act; and are allowed or denied, according to the circumstances of each case.

If A takes his ship south, and B his ship north, both being citizens of Virginia, the legislature may discriminate between them, not as citizens, but on account of the acts done by each.

This act of 1856, subjects a citizen of Massachusetts to inspection, whose vessel clears for a northern port; and a citizen of

Massachusetts whose vessel clears for
160 a southern *port, is exempt from its operation. It does not discriminate between the persons, but between their acts.

By the Code of Va. ch. 148, § 5, a citizen is liable if he takes away a slave in his vessel, whereby he is lost, whether carried away wilfully or not. The act of 1856 provides for the security of slave property carried away in a vessel owned in whole or in part by a citizen or resident of another State. In the one case, the law can redress the wrong done, by personal action against the resident citizen; in the other, it can only do so by proceeding in rem, against the non-resident. In principle, where is the difference, between the discrimination made in this case, and that confessedly right, in respect to the remedy by attachment—a proceeding in rem, against a non-resident?

The object of the law is to protect slave property. If a resident citizen takes away a slave, he and his property are here to answer for the injury. If a citizen of Massachusetts does so, he withdraws himself and his property from the reach of the owner, in the very act of wrong doing. The remedy and the right are destroyed by one and the same act. Has not the State the right, looking to the practical difficulties in the way of redress for wrongs done her people, to adopt means adequate to their protection? We do not attach vessels of our own residents, because they and their prop-

erty are here to answer for the wrong. We attach and inspect the vessel of the non-resident, because neither he nor his property will be here, to answer for the wrong. The law does not discriminate between the persons, but between the circumstances attending the acts done by them, and attaching to their place of residence, and their respective liabilities for redress of wrongs done by them to our people. The citizen of Massachusetts is by his residence exempt from the redress proper to the wronged slave owner. The citizen of Virginia 161 is not. The law seeks *to put them on the level of like liability; and to subject them each to a remedy fitted to the peculiar condition of each.

But it is argued, that the act makes a distinction between vessels according to their destination, which is fatal to its validity.

This is not an objection, founded on the provision of the constitution under discussion, for this provision relates to citizenship—not to commerce or vessels. But it shows, that the discrimination is one really not based on citizenship at all—but on the acts done by these citizens.

If the slave concealed in the vessel goes to a northern port, will the owner ever recover him? and if so, at what expense? It may be of life—at least, of a large proportion of his value.

If the slave goes to a southern port, he is not thereby free, and may be more readily recovered—at no hazard of life, and at less expense.

The discrimination made rests on these patent facts; and shall it be said that Virginia must legislate for the security of her people, with her eyes closed to facts, which all the world knows? Must her legislature be blind, in order to be constitutional in its action?

I have argued this question on principle; for no adjudications have been made which can guide the investigation.

But I refer, as sustaining the construction given to this provision of the constitution, to 3 Story on Cons. § 1800; Corfield v. Coryell, 4 Wash. C. C. R. 371, 380; Conner v. Elliott, 18 How. U. S. R. 591; Tatum v. Wright, 3 Zabriske R. 429; Va. Convention 1788, p. 408.

Third. The next objection to the act of 1856, is, that it is a regulation of commerce, and that the power to regulate commerce is exclusive in Congress. C. U. S. Art. 1, § 8, c. 3.

162 *Gentlemen object to any very strict construction of the constitution.

It has been said by the highest authority, that the federal government is one of granted powers; and its power must be shown either expressly given, or necessarily implied.

This results from the character of the powers granted. The power to lay and collect taxes is given; and yet that to borrow money is not implied, but is expressly granted. Other instances might be cited, all tending to show, that the framers of

the constitution meant to leave little to implication, and to indicate by express grant the powers intended to be conferred on the government they created.

The grant of powers to the federal government, as a matter of history, was reluctantly made; and this spirit indicates, that they should not be extended, except by necessary implication, from express grants. Those granted were rather matters of expediency—those reserved, were matters of necessity.

Besides, all the powers now vested in the general government, were previously exercised by the State governments. The people of the several States were the grantors of power to their own separate governments, and to the general government. The grants of power to the latter, took from those previously exercised and held by the former; and to vest in the one, and divest the others of powers, there must be a clear and manifest purpose in the act of the grantors.

After the constitution was adopted, amendments were demanded. The 9th and 10th amendments were demanded in substance by Massachusetts, Rhode Island, New York, Virginia, North Carolina and South Carolina; were proposed in their present shape by the 1st Congress under the constitution, and ratified without a dissenting State.

163 *I hold therefore, that upon a claim of power by the federal government the onus is on the government to show its existence by express grant, or as a necessary implication from some express provision. If a power be claimed by a State, the onus is upon those, who contest it, to show that the whole power has been granted to the United States, or that it has been prohibited to the States.

The States are in, of their original title to all power, unless it can be shown, that they have divested themselves, by a delegation of it to the federal government, or by a self-denying inhibition to be found in a stipulation of the federal compact.

It has been said in the argument of counsel, that the States derive their powers from the 10th amendment! This is, I humbly submit, a grave error. The States derive no power from the constitution. They acquire nothing by it. They grant power out of themselves by it, but get nothing from it. They grant to the federal agent—the common agent of all the co-pactors; and reserve all the undelegated authority to themselves and to their separate governments. This 10th amendment is the evidence of their reserved powers, not their source.

Let it be remarked therefore, that in order to show, that the act of 1856 is unconstitutional, it must be shown, either that the power exercised has been prohibited to the State—or that it is a power wholly transferred to the federal government.

It is not contended, that there is any prohibition in the constitution, under which this law is invalid.

Has the power been granted—and so granted, as to leave no residuum to be exercised by the States?

I concede the grant of power to the federal government "to regulate commerce."

But does that grant consume the power, with no residuum to the States? Is the grant, exclusive? Is it such, as by implication, excludes and forbids the regulation of commerce by a State?

And I insist, that the onus is on the other side, not only to show the grant, but that the grant excludes the State from its exercise.

That a grant of power is not necessarily exclusive is clear. To be such it must have a double aspect: to give to the one—and to prohibit to the other.

In the Federalist No. 32, Gen. Hamilton speaks of a "concurrent and co-equal authority," between the two governments.

In itself, the mere grant of power to me, is not prohibiting the rights of every other, to exercise it. It may or may not have the character of a monopoly power.

C. U. S. Art. 1 § 8, c. 1, contains a grant of power to lay and collect taxes. This does not exclude the State power of taxation on the same subjects. When the State is to be restrained in this, the constitution in express terms prohibits the laying of duties. C. U. S. Art. 1 § 10, c. 2. So as to coining money. The grant to the general government, is followed by an express prohibition to the States. C. U. S. Art. 1, § 10, c. 1. So as to the war power. C. U. S. Art. 1, § 10, c. 3.

Now if these powers are exclusive by virtue of the grant, why the express prohibition to the States?

And if the power to coin money, to lay taxes, be not per se exclusive, and prohibitory of State power in respect to money and taxes, why shall the inference be made, that the power to regulate commerce is exclusive and prohibitory?

In the case of punishing counterfeiters of coin—a power given to the United States; C. U. S. Art. 1, § 8, c. 6, the Supreme court in *Fox v. State of Ohio*, 5 How. U. S. R. 410, discuss the question of the conflict of powers in a mode which goes far to sustain my views.

But it may be said, the power to borrow money on the credit of the United States, is surely exclusive. True—but for this reason.

The States severally never had power to borrow money on the joint credit of all.

The grant does not exclude each State from a concurrent exercise of this power. The State never having had title to it, could not reserve it, unless granted away or prohibited. Had the power been only "to borrow money," leaving out the last words "on the credit of the United States," then it would not have been exclusive.

The same reasoning applies to all other matters, which grew out of the existence of the new government, and the exercise of its peculiar powers. The States not having previously held such powers, their claim to

them, as reserved powers, unless prohibited or excluded, cannot have any foundation.

It is asked however—Is not the postal power exclusive? The mere grant of the power, does not prohibit it to the States. Suppose the government fails to establish a postal system, must the States have none? May the government enact the fable of "the dog in the manger," and the States have no relief?

This course of reasoning and illustration brings me to this point:

Exclusive power in Congress may exist, 1st. Where the grant to Congress, is followed by a prohibition to the States.

2nd. Where from the nature of the power granted, the States had no original title; and the power itself comes into being, as an offspring of the government created by the constitution. Take the case of borrowing money—and others which might be cited. C. U. S. Art. 1, § 8, c. 2, 9, 10, 14, 15, 17; Art. 4, § 3, c. 1, 2.

3rd. Where the exercise of the granted power, would be in conflict with its exercise by a State, there the granted power in exercise, excludes the State from a concurrent exercise of the power.

In the third class of cases, it is the exercise of power which excludes State power; not its grant.

*This results from the provision, that the laws of the United States, passed in pursuance of the constitution, are the supreme law. (But only such, as are in pursuance thereof.) The law passed by Congress under the granted power is supreme to all State law; but until it is passed, until the power is put forth in the form of law, it overrides no State law, passed in exercise of that power, where the State is not prohibited to do so by the constitution. In such cases the State law stands, until the supreme law of Congress, with which it conflicts, is passed.

After this general view, I proceed to state the points for which I shall contend.

1. The States are not forbidden to regulate commerce, but may do so, subject to the supremacy of any law of Congress on the same subject, with which the State law conflicts.

2. Congress has passed no law, with which the act of 1856, is in conflict.

3. The act of 1856 is not a regulation of commerce.

1. It is clear there is no express prohibition to the States to regulate commerce. In other cases there is, as I have shown: *Expressio unius exclusio est alterius*.—Duties on imports are a regulation of commerce. If the power to regulate commerce were per se exclusive, why was it necessary to forbid to the States, that which is a regulation of commerce, viz: duties on imports.

Even the power to pass uniform bankrupt laws has been held to be not exclusive. *Ogden v. Saunders*, 12 Wheat. U. S. R. 369; *Boyle v. Zacharie*, 6 Peters U. S. R. 348, 635. But a State, it was held, could not by its bankrupt act pass beyond its own limits and bind a citizen of another State. And

this, from the stringency of the prohibition as to "impairing the obligation of contracts." But in *Clay v. Smith*, 3 Peters U. S. R. 411, *if a citizen of another State became voluntarily a party to a proceeding under the bankrupt law, he was bound thereby; and his debt was released.

The power is "to regulate commerce." It is in its constitutional sense, the same as to make "rules and regulations" concerning commerce. The 17th clause of the same section gives Congress exclusive power of legislation; and other clauses give power to establish a uniform rule, and uniform laws. How easy would it have been to use one or other of these terms in the clause under consideration? And is not the omission indicative of a purpose not to give exclusive power?

Suppose Congress had made no regulations of commerce; were the States debarred from doing so?

In truth, what law of the State may not in some sense affect, and thus regulate commerce? Quarantine laws, inspection laws, are all regulations of commerce. Pilot laws likewise. Can the State pass none of these, because they regulate commerce?

These views operated on the minds of the framers of the constitution; and it must have been seen, that the States could not avoid regulating commerce by their legislation, either directly or indirectly; and hence for greater precaution, they recognized as reserved to the States, by a significant phrase, the power to pass and to execute its inspection laws. See 3 *Mad. Papers*, 1556, 1569.

It is obvious then, that had the mere grant of the power to regulate commerce, without its exercise, operated as a denial of such power to the States, it would have been fraught with evils which the sagacity of the members of the convention would have foreseen. But this clause was adopted, nem. con. Can it be believed, they unanimously, contemplated and intended such a construction of the grant of this power?

Counsel have relied on the clause as to the migration and importation of 168 slaves, C. U. S. Art. 1, § 9, c. 1; *and argue that the States could not prohibit such importation. It seems to me otherwise. As a matter of history, many had forbidden it before; and the constitution only forbids a prohibition by Congress, leaving to the States to do as they pleased; as they could have done, had the clause not been adopted. In *Groves v. Slaughter*, 15 Peters U. S. R. 499, it was decided, that Congress could not interdict the inter-State slave trade; but the States might do so. See also as to this point, *Gibbons v. Ogden*, 9 Wheat. U. S. R. 1.

The view taken, answers the argument, that in the nature of things, there can be but one regulation. I may concede, there cannot be two in operation at the same time. But what I insist on is, that where the supreme regulator is still, the lesser one may be in legal operation. In the passage

cited from *Madison Papers* 1585, by counsel, Roger Sherman does not say, there may not be two sets of regulations. On the contrary, he admits there may be. He says, "The power of the United States to regulate trade, being supreme, can control interferences of the State regulations, when such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction." He anticipates State regulations—a concurrent jurisdiction—a possible interference between them—but no danger because of the supremacy of those of Congress.

The true construction of the clause is, that the power of Congress when exercised is supreme and controlling; but it is not exclusive.

Several cases have been cited on the other side. The great case of *Gibbons v. Ogden*, 9 Wheat. U. S. R. 1; I refer to the comments on this case by Ch. J. Taney, in the "Passenger cases," 7 How. U. S. R. 283.

That case only decided, that the law of New York prohibiting vessels from coming into its waters from other States, was in conflict with the law of Congress regulating *the coasting trade; and was therefore invalid.—It did not decide that the grant of power to Congress "to regulate commerce," made the act void; but that the conflict of the act, with the law of Congress passed under its power, made it inoperative.

The Passenger cases, 7 How. U. S. R. 283, and *Chapman v. Miller*, 2 Speer's R. 764, put the avoidance of the State laws on the same ground.

In the *Black Bird Creek* case, 2 Peters U. S. R. 245, though the State law excluded commerce from a navigable creek, it was held to be valid, and not in conflict with the constitution; and so to be held until Congress passed a law contravening it. This decision settles the question in favor of the concurrent power of the State to regulate commerce, and that such are valid, until Congress by the exercise of its supreme power contravening State legislation, invalidates it.

In the "License cases," 5 How. U. S. R. 504, Ch. J. Taney held that the pilot laws do not derive their validity from congressional legislation, but are valid under State power.

I refer further to *Cooley v. Board of Wardens of Philadelphia*, 12 How. U. S. R. 299; *City of New York v. Miln*, 11 Peters U. S. R. 102.

In my view of the case, I need not insist upon any thing further than reason and the cases settle, that there is power in the States to regulate commerce which will be valid in exercise, until the exercise of the concurrent power by Congress supersedes, by contravening it.

The law is not void, for conflict with the constitution.

2. I now assert, that the law is valid, as a regulation of commerce, because it is in conflict with no law of Congress.

It is said however, that it is in conflict with the enrolling act, § 9, Brightley's Digest 138.

If the State has power to regulate commerce it may *be restrained by a conflicting law of Congress. But a law not contravening the State law, does not make it invalid. The regulations of State and Congress may consist, if not repugnant.

The license act requires a license to all coasting vessels; but it does not forbid other restrictions by a State. Congress may impose other restrictions; so may the State. Concede the right of Congress to annul the State regulations. That annulment does not result from some regulation by Congress, operating on a vessel, which is not affected by the State law. To work annulment, there must be conflict and such repugnance as to make co-existence impossible.

Ch. J. Marshall in *Gibbons v. Ogden*, ubi supra, says: "The fact that the same means may be used by the two governments does not prove that they are to be referred to the same power."

Now if Congress may not, or has not by its law, forbidden quarantine or pilot fees, when has Congress forbidden, or how can it forbid a fee for inspection of a vessel, not referring to commercial regulations, nor in conflict with any, but as a matter of police, and to save slave property?

3. This brings me to the real ground on which this case should rest. It is not a regulation of commerce, that this act of 1856 seeks. It is a regulation of internal police.

It is admitted on all hands, that there are powers, reserved to the States, under the name of "internal police." The power to regulate commerce in Congress, and this power of internal police in the State may interfere; but neither can be superseded by the other.—The reserved power is as important and as perfectly conserved by the 10th amendment, as the granted power. To permit the granted power to trench upon the reserved right, is more dangerous,

171 than the inconvenience *of allowing the reserved to restrict the granted power. No regulation of commerce, for example, can debar the State from its sovereign right to protect the life of its people, by quarantine laws; and an intrusive regulation of commerce, which would force disease into the State, may be forbidden by her sovereign power.

And it follows, that as the means necessary to give effect to the granted power, are presumed to be within the powers of Congress, so a fortiori the means necessary to conserve the reserved right, are within the compass of State authority.

The true construction in the case of such conflict, is that in so far as the regulation of commerce trenches upon the police power of the State, it is void; and vice versa. Whatever is bona fide a legitimate exercise of the police power will be valid, though it interferes with the commercial regulation.

Whatever goes beyond this legitimate bound is void.

By reference to the declaration of rights of the Continental Congress, dated Oct. 14, 1774, *Journal of Congress*, vol. 1, p. 28, res. 4, it will be seen, that the distinction is drawn between the Imperial power of Parliament to regulate commerce, when "bona fide restrained" to that object, and to securing commercial advantages to the country; and the power to regulate all cases of "internal polity," indefeasibly residing in the colonies; and further, that this regulation of commerce did not draw with it the power of taxation.

This historic distinction, on which the revolution of 1776 was based, presided as a supreme idea in the convention of 1787; and marks the line between the power of Congress to regulate commerce, and that of the State to control its internal polity. And in the case of *Gibbons v. Ogden*, ubi supra, it is laid down by Ch. J. Marshall, that this distinction is a sound one—that though the same means may be used by Congress

172 and the State, *it does not follow, that they are to be held as the exercise of the power to regulate commerce by both; that Congress must recognize the quarantine and health laws of the State, and cannot by commercial regulations interfere with them; and that it can control them, only so far as may be necessary for the regulation of commerce. See his opinion 203 to 206.

If, then, a State may protect the life and health of its citizen, is it not equally a right of the State to protect his property from being carried off by an irresponsible party? And if it be constitutional, because necessary for the purpose of preserving health, that a State inspector should board the vessel and examine it, is it the less constitutional for a State to require an inspection of an outgoing vessel, to see whether under the license of a Congressional regulation of commerce, it is not violating her criminal law, and stealing the property of her citizen?

A State may tax a licensed vessel, as the property of her citizen. The license is under commercial regulation—her tax under her internal polity. A vessel may bring in gunpowder under her license; but the State may forbid its being brought ashore under circumstances dangerous to her people. *Brown v. State of Maryland*, 12 Wheat. U. S. R. 419, opinion of Ch. J. Marshall, p. 443-4.

Now I admit, that in the broadest sense of the term, all these State police regulations may be regarded as regulations of commerce, because they affect commerce.—But they are not intended as such, and regulate commerce incidentally, or rather accidentally.

Congress cannot by licensing a vessel, give it license to commit crime against a State. The State by preventing it from committing crime, does not revoke her license, or even restrict its legitimate province. Congress may give license, but the

State may forbid its use to the injury of her people. As Congress has no power
173 to license "a vessel to violate State law, so it is no infringement of the license to require the vessel to forbear from crime, or to be inspected to see if it is being used to violate a law of the State, or to secrete and carry away a citizen's property.

The license acts on the vessel as a carrier—as an agent of commerce. The State law acts upon its owner as a man capable of wrong doing, and on his vessel as an available instrument for the purpose. The orbits of the two powers are thus separate, and distinct; and though tangential, do not intersect.

The distinction drawn by the Supreme court in the case of *Brown v. State of Maryland*, 12 Wheat. U. S. R. 419, is illustrative of the distinction I make in this case. When the tax power of the State begins, as to an imported article, and the right of the importer under the duty paid on the imported article ceases, was considered there. In the transitus it was beyond the reach of State power; as soon as it passed it, that power attached to it.

Take another case—that of incendiary publications, sent through the mail. Congress may authorize the carriage of letters and papers by mail; and the State cannot prevent it. But the delivery and circulation of such as are dangerous to the State, she may forbid; and Congress cannot enforce the delivery or circulation. The limit between the postal power, and the police power in that case, is in strong analogy to this case.

But authorities are not wanting to sustain this view. The Supreme court in *City of New York v. Miln*, 11 Peters U. S. R. 102, decided, that a law of New York, which requires the master of a vessel entering the port of New York, to make a report in writing to the Mayor, containing the names, ages, last legal settlement of every passenger who shall have been on board during the voyage, and inflicting a penalty
174 for failure, "was valid and constitutional as a regulation of police; and was not a regulation of commerce. And Judge Barbour in delivering the opinion of the court, p. 140, says—"We suppose it to be equally clear that a State has as much right to guard by anticipation against the commission of an offence against its laws, as to inflict punishment upon the offender after it shall have been committed"; and this was said as to a right to protect the State against the ingress of pauper foreigners. The whole case is conclusive of this.

The same court in *Smith v. State of Maryland*, 18 How. U. S. R. 71, held, that a State law forfeiting a licensed vessel attempting to take oysters in the waters of Maryland, was valid. If a State law may forfeit a vessel for taking oysters, why not for taking a slave? And if as in *City of New York v. Miln*, a State may take measures to prevent crime, as well as punish it, why may not the State inspect a vessel to

see if there be stolen slaves on board, if it may forfeit for the theft if they be found?

This power to regulate commerce, what is it? "Regulate" is not so comprehensive as "legislate." It is, as already remarked, equivalent to the terms "to make rules and regulations respecting." It has reference to order and method. It does not create—nor can it destroy; it only gives order to a pre-existing thing. It is passive, until other action brings the subject into being, which it is to control. To regulate commerce does not carry with it the power to do every thing which may influence commerce, or to forbid every thing by others which may do so.

Each house may regulate its own proceedings—Congress may make regulations for the land and naval forces—regulations for the territories and other property of the United States—may regulate the value of coin, and may regulate commerce. Regulation relates to things—law applies to persons. The instruments of carriage,
175 the "modes of carriage—the regulations for outgoing and entry of vessels—these are regulations of commerce—regulations of the thing called commerce. But the persons who carry it on—the things carried—are not commerce; and are within State jurisdiction. The license of the vessel avails to make it a legal instrument of carriage. Its use as such, may be regulated by Congress. But the vessel and the owner, and the property taken on board from the State, cannot be withdrawn by the license from the jurisdiction of the State. The vessel may be taxed; the owner may be punished for crime; and the property he shall take away out of the protection of the State, she may inspect, to protect and secure the rights of her citizens.

If A swears a licensed coaster has his slave on board, can the license save it from search? And how can the license forbid the State, as a precautionary measure, from searching to prevent the carrying away of property illegally?

This law of March 1856 does no more than this. It does not touch the license of the vessel. But it does not permit the license to conceal crime, or to warrant the abduction of a slave. It operates on the vessel—the owner—and property, all of which are within and subject to its "internal polity." It does not hinder the voyage of any vessel, whose hold does not contain a fugitive from labour or from justice. It inspects, to prevent crime, or injury to its citizens by the loss of his slave.

But it is said, the law is unconstitutional, because the inspector is authorized to charge a fee for inspection.—That point does not arise in this case. But if it did, "The License cases," 5 How. U. S. R. 581, Ch. J. Taney's opinion; and "The Passenger cases," 7 How. U. S. R. 414, J. Wayne, hold quarantine fees to be legal, when charged against the owner of the vessel. And if for quarantine purposes, a fee for an inspection may be required
176 *to be paid, why not in this case,

if it be as we have shown, a legitimate subject for the police power of the State?

It is further objected, that the law discriminates between vessels. This discrimination and the reason for it have been already explained.

In *Cooley v. Board of Wardens of Philadelphia*, 12 How. U. S. R. 299; *Smith v. The State of Maryland*, 18 Id. 71; *City of New York v. Miln*, 11 Peters U. S. R. 102, it was held that pilot laws, making a discrimination between home and other vessels are valid. The police power may discriminate; and the propriety of the discrimination made, if it be a police regulation, cannot be judicially enquired into.

It is said again—that as Baker is out of the State, and his vessel too, this law is not a police regulation, because operating on person and property beyond the State. It is true, the person and his vessel are now beyond the State. But they were once here; and the act for which this prosecution is made, was done against this police law, while they were within the jurisdiction of Virginia.

It is said, that as a part of the fine goes to the State treasury to constitute a "fugitive slave fund," it is a tax on commerce. But this is not so. It is a fine recovered by action, for an offence against a law of the State.—What the State does with the penalty it is not necessary or proper to enquire.

It is submitted that the law is a due exercise of the police power of the State, and is valid.

If the views of the other side prevail, the construction insisted on, will be fraught with danger to our institutions; for it involves the absorption under the power to regulate commerce, of all power which may directly or indirectly influence its operations; and thus will give to Congress a virtual negative upon all police laws of the

State, which in any way may touch
177 or affect the persons *or vessels engaged in commerce. Such a construction would disarm every State in the south of the power of self-protection against every emissary, whose coasting license would be indeed a license to seize and harbor slave property from all possible reach of its owners. It is neither justified by the history of the constitution, by any sound rule of construction, or by any supposed necessity to preserve the real integrity of the commercial power of Congress.

Tazewell Taylor, for the appellant, in reply: The peculiarity of the act of March 1856, will attract the attention of every reader. It is the first of the kind, except one passed in 1841; passed under excitement, and in four years stricken from the statute book on the application of the persons for whose benefit it was enacted; the offence which occasioned it unatoned for. This act is limited and partial in its provisions; and makes distinctions between vessels on the grounds of ownership and destination. Our law makes it a crime to carry slaves beyond the county with intent

to defraud, whether in a Virginia or a Massachusetts vessel. This act only applies to Massachusetts vessels. A vessel against which there is no ground of suspicion, an unsworn officer may call for the power of the county to search it, if it is bound for the north, though owned by southerners. And she is to pay a tax for this search upon her. And again in this matter of discrimination between vessels, coal vessels are only charged two dollars for a search, whilst all others are required to pay five dollars for the same operation.

Is Virginia whilst she remains in the union, to protect herself by an act in violation of the constitution of the United States? Shall she not rather lose her property than violate her honor? What is the general assembly? Is it a parliament clothed
178 with all power of legislation? *It is

limited by the constitution of the United States and the constitution of Virginia. If it passes an act in violation of these, it is no law; and this court will so declare it. The legislature is not sovereign—the people are the only sovereign, and an unconstitutional law is a violation of the sovereign will of the people. The constitution of the United States is our constitution, and its violation is as much a violation of the sovereign will of the people of Virginia as is a violation of the constitution of Virginia. In the name of the sovereign people of Virginia I ask that this unconstitutional act may be declared null and void. As early as 1793 the fathers of the constitution established the principle that the courts are to decide upon the constitutionality of a law. *Kemper v. Hawkins*, 1 Va. cas. 40. And they laid down the rule on the subject: That where the law is plainly against the constitution, or the fundamental principles of our institutions, it is to be declared void. And to the like purpose and effect is *Landry v. Klopman*, 13 Lous. Ann. R. 345; and *Calder & wife v. Bull & wife*, 3 Dall. R. 386.

1st. The law is void because contrary to article 10 of the Bill of Rights of Virginia. This bill was declared in the convention of 1829, to be the foundation and basis of our government; and after that declaration was ratified by the first article of the constitution; and again with the addition of a word was ratified and adopted in 1851, by the vote of the people. It was referred to and approved by the judges in the early days of the republic. *Tucker in Kemper v. Hawkins*. And it is strange that in this year 1860, eighty years after its adoption, we are asked what it means. The article 10, declares that general warrants, which authorize a search of suspected places without evidence of a fact committed, are grievous and oppressive; and ought not to be tolerated. The attorney general says this article does not restrain the legislature;
179 *and that its only effect is, that a judicial officer cannot delegate his authority to an unsworn person to search suspected places. That no man can be disturbed by judicial authority without law. That this § 10 was merely intended to affirm

what was decided in *Money v. Leake*. And thus we are referred to a decision of Lord Mansfield in 1766, to ascertain what are our priceless privileges under § 10 of the Bill of Rights; and to the power of a British Parliament to sustain the power of our legislature. And the Attorney General has referred to the patrol and night watch of the city of Richmond. I have never heard so inapt an illustration; and can imagine the spirit of George Mason returning to the earth to rebuke such an insult.

It is said that Mason was acquainted with Mansfield's decision. That is probable; but my inference is, that he intended to guard against the exercise of any such power. And if the instrument on its face left its meaning in doubt, have we no other rights to guide us? This was not the only time that Mason spoke on these subjects.—He was a member of the convention which ratified the constitution of the United States; and he opposed the constitution, and insisted on a bill of rights to be connected with it. A committee was appointed to prepare a form of ratification; and another committee was appointed to prepare amendments; of which Mason was a member; and the report of this committee is only our Bill of Rights—the 4th amendment being the § 10 of that instrument. These principles were there declared to be the essential and inalienable rights of the people; and if this is true, are they to be protected against the executive and judiciary, and not against the legislature? The amendments reported by this committee were submitted to the States, and produced the 4th article of the amendments to the constitution, adopted by the whole people of the United States.

180 *If then § 10 of our Bill of Rights does not restrain the power of the State government, how can article 4 of the amendments to the constitution restrain Congress? Are they not in the same category? And yet in the *Commonwealth v. Murray*, 2 Va. cas. 504, Brockenbrough, J., held that Congress was restrained by this 4th article. And in the same case he says—that article is not applicable to the States because they had provided for their own security; and he refers to § 10 of the Virginia Bill of Rights. Such has been the legislative construction of the Bill of Rights. In the index to the Code of 1849 under the head of "search warrants," the first item is—"What prohibited by the constitution;" and then there are references to the act, Code ch. 203, p. 759, which provides how these search warrants may be obtained; requiring them to be founded on the oath of a party, and in all their provisions evincing a sacred regard to the essential and inalienable rights of the people. Reference has been made to the power of the police to protect the health of the people. But the act ch. 86, § 7, p. 397, shows a police officer is not allowed to enter upon a lot or a vessel without an oath.

In *Crenshaw v. The Slate River Co.*, 6 Rand. 245, 276, this court held that the

Bill of Rights is a part of the constitution of Virginia, which bound the legislature; and that the 1st section precluded the general assembly from taking private property without compensation.

It is clear then that the proposition, that the § 10 of the Bill of Rights does not apply to the legislature, is not sustained. If upon the idea of a supposed necessity the legislature may override this § 10 when the safety of the people requires it, under the present excitement it may be that the general assembly may authorize any person to enter the house of any citizen or resident, and search for suspected persons or property, and send the owner to jail. If we once depart from the plain construction 181 *put upon this provision of the Bill of Rights we are adrift, and may be carried to any length under the tyrant's plea of necessity. If four hundred millions of slave property were dependent upon this law, as said by the Attorney General. I would prefer to lose them all, rather than to live where the legislature was authorized to resort to these hand to mouth expedients, resulting in a loss of all reverence for law and all respect for free institutions, and in utter anarchy and confusion.

The act in relation to arrests, Code ch. 204, p. 761, furnishes no countenance to this act. By that act the complaint must be to a justice of the peace, on oath, and this is the basis of the proceeding; and all the provisions of the act are strictly within the provision of the Bill of Rights. Nor does the common law give this act more support. That has regard to the rights of the subject. 2 Hawkins Pleas of Crown 130, 134; 4 Black. Com. 290. It is said a private person may arrest a felon and carry him before a justice; and therefore, it is argued, a pilot may arrest the master of a vessel having a fugitive slave on board. But the objection is, that the pilot had no right to go on board the vessel. Nor is the reference to the pilot laws more fortunate. The pilot is only to enquire if disease is on board the vessel; and if it is, then to pilot it to the proper quarantine ground. As to the act in relation to patrols, Code ch. 98, p. 445, it has especial reference to houses of slaves; it says "negro quarters and other suspected places." To take property or fire arms from the dwellings of slaves or free negroes, or to break open their door the patrol must have the warrant of a justice of the peace. The principal duty of the patrol is to visit negro quarters, and the other words are to be construed with reference to the principal words, and are not to be extended beyond them.—If they go further the law is obnoxious to the same objection as the law now in issue.

182 *I shall now proceed to call the attention of the court to the extent of the authority to search under the act of March 1856. My colleague says it is founded on the imputation of a felony. There is great force in what he says; but it is not necessary to go so far. It is at least founded on a suspicion of felony. The law goes on

the suspicion that a vessel owned by persons not Virginians, and bound north, has slaves on board. Does the Bill of Rights authorize a search on grounds of suspicion? I say no. To authorize a search an offence must have been committed, and there must be a suspicion that the guilty person is in the place which is to be searched. Under this act the search is to be only upon suspicion that the offence has been committed; not because the pilot knows an offence has been committed, and the offender is on board the vessel. He goes on board and finds no person charged with the commission of a crime, yet he may there seize any person on board, on his own responsibility. Is such a power to be authorized without any safeguards; without proof of crime committed; without suspicion of a criminal being on board the vessel; without an affidavit even, is he to enter into a man's castle, and there arrest and imprison according to his own judgment or pleasure? If § 10 of the Bill of Rights does not protect a man from such a search as this, then it is indeed a worse than idle provision.

I have been unable to perceive the bearing of the pilot and quarantine laws upon this question. These laws are the handmaids and assistants of commerce. They are necessary to commerce, and may therefore be given title to enforce compensation for their essential services.—And to make the inspection laws analogous to this act, there must be found in them the authority to search for and seize the articles condemned by them. And then it would be

obnoxious to the same objection as this 183 act. *The act in relation to incendiary publications, simply provides that if the postmaster knows of a book, &c., of the kind prohibited which comes to his office, it must be burned. The postmaster must know, and then he is to inform a justice of the peace, who is to proceed regularly for the arrest, &c., of the guilty parties. The only Federal law referred to by the Attorney General, is from Brightley's Digest. That act in three lines requires every licensed vessel, upon being called on by a revenue officer, to show his license; and if he does not he is subject to a penalty. The demand is made by an officer authorized by law to make it. But the case of *Smith v. State of Maryland*, 18 How. U. S. R. 71, is cited to show that though there is the same provision in the constitution of the United States and of the State of Maryland, yet it was there held that a master of a vessel might be searched and seized for dredging for oysters. In the Supreme court no question arising on the constitution and laws of the State could be considered. There too the vessel was seized in the act; and in such a case an affidavit was necessary as the foundation of the proceeding.

The act is moreover in conflict with the fundamental principles of our institutions. Of these principles, one is equality. The act does not operate equally on citizens of Virginia. One citizen on board of a vessel

owned in New York is to be searched, another on board of a vessel owned in Virginia is not to be searched. A vessel going north is to be searched, another going south is not to be searched.

2. The next question is whether this law violates the 2d section of the 4th article of the constitution of the United States. "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." This is a grave question, and we are not much aided by the decisions. It came up last in

184 **Conner v. Elliott*, 18 How. U. S. R.

591. *Curtis, J.*, who delivered the opinion of the court, declined to give a general interpretation of the provision. Another case was *Corfield v. Coryell*, 4 Wash. C. C. R. 371; and another is *Chapman v. Miller*, 2 Speer's R. 769. And Story in his immense work on the constitution, 3 Story on const. § 1800, confines himself to the remark, that the provision was intended to confer general citizenship and all the privileges and immunities of citizens. If judges decline to attempt to interpret the terms of the provision generally, counsel may well do so, and confine themselves to the enquiry as to its true construction as applicable to this case. It is not necessary to insist that it refers to rights of property under State laws. I am to show that the law when applied to a citizen of Massachusetts deprives him of a privilege he is entitled to under this clause of the constitution. This right is not affected by State lines or boundaries; and any act of a State which disturbs or affects his privileges comes within this provision of the constitution. And any law of Congress—even a tax of one cent—which puts one citizen under a different state of things from another, is unconstitutional.

Then what is the privilege which the appellant insists has been affected by the act of 1856? He, a citizen of the United States, the owner of a vessel on a voyage from Virginia to New Bedford, entitled to the benefits of the navigation laws of the United States, on the great highway of nations, is sought to be arrested by this law, and to have imposed upon him a burthen which is not imposed upon a citizen of Virginia. Now whilst it is conceded that the soil covered by the waters is within the State, the constitution intended to secure to citizens of the United States the right to navigate the waters of the States. This right was surrendered by the States to the United

States; and the right to navigate these 185 waters is "derived from the United States, and not from the State; and every citizen of the United States is entitled to enjoy it free from all interruptions to which other citizens are not subject.

Then has not Congress exercised the power thus surrendered to it by the States? The power to regulate commerce includes navigation; and Congress having regulated the navigation of these waters, does it not follow, if the right is held under federal law, and that law directs how navigation

may be carried on over these waters, that any law by a State which imposes a condition not prescribed by Congress, is in violation of the constitution of the United States? It is not important, therefore, to enquire whether, in the absence of Congressional action the State has the power to regulate navigation; because Congress has acted. No State has ever claimed the right to regulate navigation. The regulation must not only be exclusive, but it must be uniform; and any State law regulating navigation must, therefore, be void. The case of *Livingston v. Van Ingen*, 9 John. R. 507, gives the law as to the *jus publicum*.

Then the right of free navigation over these waters under an act of Congress is one of the immunities which belongs to every citizen sailing under the flag of the United States. And the question is—does this act place a citizen of Massachusetts in any other condition than a citizen of Virginia or of any other State would occupy? There are two vessels in the waters of Virginia, under the flag of the United States, holding their title under the same sovereign authority, bound to the same place, owned by citizens of a common country—citizens of the United States—the owner of one a resident of Virginia and the other of North Carolina; they get their clearances and start with a fair wind on their voyage.

The one is permitted to go without
186 interruption; *the other is not permitted to proceed until it seeks out a pilot, and is inspected, and pays five dollars.

This property in vessels is wholly regulated by United States law; and has never been the subject of State laws since the constitution was adopted. The recording acts of Virginia do not embrace it. If it is to be transferred or mortgaged, this must be done in the custom house.—The act of Congress regulates the ownership of this property; says who shall own it—a citizen of the United States, and not a foreigner—takes it from its keel, and makes minute regulations in relation to it. And this being the case, these two citizens holding these vessels under the same law, are they not to be placed in the same condition? Each citizen is entitled to every immunity belonging to any other citizen, and a law which interferes with it deprives him of his immunities.

This law seeks to make the vessel the violator of the law, and to subject it; and the Attorney General has endeavored to show that the two vessels were not in like circumstances. Whilst he presented several illustrations he never referred to the case before the court. I would have been pleased to hear him point out the circumstances, which this court can enquire into, in which they differ; keeping in mind the facts that they hold the property under the law of the United States, and as citizens of the United States; and that as such they are entitled to the immunities of the citizen of each State.

Take the police power of the State. A State has a right to punish any captain of

a vessel committing a crime in her waters. But suppose a law is passed which provides that the captain of a vessel owned in Massachusetts shall be imprisoned for a specific offence, ten years in the penitentiary, and that for the same offence the captain of a Virginia vessel shall be imprisoned five years. Would that law be constitutional?

The police power is admitted to extend
187 to the case, and yet the law *would be clearly null, as violating this clause of the constitution. And if this is so, how does it differ from the case before the court? We admit the police power to protect slave property; but the question is, whether the means used are constitutional. The tax of five dollars, if the principle involved in it is unconstitutional, cannot lose its character by the smallness of it. And how can the law make the same act a misdemeanor in one man and not in another, and yet not affect his immunities.

This inspection is not a privilege; but the requirement of it is a burthen; and an exemption from it is an immunity; and in that sense may be regarded as a privilege; and the citizen of North Carolina is deprived of a privilege which a citizen of Virginia enjoys. I refer to *Chapman v. Miller*, 2 Speer's R. 769. It is said that this case was decided on the ground that there was a conflict of legislation. This is an error. There was not then an act of Congress on the subject; but the act was held to be unconstitutional because it imposed a pilotage on a coaster from Massachusetts which it did not impose upon a like vessel from another State.

The Attorney General considers that the only effect of this clause of the constitution is to lift the incubus of alienage from the citizens of another State. This is true. But what is the effect of lifting this incubus, upon that species of property which is held under the laws of the United States, in the waters common to all the citizens? I need not deny that a non-resident citizen of another State does not enjoy all the privileges of a citizen in the State. That is equally true of a non-resident citizen of Virginia. If both come here they must remain the same length of time to be entitled to vote.

It is said that but for the distinction made in this act between citizens of the State and citizens of other States, there would in fact be a preference given to the latter. This goes upon the assumption
188 —that if the non-resident *takes a slave he is caught by the search, and the resident who takes a slave is to be punished when he returns to the State. But how is it where the non-resident has no slave on board his vessel; or neither has them? The non-resident must be subjected to the humiliation of a search, and pay the tax; the resident goes quit. But it is said if a non-resident steals a slave and gets away we cannot punish him. If that be so, does it help us to solve the question whether this law is according to the constitution? Upon the judicial view of the case he may

be demanded, and will be surrendered; and however the fact may be this court can only look to the question as affected by the laws as they ought to be executed.

As to the oyster laws, that is legislation in respect to the property of the State; and may be such as the State may choose to make it.

This act imposes a tax on a vessel owned by a citizen of another State. It is said this is not involved in this case. The appeal brings up the law not in part but in the whole. The appellant says he did not submit to the inspection of his vessel, because if he had done so, he must pay five dollars, and have his vessel detained until it was paid. That he did not choose to pay this illegal tax, and therefore left without submitting to the inspection. This was the only mode of avoiding the tax. He could not have the inspection without paying the tax, and therefore he was not bound to submit to the inspection if he was not bound to pay the tax. And thus the constitutionality of this tax is brought up. This is a tax on property in a locality which the State laws do not cover, and on property owned out of the State. It is not pretended that the State can tax the property of other States not within her taxable limits. This too is a tax on navigation, and an unequal tax; and if the State may impose the tax of five dollars she may equally impose a tax of five hundred or five thousand dollars. I refer to Judge *Butler's opinion in 2 Speer's R. 769. It is said the act is merely for the protection of slave property. But shall we tax the people of other States to protect our property? There is no analogy between this tax and pilot and quarantine fees. In those cases a service is rendered to the person who is to pay, and no offence is charged or suspected. They are not taxes in any just sense, but payment of just dues.

I do not concur in Mr. Johnson's views of the constitution; but whether the commercial power is exclusive or concurrent, is not important in this case. The best view of the subject is by Judge Curtis in *Smith v. The State of Maryland*, 18 How. U. S. R. 71; but the whole subject has been exhausted by the arguments of counsel and the opinions of the judges from *Gibbons v. Ogden* down to this case. Whether the power in Congress is exclusive or concurrent, it is admitted on all hands, that when Congress has acted, its action is exclusive; and Congress has acted by the navigation act which prescribes the terms on which vessels shall pass through our waters. The act of 1856 is in conflict with the navigation act, stopping vessels on their voyage, and imposing other and additional conditions on which they are to exercise the rights given to them by the act of Congress. The *Passenger cases*, 7 How. U. S. R. 414. *Wayne, J., Brown v. State of Maryland*, 12 Wheat. R. 419.

I care not whether this act is called a police law or by any other name. Before it can be sustained it must be shown that

it is conformable to the constitution, or it must be held that the State may enact police laws in violation of the constitution of Virginia and the United States. In *City of New York v. Miln*, 11 Peters' R. 102, it was held that this could not be done. And this law, I insist, is in violation of the constitution.

The pilot laws were authorized by act of Congress, and wisely, because the fees 190 could not be uniform, the *trouble, labor and expense at one port being much greater than at another. And so as to the quarantine laws, by the act of 1799, they were sanctioned and adopted. *Brightley's Dig.* 810.

DANIEL, J. The action in this case was brought against the plaintiff in error to recover of him the sum of five hundred dollars, the penalty imposed by the first section of the act passed the 17th of March 1856, entitled "an act providing additional protection for the slave property of the citizens of this commonwealth." The judgment was rendered on a special verdict in which the jury find "that the defendant (the plaintiff here), a citizen of Massachusetts, did on the 4th of August, 1856, then being the captain and owner of the schooner *Nymphus C. Hall*, owned in part by citizens of Massachusetts, leave the waters of Virginia with said schooner, for a port north of and beyond the capes of Virginia, without having first obtained a certificate of inspection as required by the provisions of the statute;" and if the court shall be of opinion that said statute is not in conflict with the constitution of the United States or the bill of rights and constitution of Virginia, and is a law governing in such cases, then the jury find for the plaintiff (in the action) the sum of five hundred dollars with interest from the 4th of August 1856, and costs, &c.; but if the court shall be of opinion, that said statute is in violation of the constitution of the United States, or the constitution and Bill of Rights of Virginia, then they find for the defendant.

In the petition for the supersedeas and in the argument here, it is urged that the statute in question is in conflict with several of the provisions of the constitution of the United States—and, first, with the third clause of the eighth section of the first article, declaring that Congress shall have 191 power "to regulate commerce *with foreign nations and among the several states and with the Indian tribes."

The provisions of the statute which, it is supposed, bear more immediately upon this question as well as the other questions raised in the case, are to be found in the first, second, fourth, fifth, sixth, eighth, eleventh, twelfth and sixteenth sections.

By the first section it is enacted that it shall not be lawful for any vessel, of any size or description whatever, owned, in whole or in part, by any citizen or resident of another state, and about to sail or steam from any port or place in this state, for any port or place north of and beyond the capes

of Virginia, to depart from the waters of this commonwealth until said vessel has undergone the inspection provided for in the fourth section and received a certificate to that effect. If any such vessel shall depart from this state without such certificate of inspection the captain or owner shall forfeit and pay the sum of five hundred dollars; to be recovered by any person who will sue for the same in any court of record in this state, in the name of the governor of the commonwealth. Pending said suit the vessel of such captain or owner is not to leave the state until bond be given by the captain or owner, or other person for him, payable to the governor, with sureties, in the penalty of one thousand dollars, for the payment of the forfeit or fine and costs; and in default of such bond the vessel shall be held liable; and there is a proviso that the section is not to apply to vessels belonging to the United States government, or vessels American or foreign, bound direct for any foreign country, other than the British North American Colonies.

The second section constitutes the pilots licensed under the laws of Virginia, inspectors to execute the act. By the fourth section it is made the duty of such inspectors to examine and search the vessels mentioned in the first section, to see that no slave, or person held to service or labor in this state, or person charged with the commission of any crime within the state, shall be concealed on board said vessel. The inspection is to be made within twelve hours of the time of the departure of the vessel from the waters of Virginia, and may be made in any bay, river, creek or other watercourse of the state; provided, however, that steamers plying as regular packets between ports in Virginia and those north of and outside of the capes of Virginia, shall be inspected at the port of departure nearest to Old Point Comfort.

The fifth section directs that a vessel so inspected and getting under weigh with intent to leave the waters of the state, if she returns to an anchorage above Back river point or within Old Point Comfort shall be again inspected as if an original case; if, however, such vessel be driven back by stress of weather to seek a harbor she is to be exempt from payment of a second fee unless she holds intercourse with the shore.

By the sixth section the inspector is directed, after searching the vessel, if he sees no cause to detain her, to give to the captain a certificate to that effect: if, however, upon such inspection, or in any other manner, any slave or person held to service or any person charged with crime is found secreted on board of any vessel, or any vessel is detected in violating the provisions of this act, it is made the duty of the inspector to attach the vessel and arrest the person on board to be delivered up to the sheriff or sergeant of the nearest port in the commonwealth to be dealt with according to law.

The eighth section allows to the inspector a fee of five dollars for every inspection under the act, except inspections of vessels engaged in the coal trade, the fee for which is two dollars—and declares the vessel liable for its payment.

193 *The eleventh section forbids any pilot, under a penalty of fifty dollars, from piloting, out of the jurisdiction of the state, any vessel which is required to be inspected and which has not obtained and exhibited to him the certificate of inspection.

The twelfth section authorizes the courts of the several counties and corporations situated on the Chesapeake bay or its tributaries, by an order entered of record to appoint as many inspectors at such places within their inspection districts as they may deem necessary, to prevent the escape, or for the recapture, of slaves attempting to escape beyond the limits of the state, and to search or otherwise examine all vessels trading to such counties and corporations; the expenses in such cases to be provided for by a levy on negroes now taxed by law; but no inspection by county or corporation officers thus appointed is to supersede the inspection, by pilots, provided for in the act.

The sixteenth section directs that the fines and forfeitures except such portions as are otherwise provided for in other sections of the act, shall be paid into the treasury of the state, to constitute a fund to be called "the fugitive slave fund" and to be used for the payment of rewards awarded by the governor for the apprehension of runaway slaves, and to pay the expenses incident to the execution of the statute, and for such other purposes as may be hereafter determined on by the general assembly.

It is proper to add that by the ninth and tenth sections, provisions are made for rewarding any inspector who shall apprehend a slave in the act of escaping on board a vessel trading to or belonging to a non-slave-holding state, and for punishing any inspector who, for the want of proper exertion or by neglect in the discharge of his duties, shall permit a slave to escape. It is proper too to observe further that

194 during the same session *of the legislature at which the act under consideration was passed (indeed on the same day of the session) two other acts were passed, the one an act to amend the Code so as more effectually to prevent the escape of slaves, and the other an act to increase the rewards for the arrest of runaway slaves. By the provisions of the former of these two acts, any free person who carries or causes to be carried out of any county or corporation any slave without the consent of his owner, or who shall attempt to carry off or aid or connive at or be in any way concerned in the escape of any slave, with intent to defraud or deprive the owner of such slave, is liable, on conviction to be confined in the penitentiary and to forfeit to the owner double the value of the slave;

and if the person so offending is at the time in command of or attached to a vessel, the vessel is to be forfeited to the commonwealth: any master of a vessel trading to or bound beyond the limits of the state having a slave on board without the written consent of the owner and going with him beyond the limits of any county, and any free person traveling by land who shall aid any slave to escape out of any county are to be considered as carrying off such slave within the meaning of the foregoing provisions. The master or skipper of any vessel who knowingly receives on board, any runaway slave and permits him to remain on board without proper effort, is liable to penalties of a like character, and if such slave be on board such vessel after leaving port, the master or skipper shall be presumed to have knowingly received him. And if a free person advise any slave to abscond from his master or aid such slave to abscond by procuring for, or delivering to him, a pass, register or other writing or furnishing him money, clothes, provisions or other facility, or be in any manner accessory to the escape or attempt to escape of such slave he is also punishable therefor by confinement in the penitentiary.

195 *No one can, I think, read the act in question in connexion with the provisions of the two other statutes just mentioned, and other acts of a like character to be found in our Code and Sessions Acts, without coming to the conclusion that the act was framed with no view to the regulation of commerce, and with no design to interfere with its regulation by Congress; but that its real object and design was as its title declares, to provide additional protection for the slave property of the citizens of the commonwealth; that it forms a part of a system of police measures adopted by the legislature in the honest effort to suppress and prevent the escape and abduction of our slaves.

Such being the avowed and manifest design of the act, it is difficult to understand the argument that would place it in conflict with the provisions of the constitution in question, even allowing, to the word commerce, the most comprehensive meaning that has been given to it, and, to the grant, of power over the subject, to Congress, the most liberal construction that has been adopted in any judicial decision brought to our notice. In no one of the numerous cases cited at the bar, in the course of the extended argument here, have I been able to find any ruling or dictum which would exempt private vessels, their masters or crews—the instruments and agents of commerce—whilst within the jurisdiction of a state, from the operation of its laws passed with a view to the restraint and punishment of offences against the persons or property of its citizens. On the contrary in nearly all of these cases, in which the validity of state laws have been disputed on the ground of their alleged conflict with the clause of the constitution in question, it has been assumed on the one hand and conceded on

the other, that the laws of a state passed in the exercise of its reserved powers over its internal police, if not paramount to any mere regulation of commerce by Congress, are yet not to be denied their full force and efficacy in any cases other than those where the law of the state and the law of Congress are so directly and vitally opposed to each other that they can not be reconciled or consistently stand together. The law under consideration, as I understand it, stands opposed to no decision made or opinion pronounced in any one of the cases of *Gibbons v. Ogden*, 9 Wheat. R. 1; *Brown v. State of Maryland*, 12 Id. 419; or the cases of *Smith v. Turner*, and *Norris v. The City of Boston*, *The Passenger Cases*, 7 How. U. S. R. 283. So far from it, in the concessions made by the judges who concurred in these decisions, and more especially in the concessions made by the judges constituting the majority of the court, in the *Passenger Cases*, is to be found the admission of every principle necessary to the vindication of the law under consideration against the allegation of its being in conflict with the constitutional power of Congress over the subject of commerce. Thus in the case of *Smith v. Turner*, Mr. Justice McLean at p. 400 (7 How.) says, "in giving the commercial power to Congress the states did not part with that power of self preservation which must be inherent in every organized community. They may guard against the introduction of anything which may corrupt the morals or endanger the health or lives of their citizens." Again at page 402, whilst denying that a state can regulate foreign commerce he says, "it may yet do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as other property owned by its citizens. A state may tax the stages in which the mail is transported, but this does not regulate the conveyance of the mail any more than taxing the ship regulates commerce. And yet in both instances the tax on the property in some degrees affects its use." In the conclusion of his opinion in *Norris v. City of Boston*, p. 410, he observes: "Under the first

197 *and second sections of the act the persons appointed may go on board of a ship from a foreign port which arrives at the port of Boston with alien passengers on board and examine whether any of them are lunatics, idiots, maimed, aged or infirm, incompetent to maintain themselves, or have been paupers in any other country, and not permit such persons to be put on shore unless security shall be given that they shall not become a city, town or state charge. This is the exercise of an unquestionable power in the state to protect itself from foreign paupers and other persons who would be a public charge." Mr. Justice Grier, in the course of his opinion in the last mentioned case, at p. 457, remarks: "It must be borne in mind that the controversy in this case is not with regard to the right claimed by the State of Massachusetts,

in the second section of the act, to repel from her shores, lunatics, idiots, criminals or paupers which any foreign country or even one of her sister states might endeavor to thrust upon her; nor the right of any state whose domestic security might be endangered by the admission of free negroes, to exclude them from her borders. This right of the states has its foundation in the sacred law of self-defence, which no power granted to Congress can restrain or annul. It is admitted by all that those powers which relate to merely municipal legislation, or what may be more properly called internal police, are not surrendered or restrained; and that it is as competent and necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds and convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported." And Mr. Justice Wayne, at p. 426, says: "When Congress shall legislate—if it be not disrespectful for one who is a member of the judiciary to suppose so absurd a thing of another department of this government, to make

198 paupers, *vagabonds, suspected persons and fugitives from justice, subjects of admission into the United States, I do not doubt it will be found and declared, should it ever become a matter for judicial decision, that such persons are not within the regulating power which the United States have over commerce. Paupers, vagabonds and fugitives never have been subjects of rightful national intercourse, or of commercial regulations, except in the transportation of them to distant colonies to get rid of them, or for punishment as convicts. They have no rights of national intercourse; no one has a right to transport them without authority of law from where they are to any other place; and their only rights, where they may be, are such as the law gives to all men who have not altogether forfeited its protection." For a fuller statement of these principles, reference may be made to the opinion of Mr. Justice Barbour in the case of *The City of New York v. Miln*, 11 Peters R. 139-141, and to the opinions of Mr. Justice Woodbury and Mr. Justice Grier in *The License Cases*, 5 How. U. S. R. 628-632. In the last mentioned case Mr. Justice Grier concludes his opinion with the following observations: "It has been frequently decided by this court 'that the powers which relate to merely municipal regulations, or which may be more properly called internal police, are not surrendered by the states or restrained by the constitution of the United States; and that consequently in relation to these the authority of a state is complete, unqualified and conclusive.' Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint and punishment of crime, for the preservation of the public peace, health and morals, must come within the category. As subjects of legislation they are, from their very nature,

of primary importance; they lie at the foundation of social existence; they are 199 for the protection of life and *liberty, and necessarily compel all laws on subjects of secondary importance which relate only to property, convenience or luxury, to recede when they come in conflict or collision; *salus populi suprema lex*. If the right to control these subjects be 'complete, unqualified and exclusive' in the state legislatures no regulations of secondary importance can supersede or restrain their operations on any ground of prerogative or supremacy. The exigencies of the social compact require that such laws be executed above all others. It is for this reason that quarantine laws which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers, they operate on the ship which is the instrument of commerce and its officers and crew, the agents of navigation; they seize the infected cargo and cast it overboard. The soldier and the sailor, though in the service of the government, are arrested, imprisoned and punished for their offences against society. Paupers and convicts are refused admission into the country. All these things are done not from any power which the states assume to regulate commerce or to interfere with the regulations of commerce, but because police laws for the preservation of health, prevention of crime and protection of the public welfare, must of necessity have full and free operation according to the exigency which requires their interference."

It is true that there is conflict between some of these views and portions of the opinion of Chief Justice Taney in the same case, which it would seem proper to notice. In commenting on the case of *Gibbons v. Ogden* at p. 582, he observes: "It is admitted by the court, in that case, that a state may, in the execution of its police and health laws, make regulations of commerce, but which Congress may control. It is very clear that so far as these regulations are merely internal and do not 200 *operate on foreign commerce, or commerce among the states, they are altogether independent of the power of the general government, and cannot be controlled by it. The power of control therefrom which the court speaks of, presupposes that they are regulations of foreign commerce, or commerce among the states. And if a state, with a view to its police or health may make valid regulations of commerce which yet fall within the controlling power of the general government, it follows that the state is not absolutely prohibited from making regulations of foreign commerce within its own territorial limits, provided they do not come in conflict with the laws of Congress. It has been said indeed, that quarantine and health laws are passed by the States, not by virtue of a power to regulate commerce, but by virtue of their police powers, and in order to guard the health and lives of their citizens. This, however, cannot be said of the pilot laws, which are

yet admitted to be equally valid. But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws except in so far as it has been restricted by the constitution of the United States. And when the validity of a state law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives

201 that may be supposed to have influenced the *legislature, nor can the court enquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade." He then proceeds however, more fully in support of the proposition, which he was seeking to establish, and in reference to which the foregoing remarks were made, to insist, that the grant of power to Congress to regulate foreign commerce is not of itself a prohibition to the States, but that the States have still the right to make and enforce regulations of the subject for their own territory subject only to the restriction that they do not conflict with some law of Congress.

It is proper also to observe that, in the recent case of *Sinnot v. Davenport & al.*, 22 How. U. S. R. 243, (which will be again referred to), Mr. Justice Nelson, in delivering the opinion of the Supreme court, in answer to an argument, that the act whose validity was in question, was but the exercise of a police power, and hence, if the act should be found in conflict with a law of Congress regulating commerce, it should still be regarded as a valid act and as excepted out of, and from, the commercial power, fully concurs in the views of Judge Taney on the subject. "The nullity of any act inconsistent with the constitution," (he observes) "is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the State legislature as do not transcend their powers, but though enacted in the execution of acknowledged State powers, interfere with or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case the act of Congress or treaty is supreme; and the law of the State, though enacted in the exercise of powers not

202 controverted must *yield to it." He

makes, however, this important addition: "We agree, that in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together; and also that the act of Congress should have been passed in the exercise of a clear power under the constitution." In this connexion it is further to be considered, that the Supreme court in the case of *Colley v. Board of Wardens of Port of Philadelphia*, 12 How. U. S. R. 299, have decided that though the pilot laws are regulations of navigation, and therefore of commerce, and by consequence within the grant to Congress of the commercial power, yet that this power in respect to such laws, is not exclusive; and that the laws of the States on the subject are constitutional and valid.

This being settled, in the view which I take of the law under consideration, it is not material to the settlement of this case, whether we adopt the views of those judges of the Supreme court who hold that health laws and other regulations of police passed by the State, must prevail in any conflict with regulations of commerce by Congress, or concur with Judge Taney and the other members of the court entertaining the like sentiments, in holding that the police laws of the State are to have full sway and efficacy over all matters within the jurisdiction of the State until they be found in direct and fatal antagonism to some regulation of commerce, by Congress. For placing the act in question upon the footing on which the plaintiff in error would place it, to wit, of a commercial regulation, it would, for the most obvious reasons, be entitled to the entire benefit of the main reasoning upon which Mr. Justice Curtis, who delivered the decision in the case just cited, rested the validity of the pilot laws; which

203 was, that, from their very *nature it was not necessary that they should be uniform, but on the contrary, they demanded a diversity which could alone meet the varying local necessities of navigation; and consequently that the subject was one likely to be best provided for, not by one system or plan of regulations to be adopted by Congress, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits. If we could view this act then as a regulation of commerce or navigation passed to prevent vessels from becoming instrumental in the escape of slaves, the same plea of a local necessity for the passage of the law in question sustains it. The property which it seeks to protect is of a peculiar character confined to a minority of the States of the Union; the laws necessary for its protection in one State would be wholly inapplicable to another State.

And in this connexion it may be asked, with what regulation of commerce by Congress does the law in question conflict that

the pilot laws in the case last cited did not conflict with? It was said in the course of the argument, that it conflicts with the laws of Congress regulating the enrolment and licensing of vessels for the coasting trade. In this case there is no proof that the vessel in question had a coasting license; the special verdict is silent on that subject. But waiving that defect in the case, there is a ready answer to the objection to be found in the case just cited. In that case it was admitted that the Consul, one of the vessels of which the pilotage was demanded, was engaged in the coasting trade, sailing under a coasting license of the United States, and was bound from the port of Philadelphia in the State of Pennsylvania to the port of New York in the State of New York. Yet those facts were decided to be of no force.

It is obvious that the decisions in 204 none of the cases *yet cited, bear immediately on the question before us, though they relate to subjects of a kindred character.—They were, however, made the subject of a very full examination at the bar, and I have felt it my duty to refer to them, and have, I think, shown that the opinion and reasonings, of the judges in those cases, so far as they bear on this case, instead of warranting any doubt as to the validity of the law in question, tend strongly to the establishment of its constitutionality. This law cannot be likened to the law of Alabama which was pronounced unconstitutional by the Supreme court in the case of *Sinnot v. Davenport*, 22 How. U. S. R. 227, already cited. The law there required the owners of steamboats navigating the waters of the State, before such boat should leave the waters of Mobile, to file a statement in writing in the office of the probate judge of Mobile county setting forth—first the name of the vessel; second the name of the owner or owners; third, his or their place or places of residence; fourth, the interest of each in the vessel. That law was held to be in conflict with the act of Congress passed 1793 (See *Brightley's Digest*, Coasting Trade 140, § 7,) so far as it bore upon a coasting vessel which had taken out a coasting license and was duly enrolled under the law of Congress for carrying on the coasting trade, and plied between New Orleans and the cities of Montgomery and Wetumpka in Alabama. The ground of the decision was that the enrolment prescribed by the act of Congress required the owner or owners to furnish, under oath, to the collectors all the information required by the State law, and which is incorporated in the body of the enrolment; that Congress therefore had legislated on the very subject which the State law undertook to regulate and had limited its regulation in the matter to a registry at the home ports.

I will now proceed to notice briefly the particulars in which, it is contended, 205 the law conflicts with the clause *of the constitution in question—or interferes in any manner with the operations

of commerce, or subjects it to any improper burden. The objectionable features of the law in this aspect, as is said, are those which direct the search of the vessel, and exact a fee to the pilot or inspector for making the search; and those which forfeit the vessel and direct its seizure and the arrest of those on board, if found violating the laws of the State in any of the particulars mentioned in the act.

In respect to the last objection the case of *Smith v. The State of Maryland*, 18 How. U. S. R. 71, is, as I conceive, directly in point. In that case a vessel which was enrolled and licensed for the coasting trade was seized condemned and forfeited, by proceedings, in the State courts of Maryland, for a violation of an act of that State passed to prevent the destruction of oysters in the waters within the jurisdiction of that State. The Supreme court of the United States, without dissent, sustained the judgment. In delivering the opinion of the court, Mr. Justice Curtis held that the laws of Congress for the enrolment and licensing of vessels conferred no immunity, from the operation of the valid laws of a State; that where a vessel so licensed engaged in commerce between the States is interrupted therein by a law of a State, the question arises whether the State had power to pass the law by force of which the voyage was interrupted; that if it should be found as in *Gibbons v. Ogden*, that the State had not power to make the law under which a vessel of the United States was prevented from prosecuting its voyage, then the prevention would be unlawful, and the proceedings under the law invalid. But that a State might make valid laws for the seizure of vessels of the United States—such among others as quarantine and health laws; that the State of Maryland had a right to pass laws for the protection of oysters, and the punishment of those who

206 should destroy them by the *means interdicted in the act; that to inflict a forfeiture of a vessel on account of the misconduct of those on board, treating the vessel as liable to forfeiture because the instrument of the offence, is within established principles of legislation which have been applied by most civilized governments; and that it was within the legislative power of the State to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States for a disobedience, by those on board, of the commands of such a law.

It can require no argument to show that this State has a right to pass laws to prevent the escape of its slaves, and to punish all who may aid them in the effort to escape. Indeed the right to pass such laws and to subject to forfeiture vessels which shall be made the instruments of their violation, is entirely free from seeming difficulties that were plausibly said to lie in the way of the Maryland law. So much of the law therefore as seeks to interrupt the voyage of a vessel and forfeit it when found in the actual violation of our laws, is free from

the objection under consideration. Had the appellant or his vessel been detected in the actual violation of our laws there is no regulation of commerce which he could have relied on to exempt his person from arrest, or his vessel from seizure and forfeiture.

And I apprehend it is clear that the right of a State to pass laws for the prevention of crimes against the property of its citizens, is just as well recognized as its right to inflict punishment for such crimes when actually committed. And it would seem to follow as a necessary corollary, that if the penalties for actual violations of the laws may properly reach to, and interfere with the operations of commerce, all just precautionary measures adopted with a view to the prevention or detection of such violations, must have the like force and virtue.

In the case of *The City of New York* 207 v. Miln, 11 *Peters R. 102, already cited, this proposition was treated by Mr. Justice Barbour, in delivering his opinion, as one free from all dispute. "No one will deny (he says) that a State has a right to punish any individual found within its jurisdiction who shall have committed an offence against its criminal laws. We speak not here of foreign Ambassadors as to whom the doctrines of public law apply. We suppose it to be equally clear that a State has as much right to guard by anticipation against the commission of an offence against its laws, as to inflict punishment upon the offender after it shall have been committed." For a fuller statement of the law in this respect I refer to the opinion. The passage cited bears immediately on the question in hand. Unless then the preventive measures of this law, of which, the search is the one most seriously objected to, come in conflict with some other provision of the constitution of the United States or some provision of our own Bill of Rights and constitution, the mere fact that it causes the temporary detention of vessels employed as vehicles of commerce, on their voyage, is of no weight as an objection to the validity of the law.

The law, it is said by the counsel of the appellant, is in conflict with the spirit of the fourth article of the amendments of the constitution of the United States, which declares that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized; and more especially in conflict with the Bill of Rights of Virginia, which declares that general warrants whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or 208 persons not *named, or whose offence is not particularly described, and supported by evidence, are grievous and oppressive and ought not to be granted. It is sufficient to say, in respect to the first

branch of the objection, that the clause of the constitution of the United States in question is in restraint only of process issued under the laws of the United States, and has no application whatever to the laws of the States or proceedings under them. This has been repeatedly decided by the Supreme court. *Smith v. State of Maryland*, 18 How. U. S. R. 71, and cases there cited. In passing upon the question whether the law violates our Bill of Rights, I do not deem it necessary to consider a preliminary question much discussed at the bar, to wit, whether the restraints of the section in question were restraints only on the judiciary in the exercise of its powers, or also extended to the legislature. Conceding for argument's sake that its restraining influence was designed to extend over all the departments of the government, I have not been able to bring my mind to see that it can affect such a law as the one under consideration. The power of search which is given by this law is derived from that quasi maritime power or police over the waters of the State visited by vessels engaged in commerce which is inherent to the sovereignty of every State, and has never been surrendered by Virginia to Congress—certainly never given exclusively to Congress. The Bill of Rights is intended to protect the citizens in their persons and houses from unreasonable search; but surely it could never have been within the meaning of the founders of our government, by this clause, to strip the State of one of those powers essential to the protection of the State, and one which is claimed and exercised by all nations, viz: that of ascertaining the character, purposes and intentions of all vessels visiting its ports; of seeing that they are not made the vehicles of bringing disease or crime into the 209 *State, or in other respects made the instruments of violating its laws.

It is essential to the safety of every nation that it should have the power, not only to seize and forfeit if necessary, vessels visiting its waters, and to punish the persons controlling and navigating them, for breaches of its local regulations, but also to impose upon them such restraints as are necessary to prevent them from violating its laws. The fourth article of the amendments of the constitution of the United States has never been regarded by Congress, I believe, as denying to it the full exercise of this right. Such a power has been always deemed essential to the protection of the customs and the full execution of the revenue laws, as will be seen by a reference to the history of our federal legislation. Thus, in the laws on the coasting trade, *Brightley's Digest* 148, § 41, it is declared "to be lawful for any officer of the revenue to go on board of any ship or vessel whether the same shall be within or without his district, and the same to inspect, search and examine, and if it shall appear that any breach of the laws of the United States has been committed, whereby said ship or vessel, or the goods, wares and merchandise on

board, or any part thereof is or are liable to forfeiture, to make seizure."—I am not aware that there has been any question as to the constitutionality of these provisions; and they have been in force from 1793. So again in the laws on imports and exports, Brightley p. 410, § 388, passed in 1799, it is enacted that "every naval officer, collector and surveyor, or other person specially appointed by them for the purpose, shall have full power and authority to enter any ship or vessel in which they shall have reason to suspect any goods, wares or merchandise subject to duty are concealed, and therein to search for, seize and secure any such goods, wares or merchandise; and if they shall have cause to suspect a

210 concealment thereof in any *particular dwelling-house, store, building or other place, they or either of them, shall upon proper application, on oath, to any justice of the peace be entitled to a warrant to enter such house, store or other place (in the day time only,) and there to search for such goods; and if any shall be found to seize and secure the same for trial; and all such goods, wares and merchandise on which the duties shall not have been paid or secured to be paid, shall be forfeited." Here we find the principle in question most distinctly and emphatically recognized and asserted; the right to search the vessels being placed in contrast with the right to search the houses, stores, &c.—No oath is made necessary as a prerequisite to the search of the former, whilst it is to the search of the latter.

From the very nature of the mischief, of which the law under consideration was intended as a remedy, to wit, the concealment, carrying away and escape of persons on board of vessels in the very act of leaving the waters, and departing from the jurisdiction of the State, the law would be of little worth or efficacy if no search could be made except upon warrants founded upon oath of probable cause, &c. The fact of the flight, or effort to escape, or of the aid given, or facility afforded, by the vessel would, in all probability, be rarely known or suspected till the escape had been effected. In the absence of such precautionary measures the vessel would, in most instances, be beyond the jurisdiction of the State, and the property of the citizens lost, before the slow process of the law could reach the offending vessel or its master.

But it is said that the exaction of the fee for the search is unconstitutional—that it violates the second clause of the 10th section, article 1 of the constitution, which prohibits any State without the consent of Congress, from laying any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. A complete answer

211 to this objection "is to be found in the case of *Cooley v. Board of Wardens of the Port of Philadelphia*, and the *Passenger cases*. At p. 314, of the first mentioned case, Mr. Justice Curtis says: "This provision of the constitution was

intended to operate upon subjects actually existing and well understood when the constitution was formed. Imposts and duties on imports and exports and tonnage were then known to the commerce of a civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial States enforced their pilot laws, as they were from the charges for wharfage or towage or other local port charges for services rendered to vessels or cargoes; and to declare that such pilot fees or penalties are embraced within the words imposts or duties on imports, exports or tonnage would be to confound things essentially different and which must have been known to be essentially different by those who used the language." And in the *Passenger cases*, Mr. Justice Wayne, in making a summary of what he understood to be the several propositions intended to be decided by the majority of the court in those cases, states at p. 415, (7 Howard,) as the 9th of those points or propositions, that the States may, in the exercise of their police powers, enact quarantine and health laws, and may exact from the owner or consignee of a quarantined vessel and from the passengers on board of her, such fees as will pay to the State the costs of their detention and of the purification of the vessel, cargo and apparel of the persons on board. The whole question, then, as to the fee, is, as I conceive, determined in settling the previous question. When the inspection of the vessel is once shown to fall within the legitimate functions of a police regulation the right to demand the fee for making the search, according to these authorities, follows as a necessary consequence.

Two other objections to the law re-
212 mains to be considered: *First—that it is in opposition to the second section of the fourth article of the constitution, which declares that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States; and secondly—that it conflicts with the sixth clause of the 7th section of the 1st article of the constitution declaring that, no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another—nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties to another.

Is the law open to the first of these objections? It is contended that it is in this, that it subjects the vessels of citizens of other States, to charges and burthens from which the vessels of the citizens of our own State are exempted. The language of the law out of which the question arises, is, "it shall not be lawful for any vessel of any size or description whatever, owned in whole or in part by any citizen or resident of another State, and about to sail or steam from any port," &c.

In proceeding to enquire into the force of the objection the first step is the ascertainment of the sense in which the words

citizen and resident were used by the legislature.

In the case of *Gassiss v. Ballow*, 6 Peters R. 761, it was held by Chief J. Marshall, that a citizen of the United States residing in any State of the Union is a citizen of that State. There are other cases of the Supreme court to the same effect. And in *Towle's case*, 5 Leigh 743, the General court of this State decided that a naturalized citizen of the United States or a native citizen of any other State of the union domiciled in Virginia, being entitled to all the privileges of a citizen of this State, is a citizen of Virginia; and by the Code of 1849, p. 61, it is declared, that all free white persons born in the State, all free white

persons born in any other State of this union, who may be or become residents of this State, all aliens being free white persons naturalized under the laws of the United States, who may be or become residents of this State, &c., shall be deemed citizens of this State. And by the 3rd section of the same chapter, p. 63, it is declared that any citizen of the State being twenty-one years of age, who shall reside elsewhere and in good faith become the citizen of some other State of this union or the citizen or subject of a foreign State, shall not, while the citizen or subject of another State or sovereign, be deemed a citizen of this State. The second section of the chapter provides a mode (to wit by deed in writing, &c.) by which a citizen of the State may declare his purpose to relinquish his character of a citizen, and on his adopting that mode and departing from the State, the section declares that he shall be considered as having exercised his right of expatriation so far as regards this State and shall thenceforth be deemed no citizen thereof. A citizen of another State of the Union thus becomes a citizen of this State by residing in the State, and a citizen of Virginia may cease to be such by becoming the citizen of another State or country, or by expatriation. Construing the law in question in reference to the foregoing decisions and legislative provisions, it is obvious that the words "citizen or resident" in their present collocation cannot, without interpolating into the statute other words, give expression to the true meaning and purpose of the legislature, if we give to the word resident any one of the senses in which it is ordinarily understood. For if we suppose that by the use of the word is meant one temporarily sojourning in another State of the Union with no purpose of making it his permanent domicil, then the vessel of a citizen of Virginia, domiciliated in Virginia but sojourning in another State, might be subject to the burthen; whilst a ship owned by a former citizen of the State who had expatriated him-

self, *or indeed by a foreigner neither a citizen nor a resident of any State of the Union, would be exempted from the burthen; and if we understand the word as meaning one permanently residing in and domiciliated in another State though not a

citizen thereof, then a foreigner, not a resident, of any one of the United States, or if so, having but a temporary residence, might be exempted; whilst a native Virginian who by domiciliation had become a citizen of another State of the Union would be liable to have his vessel subjected to the search on the score of his being a citizen of such last mentioned State. And if this word resident is treated as a mere synonym of "citizen" then there would be a discrimination in favor of foreigners against native Virginians, who had expatriated themselves from the State, or who were merely sojourning in any other of the United States, without having abandoned their domicil in Virginia, or who were domiciliated in any foreign country, without having yet become citizens thereof. The purpose of the legislature manifestly was to provide that vessels owned by persons wanting in a certain relation to the State of Virginia should be liable to the examination provided for in the statute, and in the effort to designate and describe them they have adopted the indirect and awkward method of indicating such persons by the relation they have to other States. The words employed for the purpose, as they are now connected, (it has been seen) without some additions and explanations, so far from conveying the sense intended, lead to manifest absurdities; but by transposing the words and giving them an immediate connection with and reference to this State, they, admit, without any additional words, and without any other change of phraseology than the simple conversion of or into and, of a reasonable interpretation, and declare, as I conceive, the true meaning of the legislature, to wit, that vessels owned

by any other persons than the citizens and residents of this State—citizens of Virginia—permanently residing—domiciliated in the State, shall be liable to the search. Under this interpretation of the law a citizen of Virginia who has abandoned his domicil, but who has not become a citizen of any other of the United States, nor formally expatriated himself—as also a citizen of Virginia domiciliated in a foreign State but not yet become a citizen of that State, and so still a citizen of Virginia, would be subject to the regulation alike with all other persons not domiciliated in Virginia whether citizens of this State or other States of the Union.

Let us now proceed to consider briefly what is the nature of the privileges and immunities of citizenship to which the constitution entitles the citizens of each State in every other State. The language is broad—universal—"all the privileges and immunities"; yet it is clear that such is not the true meaning of the constitution.—It could not have been the design of the framers of the constitution to declare that a State may not allow to its residents—its inhabitants—some privileges which it may deny to the residents and inhabitants of other States. We have no authoritative expositions of this clause of the constitution giv-

ing us a full and complete definition of its terms; though, it has been, I think, clearly shown that they must be received in a qualified and restricted sense. Thus in the case of *Campbell v. Morris*, 3 Har. & McH. 535, 554, Judge Chase says—"By taking a retrospective view of our situation antecedent to the formation of the first general government or the confederation in which the same clause is inserted, verbatim, one of the great objects must occur to every person; which was the enabling the citizens of the several States to acquire and hold real property in any of the States—and deemed necessary as each State was a sovereign and independent State, and the States had confederated only for the purposes of general defence and security, 216 and to *promote the general welfare.

It seems agreed from the manner of expounding or defining the words immunities and privileges by the counsel on both sides, that a particular and limited operation is to be given to these words, and not a full and comprehensive one. It is agreed it does not mean, the right of election, the right of holding office, the right of being elected. The court are of opinion it means that the citizens of all the States shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the State in the same manner as the property of the citizen of the State is protected. It means such property shall not be liable to any taxes or burdens which the property of the citizen is not subject to. It secures and protects personal rights." He added that "a restriction of the power of the State legislatures to establish modes of proceeding for the recovery of debts is not to be inferred from the clause under consideration." In that case the words of the law whose constitutionality was questioned are—"If any person whatsoever not being a citizen of this State and not residing therein, shall or may be indebted unto a citizen of this State, or of any other of the United States, or if any citizen of this State being indebted to another citizen thereof shall actually run away, abscond or fly from justice, or secretly remove from his place of abode with the intent to evade the payment of his or her just debts, such creditor may in either case make application, &c., for an attachment," &c.

It was argued that the statute put the citizen of another State on a worse footing than the citizens of the State of Maryland; as by its provisions an attachment could not issue against a citizen of that State unless he was absconding or departing with a design to defraud his creditors, whereas in the case of a citizen of another State it was only necessary to show that he lived out of 217 *the State, and without any default or fraud on his part he was liable to be proceeded against. But the objection was without avail, and the validity of the law was sustained by the court. See also, *Ward v. Morris*, 4 Harris & McH. 330, in

which a decision was made to the like effect. See also, *Corfield v. Coryell*, 4 Wash. C. R. 370.

Like differences between the modes of proceeding against the citizens or residents of other States and the modes of proceeding against their own citizens or inhabitants will be found in the laws of most of the States; and I know of no decision in which it has been held that, by such discriminations, the citizens of such other States are deprived of any of their rightful privileges and immunities. A like discrimination is made in our own laws and, I presume, in the laws of other States in demanding of the resident of another State seeking to enforce by suit a demand against a resident of this State, that he give security for the payment to his adversary of the costs of the suit in case he is cast in his suit; not only so, but that he also secure to the officers of the law the fees for the services they may be required to render him in the discharge of their respective duties—whilst a resident of the State is free to prosecute his suit without giving such security.

In neither of these instances can it be said that the non-resident is deprived of any of the immunities of citizenship, in the sense contemplated in the constitution; he is held ultimately responsible for nothing that he would not have to meet were he a resident citizen of the State; though his responsibilities are enforced in a mode differing from that adopted in the case of the citizen of the State; a difference justified by the difference in the relative situations of the two parties. The presence of the person of the citizen and his consequent immediate amenability to the process of the court justly exempts him from 218 *a proceeding in the one instance and a demand for security in the other, that are deemed just and necessary in the case of the non-resident who is beyond the reach of the ordinary process of the law.

The principle exhibited in the foregoing illustrations admits, obviously, of a further extension. Whilst all the property in the State, whether owned by its own citizens or the citizens of other States, is entitled to its protection, the State has an undoubted right to see that no property within its limits and jurisdiction by whomsoever owned becomes the source of annoyance to the community or of danger to the lives or peace or property of its citizens. It would seem equally just that, when any species of property whether from its peculiar situation or other cause, though that cause be the absence or non-residence of the owner, becomes the source of peculiar or extraordinary danger to the community, the State should have the right to adopt such regulations of police and set on foot such measures of vigilance as it may in its wisdom deem best calculated to guard against the threatened mischief. There is no injustice in subjecting the property of one class of citizens of the State to stricter regulations than those applied to the like property of another class of citizens of the State, if

the discrimination is founded in a stronger necessity for rigor in the one case than in the other; nor is there any injustice in adopting a greater degree of vigilance in respect to the property of citizens of other States than is observed in respect to the like property owned by citizens of this State if there is greater danger, or reasonable grounds for the apprehension of greater danger to the safety of the public from the presence of such property in the one case than in the other.

It will be agreed too, I conceive, that in passing upon the law under consideration, respect for the legislature, nay sheer justice to that body, requires of us, that

219 we *give it credit for fair and reasonable dealing; that we are to take it for granted that the legislature has fairly endeavored to adapt the provisions of the law to the end avowedly sought to be accomplished; that under the pretext of providing a better protection to the slave property of the State, the legislature has not contemplated the sinister purpose of conferring upon the resident citizens of this State undue advantages over the citizens of the other States.

Is there, then, no good reason for the discrimination objected to?—no just ground for the search of vessels owned by the citizens of other States, or by our own citizens who have abandoned their residence in Virginia, which does not apply with equal force to vessels owned by the resident citizens of the State?

We have seen by a reference to the laws on the subject, that they not only subject to seizure and forfeiture any vessels which may be used as instruments for aiding in the escape of slaves, and visit with severe penalties all masters of vessels who may aid any slave to escape, but also extend to all persons who by affording any facility or otherwise "shall be in any manner accessory to the escape or attempt to escape of such slaves."

In the absence of a right to search the departing vessels of non-resident owners have we under these laws as complete a protection against them as is afforded in the case of resident owners? To my mind it is obvious that we have not. In the case of vessels owned by resident citizens, we have in their residence and amenability to the process of our courts, a safeguard against their knowingly allowing their vessels to be used as instruments or facilities to aid in the escape of slaves which we cannot have against the owners of vessels residing beyond our jurisdiction; as to the latter the provisions of the statute in respect to the accessory to the offence are without sanction or force; beyond the reach of the

220 law its denunciations, *as to them, are comparatively, without its terrors. It is true that in respect to the forfeiture and loss of the vessels, in case of detection, the resident and non-resident owners are under the influence of the like motives to dissuade and deter them from embarking in any criminal enterprise of the kind. But in

respect of personal responsibility the two classes of owners stand on wholly different and unequal footings: A difference arising out of the very circumstance of residence in the one case and non-residence in the other. The resident uses his property—his vessel—under a sense of personal accountability for a violation of the law—the fear of an infamous punishment; a powerful restraining influence which, if not wholly inoperative in the case of the non-resident must, from the very nature of things, act upon him with a far slighter degree of force. The law therefore, as it seems to me, is not necessarily obnoxious to the charge of injustice or partiality because of its requiring a measure of vigilance to be observed in respect to the vessels of non-residents, in the act of leaving the State, from which the vessels of resident citizens are exempted. The law makes no distinction between the resident and non-resident in respect to the penalties attached to its violation. In each case the vessel is liable to seizure and forfeiture; and this, without regard to the innocence or complicity of the owner wherever he may reside. The measure of corporal punishment with which it seeks to visit the owner who is in any manner accessory to the commission of an offence, is in both cases the same. The difference in its treatment of the two classes of owners of vessels consists in its adopting a measure of preventive justice in respect to the vessel of the non-resident, which it dispenses with in the case of the vessel of the resident owner. This difference is perfectly consistent with the promptings and movements of an even handed justice. It does not necessarily imply

221 the *indulgence by the legislature of feelings of special jealousy or suspicion towards the citizens of other States.—The law does not impute, necessarily, to the citizens of other States a depravity or proneness to the commission of crime of which it acquits the citizens of this State; but proceeding upon well known motives of human conduct, it does suppose that in the residence of the latter, within the reach of our laws, and in their sense of personal accountability for a breach of the law, which consequently arises out of their situation, there is a check and restraint upon their conduct which is wholly wanting, at least does not operate in a like degree, in the case of the non-resident. The law seeks to compensate for this difference; and in the effort avails itself of the only means within its reach. By the employment of an increased vigilance in respect to the movements of his vessel, the non-resident owner is brought under an influence which the denunciations of corporal chastisement would, for the reasons already stated in this case, be powerless to establish. By the exposure of his vessel to the greater hazard of forfeiture and loss, by means of the search, his sense of fear is quickened, and he is thus restrained from becoming an accessory to any scheme by which his vessel would be made an instrument of offence against the

law. Such is, I conceive, the theory upon which the discrimination in question is founded; and the law is thus in my judgment acquitted of any injustice to the citizens of other States.

The force of this view is not impaired by the consideration that the law institutes the search as well in respect to vessels owned in part, as to those owned in whole, by persons other than resident citizens. If the search was required only in the case where the vessel was wholly owned by non-residents, the legislature might well apprehend that persons residing out of the State and disposed to aid in the escape of slaves through the instrumentality

222 *of their vessels, would seek to associate with themselves in the ownership of the vessels, persons residing in the State, and thus elude the provisions of the law. By subjecting to the search vessels owned by non-residents either in whole or in part, the legislature has sought to extend an additional restraining influence over all, interested to any extent in the ownership of the vessel, who by reason of their non-residence do not stand on the same footing of personal accountability with the resident owners of vessels.

I find nothing in the case of *Chapman v. Miller*, 2 Spears R. 769, decided by the Supreme court of South Carolina, in conflict with these views. In that case in which the validity of an ordinance to regulate the pilotage of Charleston as brought in question, vessels "wholly owned in that State" are exempted from fees of pilotage to the payment of which all other vessels were subjected. There was nothing, in the nature of the subject nor in the provisions of the law, to show any call for such a discrimination. As was said by the Judge—Butler—who delivered the opinion of the court, "the fact that coasting vessels are entirely owned in South Carolina can give their masters no better knowledge of the harbor of Charleston than masters of other coasters who have been engaged in the same trade, and who are therefore equally acquainted with the navigation. For it might be that a vessel owned in Massachusetts might be navigated by a master born in Charleston; and, vice versa, that a vessel owned in Charleston might be navigated by a Boston master; the circumstance of ownership can make no difference." And hence he argued that the discrimination was not founded in any real difference in the situation of the owners, and was unjust and in violation of the true meaning and spirit of the constitution; and the law was declared invalid.

Nor do I regard the case of *Wiley v. Parmer*, 14 *Alab. R. 627, as furnishing any authority or argument against the constitutionality of the law. On the contrary the concessions made by the judges in delivering their opinions, go to sustain the right of the State to make the discrimination in question. The question there was as to the constitutionality of a statute which enacted that there should be

assessed and collected on all slaves in the State, the property of non-residents, a tax of two dollars; whilst, at the time, the tax upon the slaves of citizens resident in the State was only one-half of that sum. The court held that the law was in conflict with the clause of the constitution under consideration. Chilton, J., after citing the clause and adverting to the supposed objects of the framers of the constitution in making it, observed: "This section of the law imposes a tax—a tax upon the slaves of non-residents, double that imposed by the then existing law upon the slaves of resident citizens, not for the purpose of enforcing any duty or obligation on the part of the owner or master with respect to the slaves; not with a view of protection to the State against any evil resulting from the situation of the property, but as was shown by the title of the act, simply for 'the purpose of raising an additional amount of revenue to support the State government and to maintain the faith and credit of the State of Alabama,'" he said, however, further, that he wished it distinctly understood, that he did not deny the power of the State to enact whatever laws might be necessary to promote the peace and domestic interests of its citizens, and such police regulations as might be deemed necessary to protect or control this peculiar species of property. This power was reserved by the States as essential to their existence and well being as separate communities, while such powers only were conferred upon the general government as affect those interests common to all the States considered as a confederate nation. If the slaves of a non-resi-

224 dent should *be turned loose upon the community without the control or guidance of their owner, he did not doubt that the State possessed the most ample power to adopt such police regulations as would effectually remedy the evil. But the law, he said, did not proceed on any such views. It did not demand the tax for any extra diligence or new measure of police arising out of the owner living apart from his slaves, or from his withholding his personal control and superintendence. Collier, Chief J., concurred fully, and in concluding his opinion said, "Slaves, it must be conceded, are a unique and peculiar description of property; and that it is competent for the legislature to enact regulations of police in respect to them which may discriminate between the resident and non-resident master. These measures of police may be so framed as to subject the non-resident to heavier pecuniary burdens." But it was not necessary, he added, to say more on that head, as the statute was plainly intended to raise a revenue, and not to regulate to any extent the police of the State.

The case of *Reed v. St. Francis county*, 17 Arkansas R. 416, affords, as I conceive, strong persuasive authority against the objection to the law under consideration. In that case the law of which the constitutionality was assailed, required that all lands belonging to non-residents should be

valued by three householders of the election township within which the lands are situate, to be appointed by the sheriff; and such valuation, provided it were not less than three dollars per acre, should govern the sheriff in assessing the same. It was urged against the law that it placed the non-resident on a different footing from that on which the resident citizens were placed in respect to the assessment of their taxable property; the general law upon the subject requiring that the assessor should require each person to give in a list of his taxable property, and that the assessor or

225 sheriff *should make out a schedule of the property so given in by each person and its value; and when thus made out it should be sworn to by the person or his agent, as being the full amount of property owned by him subject to taxation, together with the true value thereof; provided that no land shall be valued at less than three dollars. The court held that the provision objected to did not violate the second section of the fourth article of the constitution. They said that it did not follow that, because the legislature had directed one mode to be pursued for the ascertainment of the value of taxable property owned by residents, and another mode for the ascertainment of the value of such property when owned by non-residents, (though such difference might in some extreme cases work a prejudice to the non-resident,) the latter were deprived of any immunity or privilege guaranteed by the constitution; that the requirement of the general law was inconvenient and burdensome to the non-resident, because its observance would require him to have an agent in each county of the State in which he might own taxable property, who should have a personal knowledge not only of the kind of property owned by his principal, but from personal knowledge should be able to swear to its actual and intrinsic value; and was insecure and unsatisfactory to the State for the reason that it was confiding to an individual who might not be supposed to be informed fully on the subject, the assessment of the value of the property of others, and who from corruption or ignorance might place too high an estimate on such property, or else value it so low as to defraud the State out of its legitimate revenue; and that the law did not make any unjust discrimination in favor of citizens or impose burdens on the citizens of other States from which it exempted the citizens of that State.

I regard the case as fully sustaining the general proposition, that when in the regulation of any subject of internal
226 *police, a regard to justice and the due and convenient enforcement of its laws requires a State to adopt a different mode of proceeding, or a modification of the regulation, in respect to persons residing out of the State, in order fairly to meet and provide for the circumstance of their non-residence, the competency of the State so to act is not taken away by the clause of the constitution in question.

Does the act in any manner conflict with the sixth clause of the ninth section of the first article of the constitution?

For a history of this clause of the constitution and a statement of the objects contemplated by it I refer to the opinion of Mr. Justice Nelson in the case of the *Wheeling Bridge*, 18 How. U. S. R. 432-3-4-5. "Apprehensions (he says) were entertained by some that under the power to regulate commerce Congress might favor ports of particular States by requiring vessels destined to other States to enter and clear at the ports of the favored ones, as a vessel bound for Baltimore to enter and clear at Norfolk." "The rights of the States were secured by the exemption of vessels from the necessity of entering or paying duties in the ports of any State other than that to which they were bound, or to obtain a clearance from any port other than at the home port or that from which they sailed; and also by the provision that no preference should be given by any regulation of commerce or revenue to the ports of one State over those of another."—"The history of the provision as well as its language looks to a prohibition against granting privileges or immunities to vessels entering or clearing from the ports of one State over those of another; that these privileges and immunities, whatever they may be in the judgment of Congress, shall be common and equal in all the States. Thus much is undoubtedly embraced in the prohibition; and

it may also certainly embrace any
227 other description *of legislation looking to a direct privilege or preference of the ports of any particular State over those of another. Indeed the clause seems to import a prohibition against some positive legislation by Congress to this effect, and not against any incidental advantages that might possibly result from the legislation of Congress upon other subjects connected with commerce and expressly within its power."

It is obvious that the clause in question contemplates a restriction upon the powers of Congress, and not a restriction upon the legislation of the States in the regulation of their internal police. It is true that if a State under the pretext of a police regulation, should seek to make a discrimination without cause in favor of the ports of one State over those of another, there might be room for the argument that it was in fact regulating commerce, and regulating it in a manner forbidden to Congress. But does a mere fact that in a law relating clearly to a matter within the competency of the police power of the State, a regulation is found in respect to vessels bound to or from the ports of one or more States, from which, vessels bound to or from the ports of other States, are exempted, furnish necessarily, any ground for such an objection? The well established validity of quarantine laws, in which such discriminations are made, presents a ready and decisive answer to the question.—The power to adapt such laws to the necessities which call them into exist-

ence is not in any manner restrained by the clause of the constitution under consideration.—It would, I apprehend, be no cause of objection to a regulation of the kind that it applied only to vessels coming from certain ports, or was unlimited as to the period of its operation, if considerations of public safety rendered it proper that it should be so. If danger to the public health should always or generally attend, or be apprehended, from the arrival of vessels coming from certain *ports, regulations fairly made to meet the case and guard against the danger could not be set aside and annulled upon the ground that they did not embrace vessels coming from the ports of other States. No preference, in any proper sense of the word, could be said to be given to the last mentioned ports.

The same principle is, it seems to me, applicable to the law we are now examining. If the legislature had just ground for apprehending a greater danger of the escape of slaves by means of vessels about to depart for ports or places north of the capes of Virginia than by means of vessels bound in other directions there was no necessary partiality or injustice in requiring a search of the vessels in the former case and dispensing with it in the latter. There is no provision of the constitution, fairly construed, which would require the legislature, for the mere sake of a seeming uniformity, but at the sacrifice of substantial justice, either to forego a necessary measure of protection or else to subject to the search vessels from which it apprehended no danger, or none in its judgment rendering a search necessary. As to the existence of the state of facts supposed there can, I apprehend, be no question. That there is a greater difficulty in recapturing and reclaiming slaves escaping to the non-slaveholding States of the North than attends the recovery of such as escape to the slaveholding States of the South, is a fact generally known—a matter of undisputed, well authenticated public knowledge. That fugitive slaves and persons aiding them in attempts to escape would therefore seek to avail themselves of vessels bound in the former direction rather than those bound in the latter, as affording facilities for making good such attempts, and that, hence, there would probably be a greater danger that vessels destined to northern ports would become the instruments of escape, might well be regarded by the legislature as matters of fair and proper

229 *inference; and that the legislature has framed the law in reference to the foregoing state of facts and the supposed requirements of public safety arising out of it, is I think, apparent as well from the provisions of the particular act in question as from those of the other laws passed at the same time, and especially from the provision offering special rewards for the arrest and restoration to their owners of slaves escaping to non-slaveholding States. The search is required in the case of a vessel

bound north not merely because of its being so bound, but because by reason of such destination the danger of attempted escapes through the instrumentality of the vessel is enhanced. The discrimination proceeds upon no preference of the ships or ports of one State over those of another, but upon motives of State necessity, actually existing or fairly supposed to exist, in the judgment of the legislature. Entertaining such views of the objects contemplated by the law, and of the reasons on which it is founded, I have been unable to discover that any of its provisions conflict with the prohibitions or restrictions of either our State or federal constitution. And I am for affirming the judgment.

The other judges concurred in the opinion of Daniel, J.

Judgment affirmed.

230 *Lawson's Ex'or v. Lawson.

April Term, 1861, Richmond.

1. **Pleading and Practice—Executors—Assumpsit, Case at Bar.**—A sick man receives a sum of money in bank notes which he hands to his wife for safe keeping until he should get well enough to put them in bank; and he dies a few days after. After his death his executor applies to the widow for the bank notes which she refuses to deliver to him, saying she intends to keep them. He sues her in assumpsit for the money, and the declaration contains only the common counts. **Held:** The action was well brought, and he is entitled to recover.
2. **Same—Same—Suit in Official or Individual Capacity.**—The cause of action not having occurred until the death of the testator his executor might sue for the money in his own name or as executor.
3. **Same—Same—Suits in Official Capacity—Sufficient Allegation.**—If it was necessary to sue as executor, as the declaration commenced in the name of B as executor of the testator, though it alleged that the defendant was indebted to the plaintiff and promised to pay to the plaintiff, yet, in support of the justice of the case, it may be construed as a declaration in the plaintiff's character of executor.

This was an action of assumpsit in the Circuit court of the county of Alexandria, by Thomas A. Brewis, executor of John Lawson deceased, against Isabella Lawson. The declaration contained only the common counts, and whilst it commenced in the name of Thomas A. Brewis, executor of John Lawson, it charged that the defendant was indebted to the plaintiff, and promised to pay the plaintiff.

The defendant pleaded "non assumpsit;" and on the trial demurred to the evidence. That evidence was that on the 3d day of June, 1851, T. A. Brewis, the plaintiff, came to the room where John Lawson, the plaintiff's testator, was sick in bed, and counted out to him a sum of money, upwards of six hundred dollars, in notes, and asked Lawson if he (Brewis)

*See principal case cited in Vanderwerken v. Glenn, 85 Va. 18, 6 S. E. Rep. 806.

should carry the money back to the store. That Lawson said "No, he would be better after a while, and would then arrange it for the bank." Lawson then handed the money to his wife, the defendant, and told her to put it aside until he felt better, and that he would arrange it for the bank. That John Lawson died on the 18th of June, 1851; and that between that date and the time when Brewis qualified as executor of the estate of Lawson, Brewis asked Mrs. Lawson for the money which he handed to John Lawson, and Mrs. Lawson refused to give it to him, saying she intended to keep it.

There was a verdict for \$569.85, with interest from the 19th of June, 1851, until paid, subject to the demurrer to evidence; and upon the demurrer the court below gave a judgment for the defendant. Whereupon Brewis applied to this court for a supersedeas, which was allowed.

Brent and Kinzer, for the appellant.

F. J. Smith, for the appellee.

LEE, J. The money sought to be recovered in this case was the property of the plaintiff's testator in the form of bank notes, and was handed to defendant, (his wife), a short time before his death, for safe-keeping until he should be better, when as he said, he would arrange it for the bank. It remained in her possession during his life, and at his death, which took place a few days after, it was still his property. She made no claim to it as hers, during his life, nor, so far as appears, did she dispose of any part of it to her own use or that of her husband. After his death the
232 plaintiff, though before *he had qualified as executor under the will of his testator, called on the defendant for the money, but she refused to surrender it, saying that she intended to keep it.

Now as this money was part of the assets of the estate of the testator, it is clear that the plaintiff is entitled to recover it in some form of action, and in some character either individual or representative.

But it is said that if the plaintiff be entitled to recover, he cannot do so in this action, but should have declared on the special case, or in trover and conversion.

I do not think the plaintiff was bound to declare specially. The action of indebitatus assumpsit for money had and received will lie whenever one has the money of another which he has no right to retain, but which *ex æquo et bono*, he should pay over to that other. This action has of late years been greatly extended, because founded on principles of justice; and it now embraces all cases in which the plaintiff has equity and conscience on his side, and the defendant is bound by ties of natural justice and equity to refund the money. In such a case, no express promise need be proved, because from such relation between the parties the law will imply a debt and give this action founded on the equity of the plaintiff's case, as it were upon a contract,

quasi ex contractu as the Roman law expresses it, and upon this debt founds the requisite undertaking to pay. *Moses v. Macfarlan*, 2 Burr. R. 1005, 1008, 1012; *Per Buller, J., Straton v. Rastall*, 2 T. R. 366, 370.

Here this money was part of the assets of the plaintiff's testator, and it was the duty of the defendant *ex æquo et bono*, to pay it over to the plaintiff.

Nor do I think the plaintiff was bound to declare in trover and conversion. The money handed to the defendant by the testator was in bank notes, and if it be conceded that upon the refusal of the defendant to deliver the same to the plaintiff,
233 trover might be maintained *as for a tort, it by no means follows that assumpsit could not be brought. There are many cases in which a party aggrieved who has a clear remedy by action as for a tort, may waive the tort and sue in assumpsit. Thus an action against a common carrier is for a tort and supposed crime, but assumpsit will lie for the same cause. *Per Lord Mansfield, Hambly v. Trott*, Cowp. R. 371, 375.—So if a man takes a horse from another, and brings him back again, an action of trespass may be brought, but the owner may bring assumpsit for the use and hire of the horse. *Ibid.* If a bankrupt, on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the assignees may recover the goods in trover, or waive the tort and bring assumpsit. *Smith, &c., v. Hodson*, 4 T. R. 211. If a stranger takes my goods and delivers them to another a contract may be implied, and I may bring an action of trover for them or of assumpsit to recover their value. *Per Lord Abinger, Bassell v. Bell*, 10 Mees. & Welsb. 350. In this case it was decided that the assignees of a bankrupt who after the bankruptcy had delivered goods to the defendant to meet an accommodation bill which they were about to give the bankrupt, might waive the tort and sue in assumpsit. So a master whose apprentice has left him and entered into the service of another, who persuades him to remain with him after he had found out who he was and from what shop he had deserted, may waive the tort and bring assumpsit against the defendant for the work and labor of the apprentice. *Foster v. Stewart*, 3 Maule & Selw. 191. See also *Curtis v. Bridges*, Comb. R. 450; *Eades v. Vandeput*, 5 Easts R. 39; *Lightly v. Clowston*, 1 Taunt. R. 112. So if a man take the goods of another and sell them, the owner may waive the trespass and sue him for money had and received. *Gilmore v. Wilbur*, 12 Pick. R. 120; *Foster v. Stewart*, 3 Maule & Selw. 191. See also *Jones*
234 *v. Hoar*, 5 Pick. R. 285.—*Other illustrations may be derived from the cases, but I will not stop to give them. I think that in no case could the exercise of the right to elect between an action in tort and assumpsit be more appropriate than in this.—The bank notes were received and treated by the testator as money, and as such were received and retained by the de-

defendant, and though trover might lie to recover the notes, the law will imply a promise to pay the amount to the plaintiff.

It is said however that the plaintiff can only recover in his character of executor, and that here he has not declared as executor but in his individual character.

The cause of action here accrued after the death of the testator. He had and could have, no cause of action against his wife, but her retention of the money gave to the plaintiff an action to recover it as part of the assets of the estate of his testator. And although the demand by the plaintiff was before his qualification as executor, yet the refusal to pay was not upon that ground but because she intended to keep the money as her own; and as she continued to keep it until after the plaintiff's qualification as executor, his right to sue accrued immediately upon his qualification. Now where an executor sues in respect of a cause of action which accrued in the lifetime of the deceased, he must declare in his representative character. But where the cause of action accrued after the death of the testator, if the money recovered will be assets, the executor may declare in his representative character or in his own name. *Mowry v. Adams*, 14 Mass. R. 327; *Kane v. Paul*, 14 Pet. R. 33. But if necessary, the declaration may, I think, in support of the justice of the case, be considered as a declaration in the plaintiff's character as executor. The Circuit court so thought, for the judgment for costs against the plaintiff directed them to be levied of the assets of his testator. The plaintiff declared as
235 executor *of John Lawson, and the other allegations referring to him may reasonably be considered as referring to him in his character of executor; and upon the demurrer to evidence, I think, they should be so considered.

I think the Circuit court erred in rendering judgment for the defendant, instead of for the plaintiff upon the demurrer to evidence, and the same should be reversed and judgment now rendered for the plaintiff.

The other judges concurred in the opinion of Lee, J.

Judgment reversed, and entered for the plaintiff.

236 *Layne v. Norris' Adm'r.

April Term, 1861, Richmond.

1. **Pleading and Practice—Detinue—Unnecessary to Plead Statute of Limitations.**—In an action to recover property. If the defendant has been in adversary possession a sufficient length of time to render the statute of limitations a bar to the action, this possession gives title; and it is not necessary to plead the statute.

2. **Statutes—Interpretation of.**—A slave in the possession of a life tenant, which is neither employed in making a crop, nor let or hired to another, is not embraced in either of §§ 58 or 55, 1 Rev. Code of 1819, p. 388, so as to entitle the administrator of the life tenant dying after the 1st of March, to retain the slave to the end of the year.

3. **Adverse Possession of Chattel—When Statute Begins to Run against Remainderman.**—A life tenant of a slave sells her life interest and dies. The purchaser continuing to hold the slave, does not hold under, but adversely to the remainderman, and the statute commences to run on the death of the life tenant.

4. **Special Verdicts—Adversary Possession—Case at Bar.**—A special verdict which finds uninterrupted possession of a slave by the purchaser from a life tenant of her interest in the slave, for more than the time which will create the bar of the statute, without finding anything from which it may be inferred that he held by authority of the remainderman or his representative, finds in effect an adversary possession.

5. **Same—Same—Legal Inference.**—When a special verdict finds personal property in possession of a defendant, the law infers it to be adversary, in the absence of any finding to the contrary.

This was an action of detinue in the Circuit court of Amherst county, brought to the spring term of the court for 1855 by Poindexter P. Smith, administrator of Robert T. Norris deceased, against George Layne, to recover a slave named Vina.

237 Upon the trial the jury found *a special verdict, and the facts so far as is necessary to show the grounds of this court's decision are as follows:

Daniel Norris of the county of Nelson died in November 1824, having first made his will which was duly admitted to probate in the County court; and Christopher T. Estes qualified as executor thereof. The testator left a widow, Constance P. Norris, and Robert P. Norris, his only child, an infant under twenty-one years of age.—By his will Daniel Norris left a woman named Franky to his widow for her life; and directed that she should then be free; and that the widow should be decently maintained during her life or widowhood.

A few days after the qualification of the executor, he placed in the possession of Mrs. Norris, Franky and another slave Judith who had been left to Mrs. Norris until she attained the age of twenty-one years, and the four small children of Franky, for whose support the executor was to pay her.

In October 1825 Mrs. Norris renounced the provision made for her by the will of her husband; but the estate was not divided, and dower was not assigned to her; and she continued to hold the women put into her

*Adverse Possession—When Statute Begins to Run against Remainderman.—In *Clarkson v. Booth*, 17 Gratt. 499, the court said: "To be sure if the life tenant, or the assignee of the life tenant (who by the assignment becomes a tenant *per auter vie*), holds, uses and enjoys the property as his own after the termination of the life estate, such possession becomes adverse to the remaindermen and is a wrongful conversion of their property to his use, from the time of which conversion the act of limitations will begin to run against them; as was held by this court in *Layne v. Norris' Adm'r*, 16 Gratt. 236." See also, *Hannon v. Hounihan*, 85 Va. 488, 12 S. E. Rep. 157.

possession; and the executor allowed her to have other slaves of the estate from time to time, and furnished her with other aid for her support. She held the slave Franky in her possession from February 1825 until 1833 or 1834, when she sold her life estate in her to the defendant George Layne, and delivered her into his possession. The defendant by virtue of the sale and purchase continued in possession of Franky until the death of Mrs. Norris. After the purchase and before the death of Mrs. Norris, viz: in 1835, Franky became the mother of the slave Vina in the declaration mentioned; and Layne has held uninterrupted possession of Vina from the date of her birth in 1835, until the institution of this suit.

238 *The jury find that Mrs. Norris died in June 1839; that Robert T. Norris came of age some time in the year 1831; and died on the 21st of October, 1839, leaving a widow, and an infant daughter who intermarried with the plaintiff Smith in 1850, and attained the age of twenty-one years in 1851. The plaintiff qualified as administrator of Robert T. Norris on the 21st of June, 1852, up to which time the estate of Robert T. Norris had remained without a personal representative.

The Circuit court rendered a judgment upon this verdict in favor of the plaintiff; and thereupon Layne applied to this court for a supersedeas to the judgment; which was awarded.

Garland, for the appellant, insisted, that Layne's possession of the slave Vina was adversary from her birth, or at least from the death of Mrs. Norris in June 1839; and therefore plaintiff's right to recover was barred.—*Spotswood v. Dandridge*, 4 Hen. & Munf. 139; *Newby's adm'r v. Blakey*, 3 Id. 57; *Elam v. Bass's ex'ors*, 4 Munf. 301; *Garland v. Enos*, 4 Id. 504; *Brent v. Chapman*, 5 Cranch's R. 358; *Shelby v. Guy*, 11 Wheat. R. 361; 1 Rob. Pr. new ed. 506, 507; *Gay v. Moseley*, 2 Munf. 543; *Lacy v. Wilson*, 3 Id. 313; *Thomas v. Soper*, 5 Id. 28; *Garth's ex'or v. Barksdale*, Id. 101; *Givens v. Mann*, 6 Id. 191.

Macfarland and Roberts, for the appellee, insisted, that Mrs. Norris having died after March 1839, her representative was entitled to keep the slave until the end of the year; and Robert T. Norris having died in October of the same year, he was not entitled to the possession at any time during his life. And as there was no representative of his estate until the plaintiff qualified in 1852 the time did not begin to run until that qualification. They relied on 1 Rev. Code of 1819, ch. 104, § 53, 55, p. 388.

239 *They insisted further that Layne having taken possession rightfully under his purchase from Mrs. Norris of her life estate, his continuing to hold after her death was not adversary, until he did some act denying the title of the remainderman. *Kitty v. Fitzhugh*, 4 Rand. 600; *Cross v. Cross' adm'r*, 9 Leigh 245; *Carr's adm'r's v. Glasscock's adm'r*, 3 Gratt. 343; *Roberts v. King*, 10 Gratt. 184. That here no such act was done; and the special ver-

dict does not find that the possession was adversary; and the court will presume it was not. *Purcell v. Wilson*, 4 Gratt. 16; *Williams v. Snidow*, 4 Leigh 14.

MONCURE, J., delivered the opinion of the court:

This is a supersedeas to a judgment in favor of the plaintiff on a special verdict, in an action of detinue brought by Robert T. Norris's adm'r against George Layne for a slave named Vina.

The most favorable view which can be taken of the case for the plaintiff, is to suppose that his intestate Robert T. Norris was entitled to the slave in controversy in remainder at the death of his mother Mrs. Norris, to wit: on the 21st of June, 1839. Supposing him to have then become entitled to the possession of the slave, the only question is, whether he and his personal representative continued to be so entitled for sixteen years thereafter, and until the institution of the action, in July 1855?

At the death of Mrs. Norris, the defendant Layne, who had purchased her life estate in Franky, the mother of Vina, who was born after the purchase, was in possession of Vina, and has ever since remained in such possession. The action of the remainderman Robert T. Norris then accrued, and not having been instituted for more than five years thereafter, it would have been barred by the *act of limitations, if it had been pleaded. And wherever the act of limitations would be a bar to an action for property, it gives to the defendant such a title to the property as enables him to maintain his defence under the general issue, and would even enable him to maintain an action for the property. 1 Rob. Pr. (new) 506, citing 3 H. & M. 57; 4 Id. 139; 4 Munf. 301; Id. 504; 5 Cranch 358; 11 Wheat. 371.

But it was contended by the counsel for Robert T. Norris's adm'r, that Mrs. Norris, the life tenant, having died after the 1st day of March, to wit: on the 21st day of June 1839, her assignee Layne was entitled to the possession of Vina until the end of the year 1839, under sections 53 and 55, or one of them, of ch. 104, 1 R. C. 1819, p. 388. And that Robert T. Norris having died before the end of the year, to wit: on the 21st of October 1839, and having no personal representative until within five years before the action was instituted, it would not have been barred by the act of limitations, and therefore the defendant did not acquire title to the property by his possession thereof.

The answer to this argument is, that the case falls under neither of the categories created by these two sections. The 53d section applies to slaves employed in making a crop; the 55th, to slaves let or hired to another. The slave in controversy was, at the death of Mrs. Norris, neither "employed in making a crop," nor "let or hired to another."

It was further contended that a particular tenant who continues to hold the property

after the expiration of the particular estate, if not regarded as a fiduciary in reference to the remainderman, will yet not be considered as holding adversely to him, at least until after demand made, or the lapse of a reasonable time for the delivery of the property; and therefore that the defendant

241 did not hold the slave Vina adversely to Robert T. Norris *at the time of his death, which was only four months after that of his mother. So that, in that view, the action, having been brought within five years after the qualification of a personal representative of Robert T. Norris, was brought in due time.

There is no fiduciary relation between the particular tenant and remainderman after the termination of the particular estate. And if the particular tenant continues to hold and enjoy the property thereafter, he will be considered as holding it adversely to the remainderman unless it be shown affirmatively that he holds it by his authority or permission. He will not be considered as tenant at will or at sufferance of the remainderman, but is like any other person who wrongfully holds and enjoys the property of another. His case is very different from that of a lessee, holding over after the expiration of the lease; in which case, the law implies a tenancy from year to year, on the terms of the lease, as being consonant alike to the justice of the case and the presumed intention of the parties. In the case of a particular tenant holding over after the right of possession of the remainderman accrues, there is no foundation, in any prior contract of the parties, for such an implication.

Lastly it was contended that the possession of the defendant should have been expressly found in the special verdict to have been adverse to the title of the plaintiff, and cannot be inferred to have been so from the facts therein found.

Such adverse possession is, in effect, found in the special verdict. It expressly finds that the defendant "held uninterrupted possession of the slave in controversy from the date of her birth in 1835 until the institution of the suit," which was in 1855; and it does not find that such possession was by authority or permission of the plaintiff or his intestate, nor any fact from which such authority or permission can, however remotely, be inferred.

242 *According to the facts found, the law of the case is for the defendant; and certainly the court will not presume the existence of other facts not found which would make the law of the case otherwise. It will rather presume, in favor of the verdict, that all the material facts of the case were therein found. Possession is the indicium of title to personal property, and when found by a special verdict to be in a defendant, the law infers it to be adverse, in the absence of any finding to the contrary. Although it is an inflexible rule that the court upon a special verdict cannot infer other facts from those found, yet it is the province of the court to make all legal

inferences from the facts found in the verdict. 1 Rob. Pr. (old) 373 and cases cited; 3 Munf. 1; 5 Leigh 615; 4 Id. 37; 11 Id. 281; 4 Gratt. 16. The cases relied on in the argument to show that the possession of the defendant must be found in the verdict to be adverse or will not be inferred by the court to be so, are not in conflict with the principle as above laid down. Williams v. Snidow, 4 Leigh 14, and Purcell, &c. v. Wilson, 4 Gratt. 16, were referred to. Both of these cases were writs of right, and according to the facts found in each, the possession of the defendant was clearly not adverse. In the former, an executory contract for the sale of land was rescinded by mutual consent of parties, and while the vendee remained in possession thereafter, without paying any rent and without pretence of title, the original vendor conveyed the land to the intermediate vendor, and the question was, whether the deed operated to pass the legal title to the land; in other words, whether such possession was adversary to the grantor; and the court held that it was not. The latter, was an action brought by one coparcener against another or the assignee of another, and the possession of the defendant was held not to be adverse, the verdict not having found 243 an actual disseisin or ouster *of the demandant nor facts which in law constitute such actual disseisin or ouster. See also Pownal v. Taylor, 10 Leigh 172, which admits of a similar explanation.

These cases depend on this principle; that a possession not adversary in its commencement will be presumed not to be adversary in its continuance, unless and until the presumption be repelled by proof that the party in possession claimed to hold adversely to the other party and with his knowledge. But the principle does not apply to this case. Here the possession of the defendant was adversary in its commencement; that is after the right of possession of the remainderman accrued. Until then the defendant held under his own title, and he never at any time held under the title of the remainderman.

The judgment of the Circuit court is reversed and judgment rendered on the special verdict for the defendant.

Judgment reversed, and entered for the defendant below.

244

*Henry v. Graves.

April Term, 1861, Richmond.

(Absent LEE, J.)

Gifts—Wife's Remainder in Slaves.—A husband in the lifetime of his wife, makes an absolute gift of his wife's remainder in slaves, by deed which is

***Gifts—Wife's Remainder in Personality.**—In *Moorman v. Smoot*, 26 Gratt. 85, the court said: "The rule is well settled, that where a wife has a vested remainder in personal estate, expectant on the death of a life tenant, and both the wife and the tenant for life outlive the husband, the wife is entitled by

and cestui que trust. 2 Sug. Vend. 936. A court of equity will not assist to create a trust in favor of a volunteer, but where the trust is actually created, equity will enforce its execution. And a party may so constitute himself a trustee, that a court of equity will execute the trust in favor of a volunteer. *Ellison v. Ellison*, 6 Ves. 250 R. 656; *1 *Leading Cases in Equity* 199 Marg. and notes, Am. ed. 1859.

But it is unnecessary to consider further the subject of trusts, as none was created, or intended to be so, in this case.

Then, was the gift in this case executed or executory? In form it is certainly an executed gift. It is by a present conveyance of an interest; not a contract for a future conveyance. If the interest had been a present or vested one, the conveyance would certainly have been an executed, not an executory gift. But the interest being contingent, it is contended that it could not be conveyed, and therefore the conveyance cannot be valid as an executed gift. It might in that view still be valid, as an executory, though in the form of an executed contract, if it were founded on valuable consideration. A court of equity would, in that case, treat it as a contract to convey, when the interest, by becoming absolute, should become capable of being conveyed. But being voluntary, a court of equity would not give effect to it in that way, since that court, as before stated, never assists a volunteer to perfect his title.

The question then resolves itself into this: Can such a contingent interest be conveyed? If it can, the interest in this case was conveyed, by a good and valid conveyance. If it cannot, the conveyance is ineffectual, either as an executed or an executory gift.

It is a general rule that property is not only liable for the owner's debts but may be sold, or even given away, at the pleasure of the owner. 2 *Spence's Eq. Ju.* 896. It was a rule of the common law, subject only to a few exceptions, that "no possibility, right, title, nor any thing in action should be granted or assigned to strangers, for that would be the occasion of multiplying contentions and suits." *Id.* 850. But the court of chancery, from the earliest times, has given effect to assignments of every kind

of future and contingent interests and possibilities *in real and personal property, if made for valuable consideration; *Id.* 852; unless indeed they were void for maintenance or champerty. Formerly equitable estates and interests were considered as choses in action, and assignments of them were treated only as executory contracts. But a trust or equitable estate is not now considered a chose in action. It is a present interest or estate, and whatever would be the rule of law if it were a legal estate, is applied in equity to a trust estate. The legal estate follows the trust or equitable estate as its shadow, into whose hands soever the legal estate may descend or be conveyed, except it pass to a purchaser for valuable consideration without notice. *Id.* 875. A trust or equitable

estate or interest may therefore now be assigned in equity, as a legal estate or interest of the same kind might be at law; and effect is given to the assignment as an executed, and not an executory contract. So that a voluntary assignment of such an estate or interest is valid, if it be complete. *Id.* 880, 907. So also a voluntary assignment of a chose in action will be effectual at law or in equity, if it be complete; the only question being as to what is necessary to make it complete. *Id.* 865, 907. And that question depends on the circumstances of the case. Until complete, the donor, as in every other case of executory gift, has the locus penitentiæ. As to voluntary assignments of contingent interests, possibilities and expectancies in personal chattels, they are valid if complete; unless the subject of the assignment be a mere possibility, uncoupled with an interest. *Id.* 910. An assignment of such a possibility is ineffectual, except as an executory contract, which must of course be founded on valuable consideration. A man cannot assign that which does not exist. *Id.* 866.— Though he may make a contract, in regard to it, and if founded on valuable consideration the contract will be enforced when and so far as may be possible.

252 *The case of *Meck v. Kettlewell*, 1 Hare R. 464, 23 Eng. ch. R., decided in 1842, was much relied on by the counsel for the appellant in this case. There M. who, in the event of surviving her daughter and of the death of her daughter without issue, would as next of kin be entitled to a fund which was vested in trustees, executed a voluntary assignment of her interest in the fund to the husband of the daughter, and declared the trusts of the assignment, as to part for the benefit of M. herself, and as to the residue for the daughter's husband. No notice of the assignment was given to the trustees. The daughter afterwards died without issue; and the husband filed a bill against the trustee and M. to compel the performance of the trust. Held, that the voluntary assignment did not create a trust which a court of equity would enforce, and the bill was dismissed. In that case the interest conveyed was a mere expectancy, founded on a double contingency; and though the Vice Chancellor, in the course of his opinion, makes some dicta which may tend to support the position contended for by the appellant's counsel, he concludes it by saying: "I decide only that a voluntary assignment of a mere expectancy, not communicated to those in whom the legal interest is, does not create a trust in equity within the principle of the cases relied on by the plaintiff." This decision was affirmed on appeal, by the Lord Chancellor. 1 Phil. R. 342, 19 Eng. ch. R. But it can afford little or no aid to the appellant, and has been much shaken, if not overruled, by subsequent decisions.

In *Kekewich v. Manning*, 12 Eng. L. & E. R. 120, decided in 1852, effect was given to a voluntary assignment of an equitable chose in action. *Knight Bruce*, L. J., re-

viewed the authorities very fully, and in the course of his opinion expressed himself thus: "As, upon one hand, it is, on legal and equitable principles, we apprehend, clear, that a person *sui juris*, acting
253 freely, fairly, *and with sufficient knowledge, ought to have, and has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversionary, and howsoever circumstanced; so, on the other, it is as clear generally, if not universally, that a gratuitously expressed intention, a promise merely voluntary, or to use a familiar phrase, *nudum pactum*, does not (the matter resting there) bind, legally or equitably."

In *Voyles v. Hughes*, 23 Id. 271, decided in 1853-4, effect was given to a voluntary assignment by deed, of a reversionary interest in stock standing in the name of trustees. Stuart, V. C., after referring to the decision in *Meek v. Kettlewell*, said: "The soundness of the doctrine which treats a deed of assignment complete in form, as a mere agreement, although it in terms assigns and transfers an equitable reversionary interest in personal property, and which denies to it in this court, if voluntary, any effect as a transfer of the right to property, has been much questioned. If that doctrine is to prevail, it deprives the owners of reversionary personal property of the right of alienation by one legitimate mode. As abridging the right to alienation, it materially lessens the value to its owners, of the enormous and increasing amount of reversionary personal property. Fortunately, in the recent case of *Kekewich v. Manning*, a more liberal and enlightened view of the law upon this subject was taken." See other cases referred to in the notes to *Ellison v. Ellison*, 1 Lead. ca. in *Eq. Am. Ed. supra*, where the authorities on the subject are fully collected and commented on. See also the case of *Jones & wife v. Obenchain*, 10 Gratt. 259.

In *Dold's trustee v. Geiger's adm'rs*, 2 Gratt. 98; this court held that choses in action to which the wife becomes entitled during her coverture, even though
254 they *be such as are subject to her equity, are liable to the claims of the creditors of the husband, (in subordination of course to her equity). And, for the same reason and to the same extent, they may be sold or given away by the husband; as is expressly said by Judge Stanard in his able opinion in that case, in which the other judges concurred. Id. pp. 106, 110 and 111. Though his gift of them would of course be subject to her right of survivorship.

It may be stated as the result of all the authorities; that a voluntary gift valid in law or equity, may be made of any property real or personal, legal or equitable, in possession, reversion or remainder, vested or contingent, and including choses in action unless they be of such a nature as that an assignment of them would be a violation

of the law against maintenance and champerty; that such a gift, to be valid, must be complete, and not executory; that what is necessary to the completion of a gift, depends on the nature of the subject, and the circumstances of the case; and that it is always sufficient, though not always necessary to the completion of a gift, at least between the parties, that the donor do everything in his power, or which the nature of the case will admit of, to make it complete.

Now let us apply the principles before stated to this case. What was the nature of the interest conveyed? It was not a mere possibility or expectancy, but a substantial, appreciable interest. It was a legal interest.—The wife had a vested remainder in slaves, expectant upon a life estate. The particular estate and remainder made together but one absolute estate in the slaves.—The assent to the legacy of the particular estate enured to the benefit of the remaindermen, who, though not in actual possession of the remainder during the existence of the particular estate, yet had all the possession of which a remainder is susceptible. The remainder was

255 *not a mere chose in action, but at most a quasi chose in action. No action was necessary to reduce it into possession, but at the termination of the life estate it would fall into the possession of the remaindermen by operation of law. The possession of the life tenant was not adverse to them, but was in some sense their possession, as both held under the same title. The possession of the remaindermen was not that actual or constructive possession which is necessary to perfect a husband's title to his wife's personality; but was capable of maturing into such a possession by his surviving his wife or the life tenant. In that event her interest in the subject would become absolutely the property of him or his assigns, without any administration on her estate in case of her death before actual possession obtained. In that respect, the interest seems to differ from a chose in action proper, of the wife; and to be more like her chattels real, to which the husband or wife is entitled absolutely by survivorship. Though in other respects the two subjects differ; and especially in this, that the wife's right by survivorship to her chattels real may be defeated by the alienation of the husband in his lifetime, even though without consideration, but not by will; whereas her right of survivorship to her interest in remainder cannot be defeated by his alienation, even for valuable consideration. (See 3 Coke by Thomas Marg. 306 note M., 310 note O, where will be found, in a condensed form, a full statement of the husband's right in the chattels real and personal, and choses in action of the wife.) That such is the nature of the husband's interest in the wife's vested remainder in slaves expectant on a life estate therein, is shown by the cases in this court of *Dade v. Alexander*, 1 Wash. 30; *Upshaw v. Upshaw*, &c.,

2 Hen. & Munf. 381; and *Wade v. Boxley, &c.*, 5 Leigh 442; and also by the cases in Kentucky of *Banks' adm'r v. Marksberry*, 3 Litt. R. 275; *Turner v. Davis's* 256 *adm'r, 1 B. Mon. R. 152; *Green's heirs v. Boon*, 5 Id. 556; *Ring, &c.*, v. *Baldrige*, &c., 7 Id. 535; *Davenport v. Prewett's adm'r*, 9 Id. 94; and *Sander's ex'ors v. Sanders*, 12 Id. 40. Whether the rule thus established in regard to slaves is confined to them, or extends to other tangible property, or even to stocks, money and other subjects, which are more of the nature of choses in action, it is unnecessary to enquire, as the subject in controversy here is slaves, and the rule seems to be well established as to them.

Such being the nature of the husband's interest in this case, it was clearly assignable, with or without consideration. And we think it would have been so, even if it were necessary that administration should be taken on the estate of the wife to reduce the interest into possession; as, in that case, the administrator of the wife would be but a trustee for the assignee of the husband. The interest being assignable, it was effectually assigned, in the best, if not the only way in which it could have been, at least to volunteers, by deed duly recorded. And the husband having survived his wife and the life tenant, his assignees are absolutely entitled to her share of the slaves, or of the proceeds of the sale thereof. The decree ought therefore to be affirmed.

Decree affirmed.

257 **Farmers Bank of Va. v. Kent, Paine & Kent.*

April Term, 1861, Richmond.

Partnership—Agency—Case at Bar.—K., K. & A. were a firm doing a wholesale business as merchants in Richmond, and in 1846 they employed P. to carry on a retail business in Lynchburg, under the style of P. agent for J. S. K., the name of one of the partners. The publication was made and the sign put up in the above name as prescribed by the statute. In 1850, some of the partners retired, but the firm in Richmond was continued, new partners being admitted under the name of K., P. & K.; J. S. K. continuing to be a partner of the firm; but neither then nor at any time after the Code of 1849 went into effect, was there any new publication as to the agency in Lynchburg. In 1853 the goods of K., P. & K. in the storehouse of P. in Lynchburg were taken under execution by his creditors. **Held:** The law having been complied with in 1846, and the present firm in Richmond being a continuation of the former, the goods are not liable to the creditors of P.

In February 1853, the Farmers Bank of Virginia sued out of the clerk's office of the

*In *Nat. Bank v. Cringan*, 91 Va. 361, 21 S. E. Rep. 820, the court said: "The only cases in which the statute (Acts 1839, ch. 72 p. 45; V. C. 1849, ch. 146, § 13, p. 586; V. C. 1887, § 2877) has come under review in our supreme court of appeals were cases of agency. See *Farmers' Bank v. Kent, et al.*, 16 Gratt. 257; *Penn v. Whitehead*, 17 Gratt. 508, 524."

Circuit court of the city of Lynchburg, two executions against the goods and chattels of John J. Purvis and others; and upon these executions the sergeant of the city returned that they had been levied upon a lot of dry goods, the property of J. J. Purvis, found in his storehouse on Main street in the city of Lynchburg. And that the property levied on was claimed by the firm of Kent, Paine & Kent, who had executed a suspension bond; which was returned therewith.

At the June term of the court for 1853, on the motion of the plaintiffs, Kent, Paine & Kent were summoned to appear at the next term of the court to make themselves parties to the proceeding, in order that their claim *to the property levied on might be determined according to law. And at the November term of the court they having appeared, the court made an order that a jury be empanelled at the bar of the court to try the issue—whether at the time of the levy of the said executions on the property claimed by Kent, Paine & Kent, and mentioned in the return of the sergeant, the said property levied on as the property of J. J. Purvis and as liable for the said debts mentioned in said process, was the property of Kent, Paine & Kent, and not liable to be levied on for said debts. And on the trial of this issue Kent, Paine & Kent were to be considered the plaintiffs, and the said plaintiffs be considered as the defendants.

At the June term 1856 the cause came on for trial; when the jury found a special verdict; the material facts of which are stated in the opinion of Judge Lee. And upon this verdict the Circuit court rendered a judgment in favor of Kent, Paine & Kent; and thereupon the Farmers Bank applied to this court, for a supersedeas, which was awarded.

Mosby, for the appellants.

J. O. L. Goggin and Kirkpatrick, for the appellees.

LEE, J. Waiving the question whether Purvis was a trader within the meaning of the thirteenth section of chapter 145 of the Code of Virginia, and conceding for the purpose of this case, that he was such a trader, the important enquiry occurs whether previous to the levy of the execution upon the goods claimed by the defendants Kent, Paine & Kent, the provisions of the section above referred to had been so complied with as to protect the property against the claims of the creditors of Purvis.

The firm of which that of Kent, Paine & Kent was the continuation, consisted of six persons, Horace L. *Kent, George F. Kendall, George M. Atwater, James S. Kent, William G. Paine and John Enders, (the last named being a dormant partner), and they carried on their business under the partnership name of Kent, Kendall and Atwater. Whilst thus engaged in business, this firm on the 1st of September, 1846, employed Purvis as their

agent to conduct a general dry goods business in Lynchburg, at a stated compensation, and for convenience, the business was to be conducted for them by him as the agent of James S. Kent, one of the partners. A written instrument evidencing the agreement was accordingly signed by Kent, Kendall & Atwater and Purvis, and on the 7th of December, 1848, was acknowledged by Purvis and spread of record in the hustings court of Lynchburg. Immediately after it was made, a sign was placed over the door of the storehouse with "J. J. Purvis, agent for J. S. Kent" inscribed upon it, and an advertisement was inserted in a newspaper printed in Lynchburg in the name of J. S. Kent announcing that he had appointed J. J. Purvis his agent for the purpose of conducting a general dry goods business in Lynchburg; and the same was continued for six weeks from the 1st of October, 1846. The agreement appears to contemplate the continuance of the agency for three years only, but after the expiration of that time the business was continued in the same way by the consent of the parties until the change in the old firm and the formation of the new under the partnership name of Kent, Paine & Kent, in February 1850, and by like consent was continued in the same way until the levy of the plaintiffs' execution was made. James S. Kent was a partner in both firms and his name was adopted by the last named firm for the purposes of the Lynchburg agency just as it had been by the former firm. Indeed the firm of Kent, Paine & Kent was but a continuation with a change of partners, of the old firm of Kent, Kendall & Atwater, and *the Lynchburg agency was continued without change in any respect except that James S. Kent represented the partners composing the new firm instead of those of the old.

The fair construction of the acts of those parties is that those constituting the firm of Kent, Kendall & Atwater doing a wholesale dry goods business in Richmond, desiring to conduct a retail business in Lynchburg, adopted the name of one of the partners James S. Kent, as the partnership name for the Lynchburg concern, and in that name established the agency of Purvis, and put up the sign and published the advertisement for the purpose of disclosing the name of a principal liable for the payment of the debts that might be incurred, as required by the act of 1839; that after the three years contemplated by the written agreement, they continued by consent to carry on the business in the same way, and after the change in the firm and the formation of the new firm of Kent, Paine & Kent, James S. Kent being a partner of this firm, the business was continued in the same name; and after the new Code took effect, as the provisions of the thirteenth section of chapter 145 had been complied with when the agency was first established, they did not deem it necessary to renew what had been then done.

Now no one can doubt that parties carry-

ing on business in a particular partnership name in one place may do business in other places in a different partnership name. They may have as many different partnership names as they have places of business. The parties doing business under the name of Kent, Kendall & Atwater in Richmond might well carry on business elsewhere under a different partnership name, and they might adopt the name of one of the partners as the partnership name for the Lynchburg concern. For where partners agree that their business shall be done in 261 the name of one person, *whether himself interested in the partnership or not, that is the partnership name and the partners are bound by it. Collyer on Part. § 215, nn.

And as those parties might carry on the business in the name of James S. Kent, I can see no reason why they might not establish an agency of which that firm should be the principal, nor why the act of assembly should not be deemed sufficiently complied with if the sign and advertisement were in that name as the principal. It certainly could not be required that the individual names of all the partners should be stated. This would involve very great inconvenience in many cases without any real benefit to any one. Partnerships sometimes consist of a great number of partners, to name all of whom might be very difficult and inconvenient if not impossible; and in the cases in which there might be dormant partners, no such agency could be established. Nor can any useful purpose be accomplished, because if the name of the firm be given as that of the principal in the agency, all the partners ostensible or dormant are just as much liable and to the same extent as if their names had been particularly specified.

But whilst the counsel for the plaintiff does not seriously controvert this proposition, he yet urgently insists that the proper firm name was not given, that it should have been Kent, Kendall & Atwater, instead of James S. Kent. The error of this consists, I think, in the failure to distinguish between the two concerns at Richmond and Lynchburg. They were in legal contemplation, separate and distinct. The one was a wholesale and credit business, the other a retail business for cash; they were conducted at different places; the one by the principals in person under the name of Kent, Kendall & Atwater, afterwards Kent, Paine & Kent, and the other in the name of J. J. Purvis agent for James S.

Kent; separate books were kept and a 262 weekly account of daily sales *rendered by the latter concern to the former. Being different concerns, it was therefore proper that the agency should be conducted in the name assumed for the firm at Lynchburg, and the sign and advertisement in that were a sufficient compliance with the requirement of the law.

That after the change in the old firm and the formation of the new firm of Kent, Paine & Kent, or after the new Code took

effect, there was no new sign or advertisement, will not defeat the right of the defendants to have their property protected against the creditors of Purvis. The new firm was, as is found by the jury, but a continuation of the old firm, and the business at Lynchburg was continued in the same name and manner as during the old firm. The partnership name James S. Kent represented the new firm just as it had the old firm, and any new sign or advertisement would have been the same as those which had been put up and published before the act took effect. As long as the sign remained over the door and the advertisement in the paper was unexplained or not countermanded, James S. Kent remained the partnership name of the firm for which Purvis did business as agent. James S. Kent was the ostensible principal of that agency, and the other partners of the Richmond house stood in the same relation to the Lynchburg concern as William G. Paine and John Enders did to the concern of Kent, Kendall & Atwater, and Robert G. Payne to the concern of Kent, Paine & Kent. If Purvis was a bona fide agent and James S. Kent a bona fide principal, the terms of the statute were satisfied. So far as the requirements go, it was wholly immaterial whether James S. Kent was sole principal or whether he had partners trading with him under his name and who would be equally responsible for the debts of the concern.

Upon the fair construction of the 263 statute in question, "I think what was done was sufficient to protect the goods levied on (which the jury have found expressly were the property of Kent, Paine & Kent) from the claims of the creditors of Purvis, and that the Circuit court did not err in so deciding. I am of opinion therefore that the judgment should be affirmed.

The other judges concurred in the opinion of Lee, J.

Judgment affirmed.

264

***White v. White & als.**

April Term, 1861, Richmond.

[80 Am. Dec. 706.]

(Absent, ALLEN, P.)

1. **Dower—Assignment of—Moneyed Compensation in Lieu of.**—Unless it is impossible to assign to a widow her dower in real estate in specie, a court of equity has no power, under its general jurisdiction, against her will, to decree a sale of the real

***Dower—Assignment of—Moneyed Compensation in Lieu of.**—In *Simmons v. Lyles*, 27 Gratt. 930, it was said: "The court is not authorized to substitute a commutation or a compensation in money, merely because dower in kind may prove to be injurious to the interests of heirs or creditors. The right of the widow is a legal one, and is paramount to any and every claim or lien created by the husband after the marriage. In *White v. White, & als.*, 16 Gratt. 264, this court laid down the rule on this subject in the strongest possible manner. It was there held,

estate and to provide her a compensation in money in lieu of her dower.

2. **Statute Concerning Partition—Construction of.**—A widow entitled to dower in the real estate of her deceased husband, is neither a joint-tenant, tenant in common or coparcener with the heirs at law, within the meaning of the statute concerning partition, Code, ch. 124, p. 536, so as to authorize a court of equity to sell the whole estate, against her will, and compel her to receive a moneyed compensation out of the proceeds, in lieu of her dower.

3. **Judicial Sales—Personalty—Widow's Share.**—In decreeing a sale at the suit of the heirs of a decedent's estate real and personal, except the widow's share of the slaves, the court should protect and secure to her her interest in the proceeds of the sale of the other personal property.

4. **Deeds—Construction of—Case at Bar.**—A conveyance of slaves in trust for S for her life, and after her death to B and the heirs of her body forever. But should B die without heir or heirs of her body, in that case to C. The conveyance does not give B a separate estate; but upon her marriage and the husband's possession of the slaves, the right of B in the slaves is vested in him.

Edmund P. White, of the county of Caroline, died about the year 1856, leaving a

that unless it was made to appear that it was impossible to assign dower in the real estate, it was not competent for a court of equity, in the exercise of its general jurisdiction, to decree a sale of the whole property, and to provide a compensation in money in lieu of dower against the consent of the widow, however much it might be to the interest of the heirs to have a sale of the whole, and a moneyed compensation to the widow."

The principal case was cited to the same effect in *Wilson v. Branch*, 77 Va. 69, 70.

In *Hoback v. Miller*, 44 W. Va. 637, 29 S. E. Rep. 1014, the court said: "Counsel for appellant cite *White v. White*, 16 Gratt. 264, and *Simmons v. Lyles*, 27 Gratt. 922, to the effect that if the property is insusceptible of assignment in kind, in the suit for partition, it may be sold, and she paid money in lieu of dower in kind, and would thence deduce the correlative right of the widow to force a sale upon the heirs; but, if those cases be correct, I know of none sustaining the widow's right to sell the freehold, out and out, to get money commutation for her dower. The common law warrants no such remedy to her. Nor can we base it on general principles of equity jurisdiction; for, there being no such right by common law, equity will not afford a remedy without right."

Same—Same—Same—Alienation of Land in Lifetime of Husband.—While it is true, as laid down above, that the widow cannot be compelled to receive a compensation in money in lieu of dower in land of which the husband died seized, unless it is impossible to assign her dower in kind, yet, by statute (Va. Code 1849, ch. 110, sec. 112, Va. Code 1887, sec. 3278), if there has been an alienation made under decree of court, or by the husband, in his lifetime, she cannot insist that her dower shall be assigned in kind nor can she refuse to receive an equivalent annuity in lieu of dower; the option in this matter being lodged by the statute exclusively with the alienee. *Verlander v. Harvey*, 36 W. Va. 379, 15 S. E. Rep. 56; *Hoback v. Miller*, 44 W. Va. 637, 29 S. E. Rep. 1014.

†**Statute Concerning Partition—Construction of.**—The proposition that a widow, entitled to dower in

widow and four infant children, and possessed of a large real estate of eleven hundred and fifty acres, some forty slaves, and stock, farming implements, &c., suitable for such an estate, bank stock, &c. Wood-

son Wright qualified as administrator
265 *upon the estate, and acted as such until his health failed, and he was succeeded by P. L. Marye. Mrs. White qualified as guardian of her children, and acted as such for the eldest of them, John B. White, until he came of age in 1860. She was removed from the guardianship of the others, of two of whom William S. Barton became the guardian, and Charles Hern- don became the guardian of the other.

In August 1860 John B. White filed his bill in the Circuit court of Caroline county, in which he states that Mrs. White is entitled to dower in the real estate of her late husband, and that the children are each entitled to a fourth thereof. That though the estate is a large one, yet from its peculiar position dower cannot be allotted to the widow, nor partition made among the children without great injury to the parties; and that their interest will be promoted by a sale of the entire subject, and the assignment of dower and distribution of the proceeds of sale according to the rights of the parties.

He further states that an equal division of the slaves in kind according to the rights of the parties cannot be made, and that for other causes, a sale of the slaves should be made and the proceeds of sale divided. But if the court should be of opinion that Mrs. White is entitled to have her third in kind, he asks that this third may be assigned to her; and the other two-thirds sold, and the proceeds of sale distributed.

The guardians of the infant defendants were appointed guardians ad litem to defend them in this suit; and they filed answers concurring in the opinion expressed in the bill, that partition of the real estate could not be conveniently made, and that the interest of the parties would be promoted by a sale. And they also concur in the opinion that a sale of the slaves would be for the interest of the infants. They also state that among the slaves to be sold or divided are three named Billy, Jim
266 and *Carter, the offspring of a woman named Nancy, which are claimed by Mrs. White as her separate property, by gift by deed from her brother Lawrence Battaile, Jr.; but which they insist became the property of her husband upon her marriage with him. This deed is filed with the answers; and by it Lawrence Battaile, Jr., in March 1827, conveys to trustees Nancy and her two children John and George and her future increase, in trust for the benefit

of his mother Ann Hay Battaile, for her life, and after her death to "Ann Champ Battaile, (Mrs. White) and the heirs of her body forever. But should the said Ann Champ Battaile die without heir or heirs of her body, in that case" he gives the said slaves and the increase of Nancy, to his niece Sarah Robinson Battaile; with a further limitation over upon the death of the latter without heir or heirs of her body.

Mrs. White demurred to the bill, for want of equity; and answered claiming her dower in the land and her one-third of the slaves, in kind; and objected to a decree for the sale of either.

A number of witnesses were examined as to the difficulty of assigning the widow her dower in the land, and dividing the remainder among the heirs; all of whom expressed a very decided opinion that such assignment and partition of the land would be very injurious to the parties; and they state the grounds of their opinion.—They also express the opinion that it would be for the interest of the infants that the slaves should be sold.

The cause came on to be heard in September 1860, when the court overruling the demurrer of Mrs. White, and being of opinion from the evidence, that partition of the real estate could not be conveniently made in kind without a serious diminution in its value, and that the interest of the parties interested would be promoted by a sale; appointed commissioners to sell the land. And

not deciding for the present whether
267 the *limitation over of the slave

Nancy and her increase upon the death of Mrs. White without issue, was void or not, the court appointed other commissioners to allot to Mrs. White one-third of the slaves in value of which her husband died possessed, if such partition could be made.—And the cause was removed to the Circuit court of Spotsylvania county.

The commissioners appointed to assign to Mrs. White her share of the slaves, made their report; from which it appeared that they had assigned to her two of the descendants of Nancy. And in October 1860 the cause came on again to be heard, when the court confirmed the report; and it appearing to the court that the limitation over of the slaves Billy and Carter descendants of Nancy, allotted to the widow, cannot possibly take effect until after the death of the widow, and declining to decide whether the said limitation is valid or not, the commissioners thereafter appointed to sell the slaves remaining after the allotment of her third to the widow, were directed to invest the proceeds of the sale of the slave Jim in Virginia State stock to await the further order of the court. And commissioners were appointed and directed to sell the slaves remaining which were owned by the plaintiff and the infant defendants in common, and the perishable estate either at public or private sale, as they should think best; and after paying the expenses of said sale and the costs of the suit, to pay over the nett proceeds, to the complainant and the

the real estate of her deceased husband, is neither a joint-tenant, tenant in common, or coparcener with the heirs at law within the meaning of the statute concerning partition, was expressly approved in *Casto v. Kintzel*, 27 W. Va. 760.

See generally, monographic note on "Dower" appended to *Davis v. Davis*, 25 Gratt. 587.

guardians of the infants; one-fourth to each of the infants.

From this decree in the cause Mrs. White applied to this court for an appeal, which was allowed.

R. T. Daniel, for the appellant.

Barton and Herndon, for the appellees.

LEE, J., delivered the opinion of the court:

The court is of opinion that as it is not made to appear *that it was impossible to assign to the appellant her dower of and in the real estate of her husband, it was not competent for the court of equity, in the exercise of its general power, to decree a sale of the whole property, and to provide a compensation in money to the appellant in lieu of her dower, against her will and without her consent, however much it might be to the interest of the heirs at law of the decedent to have a sale of the whole estate and a monied compensation allowed to the appellant, instead of a sale of two-thirds of the estate and the remainder in the life estate of the widow.

And the court is further of opinion, that a widow entitled to dower in the estate of her deceased husband, is neither a joint-tenant, coparcener, nor tenant in common with the heirs at law, within the meaning of the statute concerning partition, in the Code of Virginia; and that therefore no power is conferred by that statute upon the court of equity to sell the whole estate against her will and without her consent, and compel her to receive a monied compensation out of the proceeds in lieu of her dower.

And the court is further of opinion, that whether the limitation in the deed of the said Lawrence Battaile, Jr., of the 19th of March, 1827, was a good executory limitation over or the contrary, (as to which the court deems it unnecessary to express any opinion), yet that the said deed did not create a separate estate for the sole and exclusive use of the appellant; but that the marital rights of her husband attached upon such interest as she took under the said deed, and that such interest should be disposed of as the other personal estate of the said Edmund P. White deceased.

And the court is further of opinion that if there was other perishable personal estate of the said Edmund P. White, besides the said slaves, as seems to be contemplated *by the said decree, the failure of the appellant to make any express claims to the same, did not bar her right to an interest therein; and that the Circuit court should have respected her right to a distributable share thereof, and not directed the whole proceeds of the sale of the same to be paid over to the children of the said Edmund P. White deceased, to her exclusion.

Thus the court is of opinion that the said decrees are erroneous.

Therefore reversed with costs, and cause remanded, with directions to proceed in the

same according to the principles hereinbefore declared, and further as justice and equity shall require.

Which is ordered to be certified, &c.

Decrees reversed.

270

West v. Ferguson & als.

April Term, 1861, Richmond.

1. **Contested Elections—Costs.**—In cases of contested elections before the County court, under the act of April 22, 1852, ch. 71, pp. 64, 65, the County court has no authority to give a judgment for costs to either party.

2. **Same—Same—Writ of Prohibition.**—If in such a case the County court does give a judgment for costs to either party, a writ of prohibition from the Circuit court is a proper proceeding to arrest the judgment.

In June 1856, Henry A. K. Ferguson and others filed their petition in the County court of Halifax county contesting the election of James R. West, as sheriff of the county. The proceeding was in form according to the act of April 22, 1852, ch. 71; and West having appeared to maintain his election, the case was heard by the County court at its August term, when the court adjudged and declared that West was duly

*For monographic note on Elections, see end of case.

*Costs.—It is by virtue of statute law alone that any judgment for costs, *eo nomine*, can be rendered in favor of either party.

This proposition laid down in the principal case was approved in *Gresham v. Ewell*, 85 Va. 7, 8 S. E. Rep. 700; *Wilkinson v. Hoke*, 30 W. Va. 405, 19 S. E. Rep. 530.

In *Gresham v. Ewell*, 85 Va. 8, 8 S. E. Rep. 700, the court said: "Costs, *eo nomine*, are not recoverable at common law, and there is no statute authorizing the recovery of costs in a contested election case in a county court. *West v. Ferguson, supra*."

See generally, monographic note on "Costs" appended to *Jones v. Tatum*, 19 Gratt. 730.

Judgments—Void.—In *Ritchie v. Sayers*, 100 Fed. Rep. 530, the court said: "It has been repeatedly held that a judgment of a court of competent jurisdiction, rendered without authority of law, is a nullity. *City of Charleston v. Beller*, 45 W. Va. 44, 30 S. E. Rep. 152; *Norfolk & W. Ry. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. Rep. 196, 41 L. R. A. 414; *Wilkinson v. Hoke*, 30 W. Va. 408, 19 S. E. Rep. 530; *Manf'g Co. v. McGinnis*, 30 W. Va. 532, 4 S. E. Rep. 782; *West v. Ferguson*, 16 Gratt. 270; *Styles v. Coal Co.*, 45 W. Va. 574, 33 S. E. Rep. 227."

†**Same—Same—Writ of Prohibition.**—In *Charleston v. Beller*, 45 W. Va. 50, 30 S. E. Rep. 154, the court said: "The judgment of the circuit court being without law to sustain it, prohibition is the proper remedy to prevent its execution. *Norfolk & W. Ry. Co. v. Pinnacle Coal Co.* (decided at this term), 44 W. Va. 574, 30 S. E. Rep. 196; *Wilkinson v. Hoke*, 30 W. Va. 408, 19 S. E. Rep. 530; *Manufacturing Co. v. McGinnis*, 30 W. Va. 532, 4 S. E. Rep. 782."

As to writs of prohibition, see also, *Neims v. Vaughan*, 84 Va. 608, 5 S. E. Rep. 704; *Hogan v. Guigon*, 30 Gratt. 718, and *foot-note*; *Ellyson, ex parte*, 30 Gratt. 10, and *foot-note*.

elected sheriff of the county of Halifax for the term prescribed by law; to commence on the first of the next January: and then proceeded to render a judgment against the petitioners for the defendant's costs. The petitioners thereupon applied to the judge of the Circuit court of Halifax for a writ of prohibition to stay the enforcement of the judgment for costs. Upon this petition a rule was made directing West and the County court to show cause why the writ of prohibition should not be awarded. And at the October term of the court the case came on to be heard when the court made the rule absolute, and prohibited the defendant West from further proceedings to enforce the judgment for costs against
271 the petitioners. *To this judgment West applied to this court for a superseas which was awarded.

Macfarland and Roberts, for the appellant.

Read, for the appellees.

ROBERTSON, J. Costs were not recoverable at common law. It is true that in actions in which damages were given the costs of the plaintiff were in reality considered and included in the quantum of damages, and he thus indirectly recovered his costs, or their equivalent. But he could not do this in actions in which no damages were given; and the defendant could not, in any case whatever, recover his costs, either directly or indirectly.—It is by virtue of statute law alone that any judgment for costs, *eo nomine*, can be rendered in favor of either party. 3 Black. Comm. 399; Com. Dig. Tit. Costs; Viner's Abr. Tit. Costs; 1 Rob. Prac. (old ed.) 389.

The act under which the proceedings in this case were had (acts 1852, ch. 71) provides that the returns of the elections of sheriffs, and of certain other officers, "shall be subject to the enquiry, determination and judgment of the respective county and corporation courts," and that "the said courts shall in judging of said elections, proceed upon the merits thereof, and shall determine finally concerning the same according to the constitution and laws of this commonwealth"; but no authority is given by it to said courts to render any judgment for costs. If such authority exists it must be found in some statute conferring upon the courts general power over the subject of costs. The only enactments having any bearing on the question under consideration, are to be found in sections 4 and 8 of chapter 185 of the Code.

The fourth section authorizes the court, "upon any motion (other than for a judgment for money), or upon any interlocutory order or proceeding," to "give or refuse
272 costs, at its discretion, unless it be otherwise provided."

The eighth section declares that, "except where it is otherwise provided, the party for whom final judgment is given in any action, or in a motion for judgment for money, whether he be plaintiff or defend-

ant, shall recover his costs against the opposite party."

Unless the proceedings under the statute of 1852, in the case of a contested election, can be considered as a "motion," or an "action," or an "interlocutory order or proceeding," it is clear that they are not embraced by either of these sections.

They certainly do not fall within the terms "interlocutory order or proceeding"; and it seems equally clear that they are neither a "motion," nor an "action." These words have a well understood technical meaning, and cannot, by any stretch of construction, be made to embrace such proceedings as are directed to be had in cases of contested elections. These proceedings are novel and peculiar in their character, and seem designed rather for the purpose of ascertaining, on behalf of the public, who has been duly elected, than of enabling rival candidates to litigate, on their own behalf, the question of right to an office. No contests can be commenced unless complaint of an undue election, or false return, is made by fifteen or more of the qualified voters, two of whom must make oath or affirmation to the truth of the facts stated in the complaint. This must be filed in the Clerk's office within ten days after the election, and the party whose election is contested must within ten days after the complaint, be served with a copy of it. The defeated candidate, who is the only other party who can be supposed to have any personal interest in the matter, cannot, at his own pleasure, enter upon the contest; and it may be commenced and prosecuted without his knowledge, or against his wish. He is
273 not a necessary party "in any stage of the proceedings. Indeed the complaint may be made and the election set aside when there has been no candidate except the one whose election is contested. In this case the defeated candidate was not one of the complainants, and the only thing in the record from which his name is to be ascertained is the statement, to be found in the decision of the court, of the number of illegal votes upon his poll.

Proceedings like these cannot be regarded as a "motion," or an "action," within the purview of the statutes regulating costs between parties.

Frivolous contests are guarded against by the requirement of an affidavit as to the truth of the complaint, by the number of complainants necessary to commence a contest, and the trouble and expense to which they must be subjected in prosecuting it. These safeguards are sufficient without superadding a liability for costs to the party whose election is contested. Such liability would operate as an undue discouragement to the institution of a contest in which the whole community is as much interested as the complainants. The refusal to give costs to either party seems to be the best mode of avoiding the discouragement of proper contests on the one hand, and the encouragement of frivolous ones on the

other. But whether this be so or not, it is enough for us to know that the legislature has not authorized any judgment for costs to be given in such cases.

The County court in rendering such judgment exceeded its jurisdiction, and a writ of prohibition was a proper proceeding to arrest the execution of said judgment for want of authority in the County court to render the same.

In this view of the case it is not necessary to decide the question which has been raised as to the right of two of the members of the County court to act as justices.

274 *The judgment of the Circuit court must be affirmed, with costs and damages.

The other judges concurred in the opinion of ROBERTSON, J.

Judgment affirmed.

ELECTIONS.

- I. Suffrage.
 - A. Rights in General.
 - B. Virginia Election Law—Statutes.
- II. Qualifications of Voters and Office Holders.
- III. Registration.
- IV. Validity of Elections—Irrregularities.
- V. Commissioners of Elections—Their Duties, etc.
- VI. Officers Elected—Term of Office.
- VII. Election Contests.
- VIII. Procedure.
 - A. Certiorari.
 - B. Mandamus.
 - C. Prohibition.
- IX. Offences against Election Laws.

I. SUFFRAGE.

A. RIGHTS IN GENERAL.

Suffrage—The Right Derived from the Constitution of the State—Legislative Powers—Constitutionality of Statute.—The right of suffrage is derived directly from the constitution of the state, and we look to it to ascertain who may or may not vote. It is not within the power of the legislature to prescribe any qualifications additional to those found in the constitution either directly or indirectly, and, since no educational qualification is prescribed by the constitution none can be required. The sole function of the legislature with respect to suffrage, is to provide the method of voting, to guard against any improper or fraudulent conduct in connection therewith, and to this end it may adopt and enforce reasonable rules and regulations, but the enforcement of a regulation which virtually establishes a test of qualification of the voter in addition to those prescribed in the constitution is unconstitutional and therefore void. *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. Rep. 483, 1 Va. Law Reg. 176.

It was further held in this case that the act of the assembly, approved March 6, 1894, "to provide for a method of voting by ballot," does not contravene any of the propositions stated above, and it is therefore not unconstitutional.

Duties of Legislature Concerning Electors—Constitutional Provision.—Under the constitution of West Virginia, § 11, art. 4, it is the duty of the legislature to prescribe the manner of conducting and making returns of elections and of determining contested elections, and to pass such laws as may be

necessary and proper to carry out their requirements in this regard without disorder or violence at the polls, and to prevent corruption or fraud in counting the votes ascertaining the result or otherwise. *Halstead v. Rader*, 27 W. Va. 806.

County and Corporation Courts—Authority to Remove Judges of Election.—The county and corporation courts have full authority to remove a judge of elections for malfeasance in office or gross neglect of duty, though he has not been convicted by the verdict of a jury of any offence. *McDougal v. Guigon*, 27 Gratt. 133. See *Lewis v. Whittle*, 77 Va. 423; also, *Nelms v. Vaughan*, 84 Va. 698, 5 S. E. Rep. 704.

B. VIRGINIA ELECTION LAW—STATUTES.

Australian Ballot System—Constitutionality.—The act of the assembly approved March 6, 1894, entitled "an act to provide for the method of voting by ballot," is a valid act; and not in conflict with Article III, sections 1 and 2 of the constitution of Virginia, nor with Article I, section 20, nor with Article I, section 8, of the Virginia Constitution. Nor is it in conflict with Article XIV of the amendments to the constitution of the United States. *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. Rep. 483, 1 Va. Law Reg. 176.

Virginia Election Law—Case in Circuit Court of United States.—See the case of *Cox v. Gilmer* (1896), 4 Va. Law Reg. 229, decided in the circuit court of the United States, Western District of Va. construing the Virginia election law. Act of General Assembly of Virginia, approved March 5, 1890, authorizing judges of an election to order the arrest of any person creating a disturbance at the polls, was held not repugnant to the Constitution of Virginia. See also, *Pearson v. Board of Supervisors*, 91 Va. 322, 21 S. E. Rep. 483, 1 Va. Law Reg. 176.

Legislative Regulation—Time for Preparing Ballot.—Under the statute, March 6, 1894, providing for voting in booths, a limit to the time for the preparation of ballots was an obvious necessity, for which the legislature had a right to provide, and the court cannot as a proposition of law, decide that the time allowed by the statute is inadequate. The act places no limit on the number of booths that may be supplied, and the county courts have full power to multiply the voting precincts to meet the necessities of the people. *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. Rep. 483, 1 Va. Law Reg. 176.

Special Constables—Their Duties—Statutes.—It was held in *Pearson v. Supervisors*, 91 Va. 322, 21 S. E. Rep. 483, under Act of March 6, 1894, that the special constables provided for in said act are sworn officers, charged with the gravest duty to the public in which every citizen is interested, and for failure to perform their duty severe penalties are inflicted. Among these is the duty to render to those who are blind or unable to read on account of defective education every assistance necessary to aid the elector in preparing his ballot. The word "may," used in the fifteenth section of this act, relating to the duty of special constables, is mandatory and not merely permissive and directory.

Secret Ballot—Duties of Special Constable.—A vote by ballot *ex vi termini* implies a secret ballot; and the secrecy of the ballot is a right which inheres in the voter; but a blind man or a man unable to read, must, in the nature of things so far compromise this right of secrecy as to obtain the aid of others in the preparation of his ballot; for which purpose a constable is provided by the statute. It is therefore the duty of the special constable, which he is

sworn to faithfully execute, to assist the voters in preparing their ballot, when requested, to observe all his rights and to keep the secrecy of his ballot inviolate. *Pearson v. Supervisors*, 91 Va. 323, 21 S. E. Rep. 483.

Construction of Election Statutes.—It is said by the court in *Loomis v. Jackson*, 6 W. Va. 601, that "Election statutes are to be tested like other statutes; but with a leaning to liberality, in view of the great public purpose which they accomplish; and except where they specifically provide that a thing shall be done in the manner indicated, and not otherwise, their provisions, designed merely for the information and guidance of the officers, must be regarded as directory only; and the election will not be defeated by a failure to comply with them, provided, the irregularity has not hindered any who were entitled to vote from exercising the right of suffrage, or rendered doubtful the evidence from which the result was to be declared."

II. QUALIFICATIONS OF VOTERS AND OFFICE HOLDERS.

Requirements for Citizenship—Evidence of Naturalization—Parol Evidence Inadmissible.—The law requires that an alien, in order to become a citizen, must be naturalized in a court of record and admitted to citizenship by the judgment of such court; therefore if it is claimed that an alien has been naturalized in a certain court, and this is the only court in which he claimed to have been naturalized, and on examination of the record it is shown that no record was made of naturalizing such alien, it cannot be proved by parol evidence that such alien was naturalized, and, by inadvertence no record was made thereof; nor can the citizenship of an alien under such circumstances be presumed by proof of his having held real estate or of his having voted or held office or by other circumstances. *Dryden v. Swinburne*, 20 W. Va. 90.

Naturalization of a Father—Effect on Son.—By section 2173 of the revised statutes of the United States if the father be naturalized, while his son under the age of 21 is residing with him in the United States, his son will also be considered a citizen; but if at the time of the naturalization of the father the son is over the age of 21, such naturalization does not affect the character of the son as an alien, even though the father was naturalized before the first of Dec. 1873, when revised statutes of the United States went into operation. *Dryden v. Swinburne*, 20 W. Va. 90.

Naturalization of Aliens—Authority of the Court to Antedate Its Order.—No court of the United States has authority or power in naturalizing an alien to declare in its order that such alien shall be deemed a citizen from a time prior to the making of the order: if such declaration is made it is unauthorized and void so far as such declaration is concerned, and he is a citizen only from the time such order is made. *Dryden v. Swinburne*, 20 W. Va. 91.

Extension of City's Boundary—Effect on Voter's Privileges.—The Act of the Assembly, Sess. 1866-7, p. 635, extending the boundaries of the city of Richmond was held in *Wade v. City of Richmond*, 18 Gratt. 583, to operate upon the municipal relations of the inhabitants of the territory annexed to the city but in political elections they were still to vote as part of the county of Henrico.

Cession of Land for District of Columbia—Effect on Voters.—A person who, at the time of the cession of the District of Columbia to the United States,

resided in that part of the county of Fairfax which, by the said cession, was comprehended in that district, and who has continued to reside there ever since, is not entitled to vote for members of the General Assembly; notwithstanding he was born in Virginia and possesses a freehold therein. *Custis v. Lane*, 3 Munf. 579.

Authority of Nominating Conventions to Judge of Qualifications of its Members.—In passing on the right of nominees for public office to appear on the election ballots, the supreme court in *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S. E. Rep. 281, recognizes the right of the convention making the nominations to judge of the election, qualifications, and returns of its own members, and will not go back of its action to inquire as to the right or title of delegates admitted by it as members.

Disqualification of Elected Officer—Effect as to His Defeated Opponent.—Where two parties are opposing candidates for the office of sheriff, and the one receiving the highest number of votes disqualifies himself from holding the same by contracting to farm or sell the office or a portion thereof, such fact does not confer any interest in the office on the party receiving the minority of the votes cast at the election. *State v. Matthews*, 44 W. Va. 372, 29 S. E. Rep. 994.

Election of Alien—Incompetent Candidate—Effect.—If an alien and a citizen, eligible to office are rival candidates for the same office, and the alien receives a majority of the votes cast, though such alien be declared incompetent by the court in the contest between them, the citizen having received only a minority of the votes cannot be declared elected to the office; but it must be held to be vacant. *Dryden v. Swinburne*, 20 W. Va. 91. See *State v. Matthews*, 44 W. Va. 372, 29 S. E. Rep. 994.

Justice Convicted of Felony—Forfeiture of Office—Effect of Pardon.—A justice of the peace was convicted of the felony of malicious stabbing, sentenced to the penitentiary, confined there, and then pardoned. *Held*, the conviction and judgment for this felony, was a forfeiture of his office of justice, and incapacitated him from afterwards acting under his commission; and the pardon neither avoided the forfeiture, nor restored his capacity. *Com. v. Fugate*, 2 Leigh 724.

Selling or Farming Out Office—West Virginia Statute Construed.—The provision of West Virginia Code 1868, ch. 7, sec. 5, concerning the selling or farming out of offices is held to mean that the parties are disabled from holding the term of office, the whole or part of which was thus sold or contracted to be sold, whether the term of office be an existing or a future term of office, not then in existence; but it is only the term of office contracted for, that these parties are disabled from holding; and their competency to hold a future office is not affected, unless the contract is to sell or farm a future office, and then he is incompetent to hold only the future office so sold or farmed. *Dryden v. Swinburne*, 20 W. Va. 91.

III. REGISTRATION.

Board of Registration—Acting in Judicial Capacity—Not Subject to Civil Action.—Acting under the provisions of § 8, ch. 78, Acts of 1866 (W. Va.), the members of the County Board of Registration passing upon the right of a party to be registered or not, were acting in a judicial capacity, and if they acted within their jurisdiction, limited by the statute, they could not be amenable in a civil action.

Fausler v. Parsons, 6 W. Va. 486. It is said in this case, that it seems, therefore, settled that where the subject-matter and the person are within the jurisdiction of the courts, the judge, whether of a superior or inferior court, is not subject to a civil action for any matter done by him in the exercise of his judicial functions. He is not bound, at the peril of an action for damages, or personal controversy, to decide right, in matter either of law or fact; but to decide according to his own convictions of right, of which his recorded judgment is the test, and must be taken to be conclusive evidence.

Registration—Mandamus—When Proper.—Where under the Code of 1887, § 83, a voter appealed from refusal of the registrar to allow him to register, the answer of the registrar that the voter did not offer to qualify as to his right to vote, and that he was not entitled to vote, was held to be no defence to an application for *mandamus* to compel the registrar to transmit to the court the grounds relied on by the appellant, and the reasons for his refusal to register him. *Coleman v. Sands*, 87 Va. 660, 13 S. E. Rep. 148.

Right to Inspect Registration Books—Mandamus.—A *mandamus* will lie to compel a registrar to allow any citizen to inspect, and take copies of the registration book, although he is allowed no compensation for so doing; the books being of a public nature, in which every citizen has an interest; and more, the statute provides for such inspection in plain language. *Clay v. Ballard*, 87 Va. 787, 13 S. E. Rep. 262.

Right to Inspect Registration Books—Mandamus.—*Mandamus* will lie to compel a custodian of the registration books to allow a petitioner to see the poll books in his possession, under Code of 1887, § 84, providing that the registration books shall be at all times open to public inspection, and section 132, of the Code, providing that the poll books, being lodged with the clerk, shall remain "for the use of persons who may choose to inspect" them. *Keller v. Stone*, 96 Va. 667, 32 S. E. Rep. 454.

Same—Liberal Construction of Statutes.—The provision of the Virginia Statute, Code 1887, § 84, which provides that the registration books "shall at all times be open to public inspection" was intended as a safeguard against fraud and must be liberally construed. *Clay v. Ballard*, 87 Va. 787, 13 S. E. Rep. 262.

IV. VALIDITY OF ELECTIONS—IRREGULARITIES.

Local Elections—Failure to Comply with Requirements of Statute—Effect—Parol Evidence.—Where a question was submitted to the voters of the county of Clarke, under Acts of 1879-80, p. 271, which made it the duty of the sheriff of the county to post notices of the election at every voting place in the county within a prescribed period preceding the election, the failure on the part of the sheriff to post the notices as required, invalidates the election. *Haddox v. County of Clarke*, 79 Va. 677.

It was also held in this case that on application for liquor license where such an election has taken place, that parol evidence is admissible to prove that notices of the election had not been posted, or that other plain and express provision of the statute, providing for the election had not been complied with. See *Chalmers v. Funk*, 76 Va. 717.

Concerning the Holding of Elections—Provisions Directory.—Many of the provisions of the law in regard to the manner of holding and conducting the elections and counting the votes and certifying the result, must be held to be directory only, and intended to point out to inexperienced and ignorant

persons, who are sometimes necessarily called upon to act as election officers, a plain, easy and direct way by which they are to attain the great end of their creation, viz.: to ascertain the true result of the election. And when the true result of a legal election has been ascertained, or can be ascertained, by the officers charged with the performance of this duty, no irregularity, mistake or even fraud committed by any of the officers conducting the election, or by any other person, can be permitted to defeat the fair expression of the popular will as expressed in said section. Fraud in such case is never to be presumed, but must be particularly alleged, especially when the act charged as a fraud may be innocent. *Loomis v. Jackson*, 6 W. Va. 612, 660.

Directory Requirements—Non-Compliance with—Validity of Elections.—Any provision in regard to the matter of holding and conducting elections, counting votes and certifying the result, must be regarded as directory only, and when the true result has been or can be ascertained, no irregularity or even fraud by the officer of the election, or by any other person, can be permitted to defeat the popular will as expressed thereat. *Loomis v. Jackson*, 6 W. Va. 612. See *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. Rep. 557; also, *Snodgrass v. Wetzel*, 44 W. Va. 56, 20 S. E. Rep. 1035. In this last case the defeated candidate for clerk of the county court asked to have the vote from a certain precinct thrown out on the ground that the two poll clerks divided the ballots between them and each signed his own name and the name of the other clerk, instead of each signing his own name on each ballot, as directed by the statute; this was done, however, in the presence of the election judges and of each other. It was held to be a ministerial act and capable of being validly done by an agent. The court said, however, that if one person standing, by another, authorizes him to sign his name, it is not an act of agency, but is regarded as the very signature of the party himself, as if done by himself. And in the case of *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. Rep. 557, the court went so far, in order to uphold a fair result, that it ignored the act of officers of the election in appointing two poll clerks without a shadow of authority, and the acting of such unlawful poll clerks of the same political party in preparing the ballots of illiterate voters in separate rooms, with every opportunity to falsify the ballots.

Politics of Ballot Clerks—Directory Provision.—While the election law requires the ballot clerks to be of opposite politics, the mere fact that such is not the case is not alone sufficient to justify the exclusion of the poll from the court. *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. Rep. 557.

Commissioners Unlawfully Appoint Two Additional Ballot Clerks—Effect on Validity.—It is said further in the opinion of this case, that while, ordinarily, such misconduct on the part of the judges, unexplained, raises grave suspicions, and would require but a small amount of additional evidence to destroy the presumption of fairness and sustain the charge of corruption, yet, such conduct may be, as it was in this case, satisfactorily explained so as to excuse their conduct. *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. Rep. 557.

Directory Provisions.—Commissioners of election appointed at the May term of court when the statute directed that they be appointed at the April term, were deemed validly appointed, the court consider-

ing the provision directory only. *Redd v. Supervisors*, 31 Gratt. 695.

Irregularity in Election—Review by Certiorari—Corrected.—At an election for county officers, four persons who had not registered, were allowed to deposit ballots, but were subsequently and before the whole vote was counted, declared by the election officers to be improper voters. On being called before the officers they were sworn as to the character of the ballots deposited by them, and four ballots were accordingly destroyed, which did not change the result of the election. The election officers certified certain parties as having received the highest number of votes, and the board of supervisors set the election aside because of the irregularity mentioned, and ordered another election. Subsequently, the parties who had been elected by the first vote, petitioned the circuit court for a writ of *certiorari* to supervise the proceedings of the board of supervisors. *Held*, that there was no irregularity in the election, in fact or in law, that would be sufficient to invalidate the election, according to the provisions of § 28, Acts 1868; and that it was a proper case for review by a higher court. *Burke v. Monroe Co.*, 4 W. Va. 371.

Informalities in Holding Election—Effect.—Mere informalities on the part of election officers in holding, and ascertaining and declaring the result of an election, unless otherwise provided by statute will not vitiate an election in other respects fair and impartial. *Knight v. Town of West Union*, 45 W. Va. 194, 22 S. E. Rep. 163.

Election Valid Though Held and Certified by Only Two Judges.—An election held in Halifax county by only two judges of election and certified by them is valid, and the commissioners of election may be compelled by mandamus to count the vote so certified. *Keesee v. Melvin*, 3 Va. L. R. 385, decided Nov. 21, 1895. In note appended to this case it is said, that "the judgment in the principal case settled a question of general interest which is constantly arising. As no opinion was delivered it escaped the attention of the editors, but its importance to the general public is sufficient reason for reporting it at this late day."

Irregularities Have No Effect—Unless Result of Election is Thereby Changed.—It is affirmed in *Loomis v. Jackson*, 6 W. Va. 602, that no irregularity, or even misconduct, on the part of the election officers, or other persons, will vitiate an otherwise legal election, unless the result thereof has been thereby changed, or rendered so uncertain as to make it impossible to ascertain the true result. A different rule would make the manner of performing a public duty, more important than the duty itself.

Clerical Error—Does Not Invalidate Election.—A mistake entered in the record of the county court in relation to the date of an order concerning an election will not invalidate the election. *Thomas v. Com.*, 90 Va. 92, 17 S. E. Rep. 788.

Conformity with Statute—Substantial Compliance—Presumption of Fairness.—It is necessary that all the details required by the statute in conducting an election should appear on the record; but if it appears from the record that the county court, with the poll books, tally sheets, and certificates of election from the various precincts before it, has canvassed the returns, and declared the result, it will be presumed to have acted rightly, unless the contrary be made to appear. *Minear v. Tucker Co.*, 20 W. Va. 687, 20 S. E. Rep. 669.

Same—Election Concerning Issue of Municipal Bonds.—In a municipality having less than 600 voters, an election confined solely to the question of the issue of municipal bonds is not invalid because conducted in the mode prescribed for the election of municipal officers, in the absence of political or party nominations. *Knight v. Town of West Union*, 45 W. Va. 194, 22 S. E. Rep. 163.

Election under Statute Afterwards Repealed—Effect.—An election concerning the sale of spirituous liquors, held July 1st, 1886, under act of Feb. 26, 1886, was not invalidated by repeal of that act by the adoption of the Code, § 4202, May 1st, 1888; *Thomas v. Com.*, 90 Va. 92, 17 S. E. Rep. 788.

Provision by Implication—Service of Sheriff in Special Election.—The order of the county court directing the sense of the qualified voters to be taken, directs the election to be held by the commissioners of election in conformity to law. Though the order does not expressly require the sheriff to act, so far as the agency of the sheriff was rendered necessary by the law, although not named in the order, he was within its operation. *Redd v. Supervisors*, 31 Gratt. 695.

V. COMMISSIONERS OF ELECTIONS—THEIR DUTIES, ETC.

Nature of the Tribunal.—The county commissioners acting in special session to ascertain the result of a contested election, are an inferior tribunal proceeding in a summary manner and not according to the course of the common law. This tribunal is a creature of, and its proceedings are governed entirely by the statute; and no provision is made for a review of its action or proceedings upon motion, appeal, writ of error, or *superseas*. *Chenoweth v. Commissioners*, 26 W. Va. 234.

Commissioners of Election—Their Duties Defined.—The commissioners of election are the body to compute and ascertain the number of registered voters in the county, the number of votes cast at the election, to separate them and ascertain for whom, or for what purpose the majority of votes were cast. In ascertaining and reporting the number of registered voters in the county they are to be guided and controlled by the registration books. But where the register had recorded therein the death or removal of a person registered, it was proper to omit his name from the count. *Redd v. Supervisors*, 31 Gratt. 695; *Brown v. Randolph County Court*, 45 W. Va. 827, 22 S. E. Rep. 165.

Powers and Duties of Commissioners—Election Returns—Mandamus.—The powers and duties of commissioners of election, as prescribed by §§ 133, 134, 135, 136, 137 of the Code are to ascertain the results of elections from the face of the returns, if regular, and if not regular, to summon any clerks, judges, etc., deemed necessary to investigate any returns which require it and cause the irregularity to be corrected as required by the statute, and then to ascertain the result from the correct returns. When the result has thus been ascertained and signed by the required number of commissioners, and attested by the clerk, and had an abstract of the votes cast annexed thereto, the duties of the commissioners are completed. And when returns have been made and the result ascertained in the manner thus prescribed by law the commissioners cannot go behind the returns and throw out a precinct. If they do this, without authority, the clerk may be compelled by *mandamus*, to issue the certificate of election to the person elected by the regular vote. *McKinney v. Peers*, 91 Va. 684, 23 S. E. Rep. 506.

Same—Manner of Counting Ballots.—It is the legal duty of the board of election canvassers to count all ballots or parts of ballots where the intention of the voter appears from the face of the ballots, though not marked or erased in the plain manner directed in the statute, and to reject all ballots or parts of ballots where such intention does not appear from the face of the ballots. If, from the face of his ballot, the intention of the voter is apparent as to his choice of candidates for any office, his vote should be counted as to such office, although his intention as to other candidates for other offices be not ascertained, and the ballot invalid as to them. It is further their duty to make a careful record of every ballot rejected by it, with the reason therefor, and the identification of such ballot as a part of such record. *Dunlevy v. County Court* (W. Va.), 35 S. E. Rep. 966.

Acts of Commissioners—Ministerial and Judicial—Prohibition.—While many of the acts of the commissioners, while sitting as a board of canvassers, after an election, are merely ministerial, they are not all so; and where such tribunal, clothed by the statute with both ministerial and judicial powers, is merely exercising its ministerial functions, to its action in such matters prohibition will not lie; but when it is exercising its judicial functions, and is proceeding in excess of its judicial powers, or is usurping judicial powers which do not belong to it, to such action a writ of prohibition will lie. *Brazie v. Fayette Co. Com'rs*, 25 W. Va. 213.

Same—Errors of Canvassers.—Mere errors and irregularities of such commissioners, while proceeding within their jurisdiction, are not subject to prohibition. *Fleming v. Com'rs*, 31 W. Va. 608, 8 S. E. Rep. 267.

Judicial and Ministerial Duties.—Aside from the quasi judicial functions necessarily incident to the duties of county commissioners in determining that the ballots, poll-books and certificates of election returns, the legality of which are in question, are genuine, that they are in fact the returns and substantially in the form prescribed by the statute, and to correct them if necessary and have them put in the proper form, the duties of said commissioners are purely ministerial, and their judicial functions are limited to the acts prescribed by the statute. *Brazie v. Com'rs*, 25 W. Va. 213; *Chenoweth v. Com'rs*, 26 W. Va. 230; *Fleming v. Com'rs*, 31 W. Va. 608, 8 S. E. Rep. 267.

It had been established by decisions of the W. Va. court, prior to the enactment of the present election law—*Brazie v. Com'rs*, 25 W. Va. 213; *Chenoweth v. Commissioners*, 26 W. Va. 230; *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. Rep. 274—that election officers had conferred upon them both ministerial and judicial powers and that *certiorari*, and not *mandamus*, was the proper remedy to review other proceedings.

Board of Supervisors—A Judicial Tribunal—Power Limited by the Statute.—By the provisions of ch. 8, Code of W. Va. 1888, in conferring upon the board of supervisors the power to call and examine witnesses, to compel the production of papers, to open, inspect, examine and count the ballots cast at an election, and to make all orders deemed necessary to enable them to discharge their duties; and that their determination upon that subject should be entitled to the force and validity of a judgment until impeached on proper grounds, it was the evident intention of the legislature to establish a judicial tribunal. *Loomis v. Jackson*, 6 W. Va. 616.

But it was further held in this case that this special court, having no common-law jurisdiction cannot permit amendments of notices and specifications after the time has passed when the party themselves might be allowed to correct omissions and supply defects.

Whether Precinct Commissioners, etc., Were Sworn—Judicial Question.—When commissioners were assembled, under our statute, in special session, after an election, to canvass the votes cast, and the question was presented to them whether the precinct commissioners, canvassers, and clerks at a certain voting place were sworn, such question was a judicial one, within their jurisdiction, and whether on the evidence before them they decided rightly or wrongly, could not be the basis for an application for a writ of prohibition. *Fleming v. Com'rs*, 31 W. Va. 608, 8 S. E. Rep. 267.

Commissioners of Election—Ministerial Officers.—The five commissioners of election, provided for under §§ 40, 41, 42, of the Virginia statute, are merely ministerial officers, whose duty is to take the votes, count them, and certify the result; therefore, since a writ of prohibition cannot be issued to a ministerial officer, it could not properly be issued to such commissioners. *Ellyson, ex parte*, 20 Gratt. 10.

Duties of Commissioners—Virginia Law.—The duties of commissioners of election are entirely ministerial, and if they fail to discharge them, they may be compelled to do so by *mandamus*. *McKinney v. Peers*, 91 Va. 684, 22 S. E. Rep. 506. See also, *Keesee v. Melvin*, 8 Va. L. Reg. 284; *Brown v. Randolph Co. Court*, 45 W. Va. 327, 32 S. E. Rep. 166. See also, *Dunlevy v. County Court* (W. Va.), 35 S. E. Rep. 966.

A board of canvassers cannot make law but they must obey it as it is made for them. *Alderson v. Commissioners*, 32 W. Va. 454, 9 S. E. Rep. 863.

Power of Commissioners in Canvassing Returns—Presumption of Fairness.—If no ballots are returned, or if those returned are shown to be forged or fraudulent, and not the true ballots cast at the election, the commissioners have the power to reject and refuse to count them, notwithstanding the returns are "duly and legally certified"; as the county court commissioners are officers duly elected by the people, and in passing upon the result of an election act in a quasi judicial capacity. *Fleming v. Commissioners*, 31 W. Va. 608, 8 S. E. Rep. 267; *Brazie v. Commissioners*, 26 W. Va. 213, 221; *Chenoweth v. Commissioners*, 26 W. Va. 230. In such case it must be presumed that they acted rightly and within their legal authority, until the contrary is plainly made to appear. *Loomis v. Jackson*, 6 W. Va. 613; *Halstead v. Rader*, 27 W. Va. 806.

Competency of Commissioners to Recanvass Returns—Review by Certiorari.—County commissioners in canvassing returns of an election for congress, on a recount, sign various exceptions for alleged errors taken by one of the candidates voted for, and the count is completed, and result declared. The party excepting obtains a *certiorari* to review the action of commissioners, and the circuit court reverses it, and remands the matter to them, with directions to again perform the work of canvassing the returns. *Held*, that commissioners are not *functus officio*, but are yet competent to canvass the returns in compliance with the order of the circuit court. *Alderson v. Com'rs*, 32 W. Va. 454, 9 S. E. Rep. 863.

Commissioners—Certificate of Result—Delivery to County Clerk—Compliance with Statute.—The requirements that the commissioners of election of

each place of voting shall make out and sign a separate certificate of the result of the vote and deliver the same to the clerk of the county court within four days thereafter (Sunday included), is mandatory only; and if it is not complied with at any place of voting that fact vitiates the determination of the question voted for whether the county-seat shall be relocated by the votes cast at such election; and this provision cannot be regarded as substantially complied with, if the commissioners of election at each place of voting only insert the result of the vote at each precinct in the certificates, or in one of the certificates which they are required to make and sign. *Welch v. County Court*, 29 W. Va. 68, 1 S. E. Rep. 337. See *Redd v. Supervisors*, 31 Gratt. 695.

Right of Each Candidate to Separate Recount of Vote by Commissioners.—Concerning whether each candidate shall have the right to a recount of the vote cast, it is said in *Chenowith v. Com'rs*, 26 W. Va. 230, that the reasonable and practicable rule would seem to preclude such right after there had been a recount at the instance of some other candidate at the same election.

The county commissioners, in reviewing the returns of an election after they have opened the sealed packages returned by the district commissioners, recounted them upon demand of an opposing candidate and again sealed up the ballots, cannot under the provisions of § 21, ch. 155, Acts 1882 of W. Va. upon a subsequent demand of either of the said opposing candidates reopen the packages and recount the ballots the second time. *Chenowith v. Com'rs*, 26 W. Va. 230.

Power of Canvassers to Go Behind Returns.—The case of *Brazie v. Commissioners*, 26 W. Va. 213, holds that canvassers have no power to go behind the returns to inquire as to fraud or illegality in the election; but that their duty is to pass upon the return as certified to them from the several voting precincts of the county which they are required to review. It was further held in this case that the 26th sec. of ch. 155, Acts 1882, has no application to the duties of commissioners as canvassers of an election, the powers therein conferred apply only to the final judges of election in case of contested election. *Brazie v. Com'rs*, 26 W. Va. 213.

Irregularities, etc., in Elections Presumed to Have Been Corrected by Supervisors—Effect.—All errors, irregularities and illegalities committed at the election, or existing at the time of the examination of the returns by the board of supervisors as provided for by statute, must in absence of averments and proofs to the contrary, be taken and held to have been corrected by such board. From this it follows that any specification which alleges errors, irregularities and illegalities or misconduct on the part of the officers, or other persons conducting the elections, committed before the action of the board of supervisors was had thereon must be held insufficient, unless such errors are further alleged to have been carried into and formed a part of the election as certified by the board of supervisors. *Loomis v. Jackson*, 6 W. Va. 616.

Return of Poll by Commissioners—Presumption of True Result.—The return of a poll by the commissioner of the election is *prima facie* the true result of the election and will not be reversed by the court because of misconduct of the election officers or other persons, unless it plainly appears that such misconduct changed the result of the election. *Dial v. Hollandsworth*, 30 W. Va. 1, 19 S. E. Rep. 557;

Minear v. Tucker County, 30 W. Va. 627, 30 S. E. Rep. 659.

Meeting of Commissioners—Requirements of Notice.—Where the commissioners of a county meet as a canvassing board, five days after an election, for the sole purpose of declaring the result thereof, counting the votes, etc., as required by statute, no notice is required to be posted as to the object of the meeting. But notice is necessary when special sessions are to be held for other purposes. *Minear v. Tucker County*, 30 W. Va. 627, 30 S. E. Rep. 659.

Action of Ballot Commissioners—Subject of Review.—The action of ballot commissioners is, under the statute, subject of review by the courts. *Marcum v. Ballot Com'rs*, 43 W. Va. 263, 26 S. E. Rep. 281.

Right to Certificate of Election—Statement from Canvassers.—Although the whole matter of an election may be reopened by the tribunal which may try a contest for an office, yet the person really elected has the right to have the certificate of election given to him by the canvassers, or proper evidence of the correct number of votes he received, to be presented to the officer having the right and by law required to give the certificate. *Alderson v. Com'rs*, 31 W. Va. 633, 8 S. E. Rep. 274.

Refusal of Canvassers to Act—Mandamus.—If the commissioners of the county sitting as a board of canvassers, after an election, refuse to sign bills of exceptions to their ruling, when requested to do so by a candidate voted for at the election, they will be required by *mandamus* to settle and sign such bills of exceptions. *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. Rep. 274; *Dryden v. Swinburne*, 30 W. Va. 90; *Poteet v. Commissioners*, 30 W. Va. 58, 3 S. E. Rep. 97; *Douglass v. Loomis*, 5 W. Va. 543.

Same—Alternative Mandamus—Inhibiting Adjournment.—When, in such case, a petition praying a *mandamus* to issue inhibiting the commissioners, until the further order of the court, from finally adjourning, or certifying the result of the election, so that the peremptory *mandamus*, if issued, will be effective; and, when the court is informed that the *mandamus* has been obeyed, the inhibition should be wholly removed. *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. Rep. 274.

Bills of Exceptions—When Commissioners Must Sign.—Under the provisions of § 3, c. 153 of the Acts of 1889 (W. Va.), which states that, in any case before a county court, etc., or other inferior tribunal in which *certiorari* would lie, the majority of the commissioners or the justice or officer shall, on request of either party, certify the evidence and sign bills of exceptions, the commissioners of a county sitting as a board of canvassers, after an election, must, on request of one of the candidates for election, sign a bill of exceptions to their ruling, and if they refuse they will be required to do so by *mandamus*. *Fleming v. Kanawha County Com'rs*, 31 W. Va. 608, 8 S. E. Rep. 267. See also, *Cunningham v. Squires*, 2 W. Va. 422.

Rights of Candidates—Bills of Exception—Review.—Any candidate voted for at the election in question has the right to be present in person or by attorney at the recount of the votes and request the commissioners to give him a bill of exceptions to their rulings against him; he thus becomes a party to the proceedings and has the right to have the rulings of such commissioners reviewed by *certiorari*. *Alderson v. Com'rs*, 31 W. Va. 633, 8 S. E. Rep. 274.

Canvassing Election Returns for Location of County Seat—Proper Tribunal.—It was held in *Welch v. County Court*, 29 W. Va. 63, 1 S. E. Rep. 337, that

returns of election on the location of a county seat must go before the county court to be canvassed, and to have the result declared, and not before the board of canvassers. Such was the law under ch. 5, § 15, Acts of 1881 (Code 1887, ch. 50, § 15). See *Poteet v. Commissioners*, 30 W. Va. 58, 3 S. E. Rep. 97; also, *Brown v. Randolph County Court*, 45 W. Va. 827, 32 S. E. Rep. 165.

Province of County Court Canvassing Election Returns.—A county court as such, canvassing the returns of an election upon a vote upon relocation of a county seat, is an entirely different tribunal from a board of canvassers, having wider function. It canvasses the returns upon the certificates, can recount ballots, hear evidence of fraud and illegality, and do what, in the case of candidates for office, could be done by that court in hearing a contest. *Brown v. Randolph County Court*, 45 W. Va. 827, 32 S. E. Rep. 165; *Poteet v. Commissioners*, 30 W. Va. 58, 3 S. E. Rep. 97.

VI. OFFICERS ELECTED—TERM OF OFFICE.

Election of Judge—Limits of His Term—Defined.—Manchester was incorporated as a city in 1874, and having more than five thousand inhabitants was entitled to have a judge of its hustings court. In March, 1874, C was elected and qualified as judge of said court. *Held*, that this being the first judge of this court, under the Constitution, C's term of office commenced on the first of January, 1875, and would continue until the 31st of December, 1880; and he was under the Constitution authorized to act as judge from the time of his qualification to the commencement of his term. *Ex parte Fisher*, 33 Gratt. 223. See also, *In re Broadus*, 33 Gratt. 779; *Ex parte Meredith*, 33 Gratt. 119; *McCraw v. Williams*, 33 Gratt. 510.

Judges—Election to Fill Vacancy—Expiration of Term.—In December, 1874, E was elected by the legislature judge of the county courts of G and B counties, and on the 12th of the same month commissioned as such; the commission stating that he was elected to fill the unexpired term of his predecessor. In December, 1879, W was elected judge of the same counties, and commissioned as such on the 20th of the same month. Without objection on the part of E, W entered, at once, upon the duties of the office, and E qualified as an attorney and practiced in both of the courts over which W presided, until the April term, 1880, when the court of appeals having decided that the terms of all the county judges in Virginia, whether elected to fill vacancies or not, commenced on the first day of January next following their appointments, and were for the full term of six years, and fixed by the Constitution, E appeared and protested that he was the lawful judge. This claim W refused to recognize, principally on the ground that E, by acquiescing in the assumption of the office by W, and becoming a practicing attorney in his court, held an office incompatible with the office of judge, and by this conduct had forfeited and abandoned his said office. *On quo warranto* by E against W, *held*, E was entitled to the office, and the fact that he only yielded to the legislative and executive construction of the constitution, until the question was settled by the supreme court, was no abandonment or forfeiture of his office. The B and G County Judge Case, 33 Gratt. 443. See *McCraw v. Williams*, 33 Gratt. 510; also, *Watlington v. Edmonson*, 10 Va. Law J. 286.

Supporting this doctrine, see *Ex parte Meredith*, *Ex parte Harrison*, 33 Gratt. 119. In *Howison v.*

Weeden, 77 Va. 704, which was a petition to compel the defendant to surrender the office of judge, it was held that the parties to the controversy were privies to the case of *Meredith*, *Ex parte*, etc., *supra*, and that the decision therein, not having been reversed was binding on them. See also, *Estes v. Edmondson*, 33 Gratt. 510; *Montague v. Massey*, 76 Va. 807; *Neal v. Allen*, 76 Va. 457.

The above cases, however, have been overruled in the subsequent case of *Burks v. Hinton*, 77 Va. 1, where it was held by a majority of the court of appeals that the constitution of Virginia empowers the legislature to prescribe the manner of filling all vacancies in office, and to declare when an office is vacant, in cases not especially therein provided for, and makes no exception as to the office of a judge; that, therefore, the joint resolution adopted by the general assembly, December 18, 1872, that all elections by the general assembly to fill vacancies in the office of a judge shall be for the unexpired term of his predecessor, is constitutional, and consequently JUDGE BURKS, who was elected in 1876 to fill the vacancy in the court of appeals, caused by the death of JUDGE BOULDIN, was not chosen for the regular term of twelve years, but only for the residue of JUDGE BOULDIN's term, which expired 31st December, 1883. See *Jameson v. Hudson*, 83 Va. 279; *Shumate v. Supervisors*, 84 Va. 574, 5 S. E. Rep. 570; also, 4 Min. Inst. (2d Ed.) 237 *et seq.*; (3d Ed.) 256 *et seq.*; *Fitzpatrick v. Kirby*, 81 Va. 407. See also, *Howison v. Weeden*, 77 Va. 708; *Watlington v. Edmonson*, 10 Va. Law J. 286.

Term of Judicial Offices in Virginia.—It is said in *Watlington v. Edmonson*, 10 Va. Law J. 286, that it is well settled by the repeated decisions of this court that the terms of office of the different classes of judges in this state begin and end at fixed and definite periods; and that after the expiration of those periods the incumbents can only discharge the duties of the office until their successors have qualified.

Claim of Salary as Judge after Removal from Office by Legislature.—On petition for *mandamus* to compel the board of supervisors of Fauquier county to issue a warrant upon the treasurer of said county for \$1,260, which sum the petitioner alleges is due him as his salary as *de jure* judge of the county court from March, 1884, to January, 1886. The petition alleges further that upon presentation of his claim, the respondents refused to recognize him as a judge, on the ground that he had been removed from office by the legislature, and one Edward M. Spilman elected in his stead. He insists, however, that such alleged removal was in violation of the constitution and without legal effect for several reasons. It was held in the case that the judgment determining that the petitioner had no title to the office, necessarily determined that he was no longer entitled to receive its emoluments, though no claim for salary was specifically made, and could not have been regularly made, in that proceeding. And stated further in the opinion that an office is a right and correspondent duty to exercise a public or private trust, and to take the emoluments belonging to it; and as was said in *Blair v. Marye*, Auditor, 80 Va. 486, "the salary follows the office as the shadow follows the substance." *Shumate v. Supervisors*, 84 Va. 574, 5 S. E. Rep. 570.

Usurpation of Office—Proceeding by Quo Warranto—Interested Party.—In the proceeding by way of an information in the nature of a writ of *quo warranto* instituted by the defeated candidate in election of

sheriff, against the successful candidate, who had forfeited his right to hold office by contracting to sell or farm the office, and who continued to claim right thereto; the latter being claimed in the information to have intruded into and usurped the office of sheriff of the county. *Held*, that such proceeding must be at the relation of some person interested, otherwise than as a citizen and taxpayer (which was not the case here), unless such proceeding is instituted at the instance of the attorney general or the prosecuting attorney of the county. *State v. Matthews*, 44 W. Va. 372, 29 S. E. Rep. 904.

Resignation from Office—Not a Matter of Right.—A registrar is not at liberty to resign at his pleasure; his resignation must be accepted in order to have effect, and until it is accepted, it is inoperative, and he remains in office. *Coleman v. Sands*, 87 Va. 699, 13 S. E. Rep. 148. It is held further in this case, that it is not true that an office is held at the will of either party. It is held at the will of both. Generally resignations are accepted, and it may be that it is generally believed that resigning is a matter of right; but it is otherwise. The public has a right to the services of all its citizens, and may demand them in all civil departments as well as in the military.

De Facto Officers—Validity of Their Acts.—A was elected in January, 1880, judge of the county court of Halifax and commissioned by the governor. Believing that his term of office commenced immediately he proceeded to hold court and transact business. *Held*, he was a judge *de facto*; and his judgments were as valid and binding, as if he had been a judge *de jure*. *McCraw v. Williams*, 38 Gratt. 510; *Roche v. Jones*, 87 Va. 484, 12 S. E. Rep. 905. See *Maddox v. Ewell*, 3 Va. Cas. 59. As to who are *de facto* officers, see *Dial v. Hollandsworth*, 30 W. Va. 1, 19 S. E. Rep. 557, 1 Mun. Corp. Cas. 222.

Acts of De Facto Officers—Valid.—The acts of *de facto* municipal officers, within the scope of their authority and under color of law, are valid and binding, in the absence of clear proof that they are not the *de jure* officers of such municipality. *Knight v. Town of West Union*, 45 W. Va. 194, 33 S. E. Rep. 163.

VII. ELECTION CONTESTS.

Fraud in Election—Manner of Obtaining Relief.—If any candidate claims that an election was fraudulent or in any wise illegal, or that ballots were incorrectly counted against him, he must get relief by contest as provided for in the statute. *Brazie v. Commissioners*, 25 W. Va. 213. See also, *Brown v. Randolph County*, 45 W. Va. 337, 32 S. E. Rep. 165.

Party Elected—Entitled to Hold Office During a Contest.—The party who has been elected to a county office and received a certificate of his election from the proper officer and has legally qualified is entitled to hold the office pending a contest for the same by another party. *Swinburn v. Smith, J.*, 15 W. Va. 423.

Petition—In Election Contest—To Whom Addressed—Requirements—Allegations and Proofs.—A petition, in a contest for the office of judge should be addressed to the special court provided by statute to try such cases, and not to the governor of the state. It ought not to contain any prayer for relief beyond what is found in the authority of the court to afford. To invoke the authority vested in the governor by sec. 13, ch. 6, W. Va. Code 1868, it is necessary that the contestant should file with the governor a petition with copies of his ground of contest, notice and specifications; and such petitions must remain

in the governor's office, in order that he may have evidence upon which to justify his official action. *Loomis v. Jackson*, 6 W. Va., 615.

The allegations and the proofs must agree. Therefore a contestant, either in his petition or notice of the ground of contest and specifications, must show directly what was the result of the election as declared by the returning officers and in what manner and to what extent the result will be affected by the correction of errors complained of in the specifications. *Loomis v. Jackson*, 6 W. Va. 615.

Right of Taxpayer or Voter to Contest Election.—A taxpayer or a voter of a county, merely as such, may appear before the county court, and in any legal mode contest the returns of and vote upon a relocation of a county seat for fraud, irregularity, or illegality, or other ground which in law would change the result or overthrow the vote, in whole or part. *Brown v. Randolph County Court*, 45 W. Va. 327, 32 S. E. Rep. 165; *Poteet v. Commissioners*, 30 W. Va. 58, 3 S. E. Rep. 97; *Welch v. County Court*, 29 W. Va. 63, 1 S. E. Rep. 337; *Hamilton v. County Court*, 38 W. Va. 71, 18 S. E. Rep. 8.

Contested Election—Statute Construed—Mandamus. It was held in *Richardson v. Farrar*, 33 Va. 760, 15 S. E. Rep. 117, that sec. 160, Virginia Code, 1887, commands that returns of county elections be, upon complaint of undue election and false returns by fifteen or more voters, and counter-complaint, if any be filed, subject to the inquiry, determination and judgment of the county court, which shall proceed in such case, without a jury, and on the testimony to decide the same upon the merits according to the constitution and existing laws; that in such a contest the quashing and dismissal of a joint complaint of undue election, and false return against three at the same election, on the ground of misjoinder of the defendants was erroneous, because the statute does not limit the contest to one; and that mandamus would lie to compel the court to proceed to hear and determine the contest.

Election Contests Decided by Special Courts—Manner of Providing.—Under ch. 6, section 15, of the W. Va. Code 1878, it is provided that when the election of the secretary of state, treasurer, auditor, attorney general, or a judge of the supreme court of appeals, or a circuit court, is contested, the case shall be heard and decided by a special court consisting of three persons, one of whom shall be appointed by the person declared elected, another by the contestant, and the third by the governor, which court shall proceed to hear and determine the case and certify their decision to the governor; it was held that, in order to authorize the governor to act in such a case, it is necessary that the contestant should file with him a petition, with copies of his grounds of contest, notice, and specifications, and such petition must remain in the governor's office as an evidence upon which to justify his official action. *Loomis v. Jackson*, 6 W. Va. 613.

Authority of Special Court—What May Be Required of It.—Under section 13, ch. 6, Code of W. Va. 1878, providing that cases of contested elections of a circuit court judge and other officers, shall be tried by a special court, the manner of forming which is therein prescribed, each court has the right to determine all questions touching the regularity and legality of the acts of the officers conducting the election and making and certifying the returns thereof, and it may be, in a proper case made, to re-examine all, or any part of the election returns which require it, and if error be found therein, to

correct them according to the law and the truth. *Loomis v. Jackson*, 6 W. Va. 618.

Election Contest—Jurisdiction of City Council—Section 1030, Va. Code.—The council of the city of Richmond, under the authority of section 1080 of the Code is the judge of the election, qualifications and returns of its members, and also has the power to order elections and to fill all vacancies in that body. The hustings court of said city has no jurisdiction to decide a contest over an election of a member of that body, even though the contestant alleges that he cannot obtain justice before it. *Mitchell v. Witt*, 98 Va. 459, 36 S. E. Rep. 528, 6 Va. Law Reg. 351.

Jurisdiction of County and Corporation Courts.—Under Session Acts 1870, p. 97, sec. 69, relating to general elections, the county or corporation courts have jurisdiction to vacate an illegal election, though but one person was voted for at such election. *Ex parte Ellyson*, 20 Gratt. 10. It was held in this case that, although a person voted for at an election, having been declared elected by the commissioners, and their report certified by the clerk, had entered upon the discharge of the duties of his office, the court might vacate the election, and direct another election to be held. See *Ferguson v. West*, 16 Gratt. 270; *Mayo v. James*, 12 Gratt. 17.

Failure of Contestants to Subscribe an Oath—Effect.—Under an act which provided that the returns of county elections should be subject to the inquiry of the county court upon the complaint of fifteen qualified voters, to which two must take and subscribe an oath, the omission to subscribe, as required, does not deprive the court of jurisdiction; such provision not being declared essential to the proceedings by the statute. *Nelms v. Vaughan*, 84 Va. 696, 5 S. E. Rep. 704.

County Court—Authority to Give Judgment for Costs—Statute.—In cases of contested elections before the county court, under acts of Virginia 1852, ch. 71, pp. 64, 65, the county court has no authority to give judgment for costs to either party. *West v. Ferguson*, 16 Gratt. 270. It was held that this case could not be considered as a "motion," or an "action," or an "interlocutory order or proceeding," under the statute of 1852, where costs might be recovered.

Jurisdiction of Supreme Court—Requirements of Constitution.—The record showing that the office of clerk of the circuit court of Kanawha county is of greater value than one hundred dollars, the supreme court of appeals has appellate jurisdiction under sec. 3, art. 8, of the constitution of W. Va., to review by writ of error the decision of the circuit courts in the case of contested election to that office. *Dryden v. Swinburn*, 15 W. Va. 234.

Subscription to Stock of Internal Improvement Company—Equity Jurisdiction.—In *Redd v. Supervisors*, 81 Gratt. 695, it was held that although a mode for contesting the returns of an election or decision of the voters of the county or corporation upon the question whether the county or corporation shall subscribe to the stock of an internal improvement company is provided by statute, Acts 1874, ch. 37, a court of equity still has jurisdiction of the question, upon a bill filed by fifteen or more of the citizens and taxpayers of the county or corporation, and to enjoin the issue of bonds of the county or corporation in payment of said subscription if the proceeding has not been properly conducted.

Power of the Legislature—Curative Acts.—The legislature may by a subsequent act correct mistakes in a local election, legalize the proceedings, if they are irregular, and so confirm the result. *Redd v.*

Supervisors, 81 Gratt. 695. It is said in the opinion of this case that "mistakes and irregularities are of frequent occurrence in municipal elections, and the state legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract, or injuriously affect the rights of third parties, are never regarded as objectionable, and certainly are within the competency of the legislative authority." See *Bell v. Farmville, etc., Co.*, 91 Va. 112, 20 S. E. Rep. 942; *Supervisors v. Randolph*, 89 Va. 614, 16 S. E. Rep. 722.

Relocation of County Seat—Election Concerning—Contest.—The fifteenth section of chapter 5 of the Acts of 1881 (Worth's Amended Code, ch. 39, § 15), provides that the clerk of the county court shall lay before the county court, at its next session after an election wherein a vote has been taken on the relocation of a county seat, the separate certificates of the precinct commissioners of the vote on this question at each precinct, and the law provides: "The said court shall thereupon ascertain and declare the result of said vote and enter the same of record." *Held*, under this law any voter of the county has a right to appear and contest the validity of these returns, and ask that the court go behind these returns and ascertain what was the actual legal vote cast at such election for and against relocation of the county seat, and has a right to demand that the evidence he offers be heard on this question; and, if the court refuses to permit him to be heard, he has a right to demand of them to settle and sign a bill of exceptions, setting out the refusal of the court to permit him to be heard, or to introduce any evidence on the question before them. And if they refuse to sign and settle such bill of exceptions, the circuit court may by *mandamus* compel them to do so, and then perfect their record so that the action of the county court in this matter may be reviewed on writ of *certiorari* by the circuit court. *Poteet v. County Com'rs*, 30 W. Va. 58, 3 S. E. Rep. 97; *Brazie v. Com'rs*, 25 W. Va. 213; *Alderson v. Com'rs*, 31 W. Va. 638, 8 S. E. Rep. 279. See *Brown v. Randolph County Court*, 45 W. Va. 827, 33 S. E. Rep. 165.

Abolition of County Court—Effect on Election Contest before it.—In the case of *Fowler v. Fowler*, 22 W. Va. 106, which was a contest for the office of prosecuting attorney, the contestant having within the manner prescribed by law given notice to the contestee of his intention to contest the election of defendant to the office in question, counter notice also having been legally served, both parties appeared before the county court at the November term 1890, and on their several motions the said notices were docketed in the court; no other term of the court being held for more than a year when the county commissioners held their first term, at which no proceedings in this contest were had. At the March term the court refused to proceed with the trial of the case on the ground that, at the said November term the county court had ceased to exist, and for that cause no contest was pending which could be tried. The circuit court having upon writ of *certiorari* reversed the judgment of the county court and remanded the cause to be further proceeded in according to law, its decision was sustained by the supreme court.

Giving of Notice—Requirements of Statute—Right of Amendment.—It is the manifest intent of the statute that a party proposing to contest the election of one who has been declared elected, shall, within a period of time precisely limited, give to him whose election he proposes to contest full information

of the case upon which he will proceed to trial. This the contestant does by a notice and specification of the particular facts which constitute his case. And he is expressly authorized to amend his case from time to time, subject to the limitation prescribed, by giving additional notices and specifications. The respondent may, within thirty days from the date of service of contestant's notice, serve a return notice, with specifications upon the contestant; and thus issues of fact are made up, and all the testimony is taken upon these issues, and afterwards a court is organized to try them, and as in other judicial controversies, the making up of the issues must precede the taking of testimony. *Harrison v. Lewis*, 6 W. Va. 713; *Loomis v. Jackson*, 6 W. Va. 613.

Return Notice—New Facts May Be Given—Statutes.—As new facts or the clue to discovery of them may be for the first time disclosed by the return notice, new notices with additional specification of new facts discovered after the service of the original notice and specification, and after the expiration of the sixty days allowed, may be given by the contestant within the forty days allowed for the taking of depositions, subject always to the limitation that reasonable notice of the taking of depositions shall be given to the adverse party as required under sec. 5 and 8, of ch. 6, Code W. Va. 1868; *Loomis v. Jackson*, 6 W. Va. 613.

Section 11, Ch. 6, W. Va. Code 1868, Construed.—It is the evident intention of sec. 11, ch. 6, of the W. Va. Code 1868, that every contested election provided for therein should be tried within a comparatively short space of time; and that it was not intended to permit an incumbent to hold his office beyond the limit of its constitutional term and thus enable him to carry on a protracted and dilatory contest with the person certified to have been elected to that office. *Loomis v. Jackson*, 6 W. Va. 613.

Requirements of Notice under West Virginia Statute.—By act of 1872-3 (W. Va.), ch. 118, it is necessary to set forth in the notice, not only the number of votes alleged to be illegal, but also the names of the parties who cast them. See *Dryden v. Swinburn*, 15 W. Va. 234. See also, supporting the first statement, *Loomis v. Jackson*, 6 W. Va. 676.

It is also necessary under the W. Va. statute, to state the objections to votes alleged to have been illegally received or rejected. *Dryden v. Swinburn*, 15 W. Va. 238; *Halstead v. Rader*, 27 W. Va. 813.

Notice—Must State Cause of Contest.—A notice which does not state the cause of contest at least in substance, is a nullity. It is no more than the blank paper, and therefore cannot be the subject of amendment. *Loomis v. Jackson*, 6 W. Va. 617; *Halstead v. Rader*, 27 W. Va. 813.

Election Contest—Statute—Not Repugnant to Constitutional Amendment.—Sec. 30, 31, 32 and 33 of the Acts of Legislature, 1872-3, prescribing the time and manner in which the election of county and district officers might be contested were held not repugnant to the provisions of the amendment, art. 8 of the constitution of W. Va. and continued in force and effect after its adoption. *Fowler v. Thompson*, 22 W. Va. 106.

Where Total Vote of Precinct Is Rejected.—Where the entire vote of a precinct is wrongfully rejected, it is not necessary to the notice to give a list of the votes and the objections to each, but it is essential that it should name the precinct, the votes of which were rejected, and objections to such rejection. *Halstead v. Rader*, 27 W. Va. 813.

Want of Qualification in the Incumbent—Facts Required in Notice.—When the ground for contesting an election was only the want of qualification to hold the office by the party returned as elected, it was held unnecessary to furnish with the notice a list of votes to be disputed, or to state facts showing that the person with the notice was held entitled to the office; but it was held sufficient that the notice should show that the contestant was a candidate for the office at the election, and set forth the facts on which he based his objections to his opponent holding the office. *Dryden v. Swinburn*, 15 W. Va. 234, 20 W. Va. 80.

If the ground of contest is the disqualification of the contestee to hold office, the notice must state facts showing the disqualification. *Halstead v. Rader*, 27 W. Va. 813.

Notice in Election Contest—Substantial Compliance with Statute.—Substantial compliance with the requirements of the statute concerning the manner of giving notice of a coming election, for the purpose of deciding upon the place for relocating the county seat was held sufficient in *Welch v. County Court*, 29 W. Va. 63, 1 S. E. Rep. 337.

Meaning of Notice as Used in the Statute.—It is said in *Halstead v. Rader*, 27 W. Va. 811, that the complaint called in the statute, § 9, ch. 109, W. Va. Code 1868, a notice does not mean simply an informal paper such as is usually understood by the term notice; but it is in the nature of a complaint or information setting forth a cause of action as well as the commencement and foundation of an important legal proceeding. See *Dryden v. Swinburn*, 15 W. Va. 238.

Notice—Requirements of—Failure to Comply with.—A notice, which states as the sole ground of complaint, that the county court commissioners failed and refused to count the votes cast at a certain precinct, which were duly and legally certified by the commissioners who held the election at said precinct, and that if said votes had been counted, the contestant would have been elected to the disputed office is held insufficient and should have been quashed by the county court. And it was further held that such could not be amended after the expiration of ten days from the time the result of the election had been declared if it could be amended at all. *Halstead v. Rader*, 27 W. Va. 806.

Mere General Allegations Are Insufficient.—Mere general allegations that the contestee was not elected, and that the return declaring him so is untrue, false and fraudulent, afford no information to the contestee of the defence he may be required to make. *Halstead v. Rader*, 27 W. Va. 810.

Petition of Contestant Filed at the Trial—For What Purposes Allowed.—In an election contest the contestant may of right file a petition at the trial, but not for the purpose or to have the effect of curing defects in the notices and specifications; and so far as the petition contains new allegations material to the case, they must be disregarded or such allegations should be stricken out. *Harrison v. Lewis*, 6 W. Va. 713.

Allegation of New Facts—To Cure Defects—When Allowed.—It was decided in the contested election case of *Harrison v. Lewis*, 6 W. Va. 721, under W. Va. Code 1868, ch. 6, § 13, where it is provided that such case shall be decided "according to law and the truth upon the petition, returns, and evidence to be submitted," that facts, new and material to the contestant's case could not be alleged upon the record and regarded by the court for the purpose of curing

any defects which may be inherent in the case made by the contestant in his notice, or notices and specifications, which were served upon the respondent within the time prescribed by law.

It was however held in this same case that the contestant might file his petition before the hearing is proceeded with, as of right; but not after the trial of the case had begun.

New Facts—Additional Notice Allowed—Time of Giving Notice.—By sec. 4, ch. 6, W. Va. Code 1868, it is expressly declared that "If new facts be discovered by either party after he has given notice as aforesaid, he may give additional notice or notices to his adversary, with specifications and affidavit as above prescribed." But it is held in *Loomis v. Jackson*, 6 W. Va. 613, 688, that the contestant in a judicial contest, needing all the time allowed by the law to collect the facts of the case, may postpone the service of his notice of contest until the sixtieth day after the election; and the respondent may in like manner and for a similar reason, delay the service of the return notice until the thirtieth day thereafter.

Additional Notice—New Facts—Requirements.—In the case of a contested election if the contestant gives an additional notice specifying new facts, it is essential that it appear in the notice that such facts are new and that they were discovered after service of the original notice, and that they could not have been discovered by the use of such diligence before service of the original notice, otherwise the additional notice is defective. *Harrison v. Lewis*, 6 W. Va. 718; *Loomis v. Jackson*, 6 W. Va. 613.

"The rule which requires the contestant to present such facts as that the court may see that the result of the election will be changed if the facts be proven, is a rule which is not only consistent with the principle of pleading, but one which is sustained by the authority of particular cases; well considered and solemnly adjudicated." *Harrison v. Lewis*, 6 W. Va. 718. It was therefore held in this case that the notice and specification taken together did not disclose such state of facts as required, hence it was insufficient and should on motion be quashed. See *Halstead v. Rader*, 27 W. Va. 806; *Loomis v. Jackson*, 6 W. Va. 613.

Contested Elections—Amendment of Notice—Two Methods.—In the trial of contested elections, two methods of amendment to the notices required by our statute are permissible: First, the statutory method, which is always based upon new facts discovered after the original notice has been given; second, the method incident to common-law procedure. *Ralston v. Meyer*, 34 W. Va. 737, 12 S. E. Rep. 783.

It is further stated by the court in this case that fairness, purity, and freedom of elections are essential to free government, and the object of the judicial tribunal engaged in deciding upon a contested election is not so much to determine the private rights of the parties, as to decide whom the people have elected in that particular election, according to the very right of the case and the principles of justice; hence, at common law, amendments to the notice of petition are permitted only to further the ends of justice, and to promote a true and impartial decision, according to the evidence. *Ralston v. Meyer*, 34 W. Va. 737, 12 S. E. Rep. 783.

Permission to Amend Counter Notice Refused—Votes Rejected.—The counter notice filed by a contestee in an election contest stated that A. and B. were not qualified voters, but had voted for the contestant;

which latter had not challenged their qualification in his notice. At the trial the contestee asked leave to strike from his counter notice the names of A. and B., and the allegations concerning them. This was refused, and the court found from the evidence that A. and B. were not qualified voters, but that they had voted for the contestee. It was held, that leave to amend was properly refused, and that the court was justified in rejecting the votes of A. and B. *Ralston v. Meyer*, 34 W. Va. 737, 12 S. E. Rep. 783.

Rights Waived by Failure to Act.—The contestee, by filing a joint counter complaint, and allowing the contestants to incur expense in procuring depositions, waive their right to move for a dismissal on the ground of misjoinder of the parties. *Richardson v. Farrar*, 88 Va. 760, 15 S. E. Rep. 117.

VIII. PROCEDURE.

A. CERTIORARI.

Certiorari Lies to Election Commissioner—General Rule.—The writ of *certiorari* lies in the state of W. Va. from a circuit court or a judge thereof in vacation to the county court commissioners convened in special session to ascertain the result of an election. *Chenowith v. Com'rs*, 26 W. Va. 232; *Fowler v. Thompson*, 23 W. Va. 107; *Dryden v. Smith, J.*, 15 W. Va. 433.

The general rule is, that upon such writ the superior court will only inquire into errors and defects which go to the jurisdiction of the inferior court. But if the inferior tribunal proceeds in a summary manner and not according to the course of the common law, and there is no remedy by appeal or writ of error, then the superior court will consider other than jurisdictional questions. *Chenowith v. Com'rs*, 26 W. Va. 232; *Dryden v. Swinburne*, 20 W. Va. 89; *Dryden v. Swinburn*, 15 W. Va. 234; *Poe v. Machine Works*, 24 W. Va. 517. See *Poteet v. County Commissioners*, 30 W. Va. 53, 3 S. E. Rep. 97.

Elections and Voters—Rulings of Canvassers—Review by Certiorari.—The rulings of the commissioners of a county sitting as a board of canvassers, after an election, to ascertain the result thereof in the county, are subject to review by the circuit court on writ of *certiorari*. *Fleming v. Com'rs*, 31 W. Va. 608, 8 S. E. Rep. 267; *Alderson v. Commissioners*, 31 W. Va. 633, 8 S. E. Rep. 274; *Fowler v. Thompson*, 22 W. Va. 106.

Certiorari Proper—To Review Action of Supervisors in Contested Case.—In *Cunningham v. Squires*, 2 W. Va. 422, upon application, by one of the contestants, to the supreme court of appeals for a writ of prohibition to the circuit court of Braxton county to prohibit that court from supervising by means of *certiorari* the action of the board of supervisors in the matter of a contested election for clerk of the circuit court of said county, the right was denied. But the action of a circuit court on the right of *certiorari* to the proceedings of a board of supervisors, to determine the rights of parties in an election controversy on its merits is subject to review by the supreme court of appeals, for it errs in the matter.

Right of Review in Election Cases—Certiorari—Writ of Error.—In an election contest before a county court or other inferior tribunal, the decision may be reviewed by the circuit court by the writ of *certiorari*; and the decision of the circuit court in such case may be reviewed in the supreme court of appeals by writ of error. *Dryden v. Swinburne*, 20 W. Va. 90. See same case, 15 W. Va. 234; also, *Swinburn v. Smith*, 15 W. Va. 433.

Election Contest—Petition for Certiorari.—A petition for a writ of *certiorari* to bring to the circuit court for review, proceedings of the commissioners of a county court, in the canvass of the returns of an election, filed by a candidate, which fails to show that he was prejudiced by the errors complained of, is not sufficient to justify the award of such writ, and will be held bad without demurrer at the hearing; and the judgment of a circuit court reversing the action of the commissioners upon a *certiorari* based on such petition will be reversed by the supreme court, with judgment for costs in that court against the party who filed such petition. *Fleming v. Com'rs*, 32 W. Va. 687, 9 S. E. Rep. 867. See *Supervisors v. Minturn*, 4 W. Va. 300.

It was held in *Dryden v. Swinburn*, 15 W. Va. 234, that the circuit court properly granted *certiorari* on the petition accompanied by a copy of the record though no previous notice had been given to the opposing candidate in the election contest to show cause why the writ should not be awarded, this being a matter within the discretion of the court, which discretion was properly exercised in this case.

Certiorari—Not in Due Form—Time of Making Objections.—Where a rule is asked in the circuit court against the board of supervisors, in the nature of a *certiorari*, and also to show cause why a mandamus should not be awarded, the former to revise the proceedings and reverse the order of the board, setting aside an election at which the petitioners claim to have been duly elected to certain county offices, and the latter to compel it to declare the election of said officers as shown by the returns certified by the officers conducting the election, and grant them certificates of election, no objection being made to the process in the circuit court, it was held too late to claim in the appellate court that it is not a proceeding by *certiorari* in due form, and the rule awarded for the mandamus must be regarded as only ancillary to the writ prayed for (which was the writ of *certiorari*). *Burke v. Monroe Co.*, 4 W. Va. 371.

Supervision by Circuit Court—Methods—Constitutional Provision.—The Constitution, § 12, art. 8, declares in the most explicit terms that "the circuit court shall have the supervision and control of all proceedings before justices and other inferior tribunals, by mandamus, prohibition, and *certiorari*." *Alderson v. Com'rs*, 31 W. Va. 633, 8 S. E. Rep. 274. See Constitution of W. Va., art. 6, § 6; *Cunningham v. Squires*, 3 W. Va. 422; *Burke v. Monroe Co.*, 4 W. Va. 371.

Writ of Error and Supersedeas Does Not Lie—Certiorari.—A writ of error and supersedeas does not lie from a circuit to a county court in an election contest, but a writ of *certiorari* is proper. The supreme court having so decided and remanded the case back to the county court for trial, and the county court having decided the case, and a circuit judge having issued a writ of error to this judgment; this writ having been issued by direction of the circuit court judge without jurisdiction or authority was held null and void and all proceedings thereon prohibited by the order of the supreme court. *Swinburn v. Smith, Jr.*, 15 W. Va. 483.

In this same case an injunction issued by the circuit court prohibiting the person who had been declared elected to the office and duly qualified from exercising the duties of his office or from interfering with the then incumbent, was held void.

Refusal to Award Certiorari—Reviewed by Writ of Error.—On refusal of a circuit court to award a writ of *certiorari* on the proper petition, to review the proceedings of the county court, in ascertaining and declaring the result of the vote on a relocation of a county seat, the proceedings may be reviewed by writ of error issued by the supreme court of appeals. *Welch v. County Court*, 29 W. Va. 68, 1 S. E. Rep. 337.

Decision of Court in Ascertaining Result of Vote—Judicial Act—Subject to Review.—The final judgment of the county court, in ascertaining and declaring the result of the vote at an election on the question of a relocation of the county seat, is a judicial act like the judgment of the court on a contested election case before it, and therefore subject to be reviewed by the circuit court. *Poteet v. County of Cabell*, 30 W. Va. 58, 3 S. E. Rep. 109; *Welch v. County Court*, 29 W. Va. 68, 1 S. E. Rep. 337.

Duties of Circuit Court upon Review by Certiorari.—Upon a writ of *certiorari* used as an appellate proceeding to bring to the circuit court for review a judgment or order of an inferior tribunal, the circuit court should decide all matters of law and fact, including those on the merits fairly arising on the record, either affirming such judgment or order, or reversing or modifying it, and render such judgment as the inferior tribunal should have rendered, or remand it to that tribunal where further proceedings are necessary, with distinct decision on the points involved in the latter event. Where, however, further proceedings are necessary, outside the record the circuit court cannot retain and try the cause, but must remand to the inferior tribunal for such proceedings. *Alderson v. Com'rs*, 32 W. Va. 454, 9 S. E. Rep. 863.

In *Dryden v. Swinburne*, 20 W. Va. 80, it was decided that, "a case being brought before a circuit court by writ of *certiorari* for review, it should review, not only jurisdictional questions of irregularity in the proceeding of the inferior tribunal, but all questions of law, and all actions alleged to be based on erroneous principles, or taken in the absence of all evidence to justify such action." *Alderson v. Com'rs*, 33 W. Va. 454, 9 S. E. Rep. 863.

B. MANDAMUS.

When Proper—Examples.—The writ of *mandamus* is the proper remedy to restore a clerk of a court ousted from his office by the illegal appointment of another person. *Dew v. Judges*, 3 H. & M. 1, 3 Am. Dec. 689.

Parties to the Writ.—The persons occupying the office ought to be made a party to the rule, or to the conditional *mandamus*, or such rule or *mandamus* ought to be served upon him, so as to enable him to defend his right before the peremptory *mandamus* issues; but if it appear from the record that he was apprised of the proceedings and defended his right, it is sufficient. *Dew v. Judges*, 3 H. & M. 1, 3 Am. Dec. 689.

Jurisdiction by Mandamus—Board of Supervisors.—In *Supervisors v. Minturn*, 4 W. Va. 300, M. filed his petition and exhibits in the circuit court of Mason county, praying that a writ of *mandamus* be awarded him, against the board of supervisors, as commissioners of election, to compel them to allow him to qualify and give bond as treasurer of the county. It was held on appeal to the supreme court that the circuit court had no jurisdiction by *mandamus* to compel the board of supervisors in such case.

Proper Remedy—Mandamus—Certiorari.—While *mandamus* is the proper legal and efficacious remedy

provided by statute for the purpose of compelling the election officers to discharge their duties in conformity with the law, when such officers, in violation of their ministerial duties, assume the exercise of judicial functions, *certiorari* may be resorted to for the purpose of reviewing their erroneous rulings, although mandamus would furnish more speedy, less expensive, and more adequate relief. *Dunlevy v. County Court* (W. Va.), 35 S. E. Rep. 968.

Petition for Mandamus—Will Not Lie against Commissioners in Matters of Discretion.—In *Marcum v. Ballot Com'rs*, 42 W. Va. 263, 26 S. E. Rep. 281, the question before the court was, whether mandamus would lie, under the present election law of West Virginia, to compel the ballot commissioners to place the name of a certain claimant of the right on the ticket, in case where two certificates of nomination for judge of the eighth circuit, emanating from two conventions, each claiming to be the true democratic nominating convention, were presented to the ballot commissioners of Wayne county, each asking a place on the official ballots, in exclusion of the other; it was held that, although the ballot commissioners were ministerial officers, yet this question was one involving judicial discretion and mandamus would not lie; the court citing *State v. County Court*, 33 W. Va. 589, 11 S. E. Rep. 72, in support of the statement that mandamus will not lie to control the exercise of the discretion of any court, board or officer when the act complained of is either judicial or quasi judicial in its nature. See *Miller v. County Court*, 34 W. Va. 285, 12 S. E. Rep. 702; *State v. Herrald*, 36 W. Va. 731, 15 S. E. Rep. 974.

If, however, the act is merely ministerial mandamus will lie. *Board v. Minturn*, 4 W. Va. 300; *Doolittle v. County Court*, 33 W. Va. 168.

Electoral Boards—Mandamus.—In *Cromwell v. Com.*, 95 Va. 264, 28 S. E. Rep. 1023, a case in which the members of the electoral board were unable to agree and failed to appoint any person to fill a vacancy in that body, or to appoint judges of election as required by the statute, it was held that mandamus would lie to compel the board to perform the duty imposed upon it by law, and for failure to obey a peremptory mandamus, that they might be punished for their contempt.

Scope of Mandamus Extended—Statutes.—Section 80, ch. 3, W. Va. Code 1891, as re-enacted in chapter 26, Acts 1893, in cases involving duties of ballot commissioners under said chapter gives the writ of mandamus more scope than at common law, rendering a process to control them as to all matters, ministerial or judicial. *Marcum v. Ballot Com'rs*, 42 W. Va. 263, 26 S. E. Rep. 281.

C. PROHIBITION.

Prohibition—When Proper—In General.—Prohibition lies only in case of unlawful exercise of judicial functions. Acts of mere ministerial, administrative, or executive character do not fall within its province. *Brazie v. Commissioners*, 26 W. Va. 213.

When Prohibition Lies.—The writ of prohibition lies from a superior court, not only to inferior judicial tribunals, properly and technically denominated such, but also to inferior ministerial tribunals, possessing incidentally judicial powers, or tribunals such as are known in the law as quasi judicial tribunals, and, even in extreme cases, to purely ministerial bodies, when they usurp judicial functions. *Fleming v. Com'rs*, 31 W. Va. 608, 8 S. E. Rep. 270.

Same—Proper Case—Certiorari.—A writ of prohibition lies from a circuit court to the county commissioners assembled to ascertain the result of an

election, under Acts 1882, ch. 155, to prevent them from exceeding their legislative powers, by examining witnesses and hearing evidence to determine whether the precinct commissioners have certified and returned the votes of persons not entitled to vote with a view to rejecting such votes. *Brazie v. Fayette Co. Com'rs*, 26 W. Va. 213; *Alderson v. Com'rs*, 31 W. Va. 633, 8 S. E. Rep. 274. And where such commissioners decide improperly, and declare the wrong result, their action will be controlled by *certiorari*. *Cunningham v. Squires*, 3 W. Va. 423; *Chenoweth v. Com'rs*, 26 W. Va. 230. See also, *Poteet v. Com'rs*, 30 W. Va. 58, 8 S. E. Rep. 97.

Prohibition to Correct Error—Improper.—In *Moss v. Barham, J.*, 94 Va. 12, 26 S. E. Rep. 388, a contested election case pending before the corporation court of Newport News, of which that court had jurisdiction, a writ of prohibition from the circuit court to prevent proceedings in the case was held improper; the court saying that the writ of prohibition does not lie to correct error but to restrain an inferior court from acting in a matter of which it has no jurisdiction, or in which it is transgressing its jurisdiction. *Nelms v. Vaughan*, 84 Va. 606, 5 S. E. Rep. 704; *Ellyson, ex parte*, 30 Gratt. 10.

When the board of election canvassers assume to exercise legal discretion which it does not possess, its action may be controlled by prohibition. *Brown v. Board of Election*, 45 W. Va. 826, 32 S. E. Rep. 168.

Should the county court exceed its jurisdiction by giving judgment for costs to either party in a contested election case under Acts 1882, ch. 71, p. 65, a writ of prohibition from the circuit court is a proper proceeding to arrest the judgment. *West v. Ferguson*, 16 Gratt. 270.

County Seat Election—Jurisdiction of Returns Taken by Improper Tribunal—Prohibition.—When a board of election canvassers assumes jurisdiction, which it has not, to canvass and declare the result of a vote upon the relocation of a county seat, prohibition will lie to restrain it, though, in its proper action, its functions are ministerial, and not subject to prohibition. *Brown v. Board of Election*, 45 W. Va. 826, 32 S. E. Rep. 168.

Jurisdiction of County Court—Prohibition Improper.

—Under the law making it the duty of the judge of the county court to fill a vacancy in the office of sheriff, the circuit court has no authority to restrain this exercise of his jurisdiction by issuing a writ of prohibition. If he exercises it erroneously the remedy is by appeal. *Shell, J., v. Cousins*, 77 Va. 328. See also, *Miller v. Marshall*, 1 Va. Cas. 158.

In *Ellyson, ex parte*, 30 Gratt. 10, JUDGE JONES says: "If a county or corporation court has such jurisdiction in any case in a contested election the petitioners have no right to a writ of prohibition."

IX. OFFENCES AGAINST ELECTION LAWS.

Requirements of the Declaration—Presumption as to Action of Officers.—The mere allegations of wilfully, unlawfully, knowingly, maliciously and corruptly, and without sufficient cause, excluding and erasing the name of the plaintiff, from the registration book, etc., do not make the declaration good, but the declaration must show by allegation how the defendants acted wilfully, unlawfully, corruptly, etc. Did they erase his name without giving him the notice required? Did they erase it without complying with the requirements of the statute? Did they act without jurisdiction? If so, the declaration should so allege, otherwise, the court will presume they acted within their jurisdiction and judicially,

and will refuse to take jurisdiction of a case against them for mere error of judgment. *Fausler v. Parsons*, 6 W. Va. 486.

Uncertainty of Allegations—Indictment Insufficient.—An election official was indicted under Code of 1873, ch. 8, sec. 43, for acting unlawfully in conducting an election. On motion to quash, it was held that though he may have acted unlawfully as charged in the indictment, it does not follow that he was guilty of corrupt conduct, for the punishment of which the statute was intended, and the indictment was insufficient. *Boyd v. Com.*, 77 Va. 53.

Certainty in the Allegations—Necessary—Informations.—In an information against a justice of the peace for bribery in an election of a clerk, it ought to be stated with certainty, that an election was held, and that the vote was given at that election. *Newell v. Com.*, 2 Wash. 88.

Gift of Intoxicating Drinks—Breach of Election Law—Indictment—Declaration.—The latter clause of section 10, ch. 5, Code, reads: "And if any person, whether a candidate or not, offer, give, or distribute any intoxicating drink to any voter on the day of an election, he shall forfeit not less than ten, nor more than fifty, dollars." *Held*, that, in an indictment based on this section of the statute, it being charged that the person to whom the intoxicating drink was given was a legally qualified voter, it is not necessary to state the facts constituting such person a qualified voter; nor is it necessary to allege any special criminal intent, but the *scienter*, or general criminal intent that is, the accused knowingly and willfully did the unlawful act, is sufficient. The offense here charged, being a misdemeanor, is not within the meaning of the term "civil case," as used in section 21, ch. 116, Code, and therefore the accused was not entitled to a special jury. But under section 17, ch. 116, the accused was entitled to challenge four jurors peremptorily, and, this having been refused, the judgment and verdict are set aside, and a new trial is awarded. *State v. Pearis*, 35 W. Va. 330, 13 S. E. Rep. 1006.

Wager on Election—Imposition of Fine under the Statute.—A short time before the election of certain county officers for Augusta county to be made in May 1866, M sold to S a wagon at the price of one hundred and fifty dollars, which was about the value of the wagon, to be paid by S when K, one of the candidates for the office of county court clerk at said election, should be elected to that office, and not at all, if he was not elected; and S at the time of said sale put up his check agreeably to that understanding; and upon these terms took possession of the wagon. *Held*, this is a wager on the part of both M and S, within the meaning of the Code of 1860, ch. 198, § 10, p. 744; and both M and S are liable to a fine not exceeding the amount that either might lose. *Shumate v. Com.*, 15 Gratt. 653.

Betting on Elections—Statute Construed as Remedial.—Section 10 of ch. 198, Va. Code 1849, in relation to betting on elections, was construed as a remedial statute in *Shumate v. Com.*, 15 Gratt. 653.

Betting on Elections—Indictment—Construction.—An indictment under § 9, ch. 5, Code of 1887, which alleges that G. and E. bet on election, though it does not expressly allege that they bet with each other will be construed to mean that they bet with each other, and is therefore good. *State v. Griggs*, 34 W. Va. 78, 11 S. E. Rep. 740.

It was also held in this case that a bet made after the voting had closed, but before any legal declara-

tion of the result of the election, is an offence. See *State v. Snider*, 34 W. Va. 83, 11 S. E. Rep. 742.

Betting on Elections—Joint Indictments—Amount of Fine—Statutes.—On conviction of two parties jointly indicted under section 9, ch. 5, Code of 1887, for betting on elections, there must be a separate fine against each, and that fine must be the value of the money or other thing which the party wagered plus \$50. *State v. Griggs*, 34 W. Va. 78, 11 S. E. Rep. 740; *State v. Snider*, 34 W. Va. 83, 11 S. E. Rep. 742.

Betting on Elections—Statute Construed—Limits of Fine.—Under section 10, ch. 198, Va. Code, 1860, providing that if any one bet on elections, he should be fined, not exceeding the amount he bet; it was held in *Re Shumate*, 15 Gratt. 653, that the amount risked or bet was the value of the property bet, because one might lose that; and, as a bet was a joint transaction, both parties were held equally guilty, and each was liable to a fine up to the largest amount bet by either party.

Judicial Notice Taken of the Result of Local Election.—The court will take judicial notice of the fact that at an election held under the Act of February 26, 1886, in the magisterial district, wherein the offence of violating the statute is laid, the vote against the granting of liquor prevailed, and no allegation to that effect is necessary in the indictment. *Thomas v. Com.*, 90 Va. 92, 17 S. E. Rep. 788; *Savage v. Com.*, 84 Va. 582, 5 S. E. Rep. 663.

275

**Mitchell v. Moore & als.*

April Term, 1861. Richmond.

(Absent, ALLEN, P. *)

1. **Marriage Settlements—Effect on Marital Rights.**—A deed of marriage settlement will not divest the marital rights of the husband to a greater extent than the terms of the deed clearly require.
2. **Same—Power of Disposal—Effect of Failure to Dispose of Personality.**—A deed of marriage settlement, settling the wife's property, provides that the wife dying in the lifetime of her husband may dispose of the property by deed or will; but does not dispose of it upon her failure to execute the power given her. The husband surviving her is entitled to the personal property.
3. **Same—Investment of Trust Fund in Realty by Husband—Effect.**—If a part of the trust fund being

*He was related to some of the parties.

Marriage Settlement—Effect on Marital Rights.—In *Coatney v. Hopkins*, 14 W. Va. 353, the court said: "A deed of marriage settlement may be so framed as to deprive the husband of all his marital rights; but he will never be deprived of them to a greater extent than the terms of the deed clearly require. *Mitchell v. Moore et al.*, 16 Gratt. 275." See also, 1 Va. Law Reg. 651; 1 Min. Inst. (4th Ed.) 347.

Same—Power of Disposal—Effect of Failure to Dispose of Personality.—As further authority for the proposition that, when, by the settlement, the wife is given the right of disposing of certain property by deed or will, but dies, having made no disposition of it, no separate estate is created thereby, and the husband surviving is entitled as her distributee to the personality, see *Andes v. Roller*, 98 Va. 623, 37 S. E. Rep. 297; *Coatney v. Hopkins*, 14 W. Va. 354; *Beard v. Beard*, 22 W. Va. 139; in all of which cases the principal case is cited as authority. See also, *Pickett v. Chilton*, 5 Munf. 467; 1 Min. Inst. (4th Ed.) 347.

personalty, is sold and invested in real estate purchased by the husband; whether it was sold rightfully or wrongfully, the husband is entitled to it, and the subject in which it is invested.

A marriage being about to take place, between Thomas P. Mitchell and Virginia B. Harvey, a deed bearing date the 14th day of November, A. D., 1849, was executed by the parties and Wm. M. Harvey, by which after reciting the intended marriage, and that Miss Harvey was possessed of real estate, slaves and other personal property, all of said property was conveyed to her brother William M. Harvey, upon the following trusts—"in trust for the said Virginia B. Harvey until the solemnization of the said intended marriage; then upon trust, that the said William M. Harvey, his executors, &c., shall permit the said Thomas P. Mitchell during the joint lives of the said Thomas P. Mitchell and Virginia

276 B. *Harvey, his intended wife, to have, receive, take and enjoy all the interest and profits of the said property hereby assigned, to and for his own use and benefit; and from and after the decease of such of them, the said Thomas P. Mitchell and Virginia B. Harvey as shall first happen to die; then upon trust that the said William M. Harvey, his executors, &c., shall assign, transfer and pay over all the said property to the said Virginia B. Harvey, in case that she survive the said Thomas P. Mitchell; but if she die before him, then to such person or persons, and in such manner and form as the said Virginia B. Harvey shall, notwithstanding her coverture, by any writing or writings under her hand and seal, or by her last will and testament in writing, direct, limit or appoint; to the intent that the same may not be at the disposal of or subject to the control, debts or engagements of the said Thomas P. Mitchell her intended husband."

This deed was acknowledged by the parties, on the day of its date, before two justices of the peace, and duly admitted to record; and soon thereafter the marriage took place. At this time it seems that Mitchell has no property, and was in embarrassed circumstances; or at least was apprehensive of an effort to subject him to large liabilities for a house in New Orleans, with which he had been connected either as clerk or partner.

On the 13th of February, 1850, an agreement was entered into between Thomas Preston and Thomas P. Mitchell, by which Preston agreed to sell to Mitchell a tract of land in the county of Bedford containing six hundred acres or more, for which Mitchell was to pay to Preston four thousand dollars about the first of the next March, when possession of the land was to be delivered to Mitchell, and of the balance of the purchase money, one thousand dollars was to be paid at the expiration of two years, and one thousand dollars at three years. And Preston at the same time sold to Mitchell
277 personal *property upon the place which was to be taken at valuation,

and which amounted to about seven hundred and forty dollars.

Among the property embraced in the deed of marriage settlement was bank stock, and state bonds, and a blank power of attorney to the cashier of the bank to sell the stock and bonds, was presented to the trustee by Mitchell. This was endorsed on the back with the approval of Mrs. Mitchell, and having been executed by the trustee, the stock and bonds were sold, and the proceeds, four thousand dollars, was paid to Preston in part payment of the land aforesaid. The receipt executed by Preston for this payment is in the following words—"Received, Bedford county, Virginia, April 12th, 1850, of Mrs. Virginia B. Mitchell, four thousand dollars, in part payment of six hundred and forty and a half acres of land, called Preston place, in five miles of Liberty, Bedford county. Given under my hand, day and date above written."

Mitchell took possession of the land at the time appointed in the agreement, and he and his wife continued to live upon it, during her life. In July 1850 she died without issue, and without having exercised the power of disposition vested in her by the marriage settlement.

In August 1850, and after the death of Mrs. Mitchell, Preston and wife conveyed the land to Thomas P. Mitchell; who, in September of the same year, executed his bonds to Preston for the balance of the purchase money and the value of the personal property purchased; and these bonds were paid off by him in January 1853. He had been in the possession and management of the trust property from the marriage until the death of Mrs. Mitchell, the trustee though he accepted the trust, not interfering with the property.

On the 26th of July, 1855, David
278 E. Moore and Elizabeth *his wife, the latter of whom was one of the heirs and next of kin of Mrs. Mitchell, filed their bill in the Circuit court of Bedford county against Thomas P. Mitchell in his own right and as administrator of his deceased wife, and the other heirs and next of kin of Mrs. Mitchell, in which they set out the facts of the marriage settlement and marriage as hereinbefore stated. They charged that the purchase of the land from Preston was for the benefit of Mrs. Mitchell, and was paid for out of her property, though the negotiation with Preston was conducted by her husband. That at the time of the marriage Mitchell was insolvent, and wholly without pecuniary means, and that it was intended, by the execution of the marriage settlement, to intercept the marital rights of Mitchell in regard to the property of his intended wife, and to exclude him from any interest therein in case he survived her. And they charge that after the death of Mrs. Mitchell, Thomas P. Mitchell wrongfully and unjustly procured a deed of conveyance of the land from Preston and wife as if he had been the purchaser thereof, and prevailed on Preston to take his bonds for the

two deferred payments, reserving a lien on the land for their security.

Mitchell answered the bill. He says that the marriage settlement was executed upon his suggestion. That he was not insolvent and wholly without pecuniary means; but that he had been a clerk in a large mercantile house in New Orleans, receiving for his services a portion of the net profits of the firm, and as such he had transacted the greater portion of the business of the concern.—That this house failed in 1845, and although he knew that he was neither legally nor morally bound for its debts, yet fearing that there might be an effort by their creditors to complicate him in the embarrassments of the said firm, he felt it to be his duty to apprise his intended wife of this state of affairs, and to suggest to her

279 the propriety of making such a settlement of her property upon herself as to protect it against the claims of creditors during coverture, and to enable her if she desired it, to dispose of it in her life time. He denies that by the settlement his marital rights were in fact or were intended to be, in any wise or to any extent, abridged, limited or intercepted otherwise than to protect the said property from liability for his debts during coverture, and to reserve to his intended wife the power of disposing of the same as therein provided, during their joint lives, and the further right to the property in the event of her surviving him. He denies that the land was purchased of Preston for the benefit of Mrs. Mitchell, but avers that it was purchased by himself for his individual benefit. He admits that the four thousand dollars was paid by the sale of the bank and state stock of Mrs. Mitchell, but avers it was done with her full consent; that she desired and authorized him to use, manage and dispose of the property for his own purposes and in his own way, and the trustee acquiesced and interposed no obstacle to the execution of the wishes of his wife; but furnished him facilities for carrying out her wishes.

The foregoing are all the statements of the bill and answer, which are necessary to present the merits of the case. There was some evidence tending to show that Mitchell was without pecuniary means at the time of his marriage.

The cause came on to be heard on the 5th day of May, 1858, when the court held that the plaintiffs and the other heirs of Mrs. Mitchell were entitled to the tract of land purchased of Preston; but that Mitchell was entitled to the slaves and other personal property embraced in the marriage settlement. And the decree was that Mitchell should surrender the tract of land to the heirs of his wife, by a proper deed of release with special warranty; and should render an account of the rents, issues
280 *and profits thereof since the death of Mrs. Mitchell; and that the bill should be dismissed as to the personal property. From this decree Mitchell obtained an appeal to this court.

Slaughter and Morson, for the appellant.

Grattan, for the appellee.

ROBERTSON, J. A deed of marriage settlement may be so framed as to deprive the husband of all his marital rights; but he will never be deprived of them to a greater extent than the terms of the deed clearly require.

In this case the deed of settlement only excludes the rights of the husband, surviving his wife, in the event of her exercising the power of appointment conferred on her. She died without having exercised that power, and leaving her husband surviving; so that he became entitled to all the personal estate embraced in the settlement; subject only to the payment of the debts for which it was bound, if any such there were, funeral expenses, and charges of administration.

Numerous authorities might be cited; but it is sufficient to refer to the case of Pickett & wife v. Chilton, 5 Munf. 467; which is directly in point, and decisive of the question.

The decree therefore is right so far as it adjudges in favor of the claim of the husband to the personal fund, and the application of the appellees to have it corrected in this particular must be denied.

It is difficult to understand upon what principle it was held that the heirs of the wife are entitled to the whole of the land purchased from Preston. The contract for the purchase was made by the husband in his own name, and on his own behalf. The price paid was six thousand dollars; of which four thousand only were paid out of the trust fund, the residue being paid
281 by the husband, *after the death of the wife, in discharge of his own bonds, and with his own money; the trust fund never having been at any time bound therefor.

The most, it would seem, that the heirs of the wife can claim, with any show of plausibility, is that the four thousand dollars, which were applied out of the trust fund in part payment for the land, should be treated as realty; and that they are entitled to it, or to a proportional part of the land.

In considering this question it is unnecessary to determine whether, under the deed of settlement, any investment of the personal fund in realty could be legally made during coverture; because, if it be conceded that it might have been, there is nothing whatever in the case to show that it was ever in fact made, or intended to be made. The allegation of the bill that the purchase was made by the wife, or by her husband for her and on her behalf, is not supported by proof, and is denied by the answer. The only circumstance connecting the wife in any way with the transaction is that the payment of the four thousand dollars was made with her assent from the proceeds of sale of state bonds and bank stock constituting part of the trust fund, and the receipt taken as for so much money paid by her. The effect of this was to show that

her husband was indebted in that amount to the trust fund, and to create for its payment an equitable lien upon the land purchased by him. Whoever might be entitled to this portion of the trust fund would of course be the person authorized to demand payment, and enforce the lien. In the event, which has happened, of the death of the wife without having made an appointment, the husband himself is so entitled. There can be no doubt of this if the sale of the state bonds and bank stock and the application of the proceeds in part payment for the land be regarded as a legal and proper disposition of so much of the trust fund.

282 In that case the husband would be as much entitled to it as a debt due from himself and for which his land was bound in equity, as if it had remained in its original form of state bonds and bank stock.

If on the other hand the sale and application be regarded as a breach of trust it seems equally clear that the husband is entitled. When a breach of trust has been committed the party injured has the right to pursue the fund through all its transmigrations; and may, if he chooses, elect to take in its stead the property acquired with it. The party injured is of course the party entitled to the fund in its original form; and its original character continues until the election to take what has been acquired in place of it has been made, and the conversion is thus perfected.

In this case it is not pretended that during the life of the wife any complaint was made of the breach of trust, or that there was any effort to pursue the fund. Its original character as personalty therefore remained impressed on it at the time of her death. On her death and in default of appointment the right to the fund and to all remedies for its recovery devolved upon the husband.—The subject is one in which the heirs of the wife have no interest or concern; and the election of the husband to take the land in lieu of the money would be for his own benefit.

The bill does not ask for relief as to the real estate of the wife conveyed by the deed of settlement, and the husband in his answer disclaims all title to it. As the only relief prayed for is in reference to the personal fund, the bill should have been wholly dismissed, the heirs of the wife having no interest therein.

The other judges concurred in the opinion of Robertson, J.

The decree of the court is as follows:
283 *The court is of opinion that upon the death of Mrs. Mitchell without exercising the power of appointment given her by the deed of the 14th day of November, 1849, the personal property conveyed therein passed to her husband, the appellant, and the real estate to her heirs at law. And the court is further of opinion that the property conveyed to the appellant by Thomas P. Preston and Susan his wife, is not to be regarded as a part of the realty

subject of said trust, but that the same, to the extent of the money advanced by Mrs. Mitchell to the appellant, and invested by him in the said land, is to be regarded as part of the personalty subject of said trust, which upon her death without exercising said power of appointment, devolved upon him as her surviving husband and administrator. The court is therefore of opinion that the appellant could not be required to surrender and convey said land to the appellees her heirs at law, nor to account for the rents and profits thereof. The court is therefore of opinion that there is no error in so much of said decree as dismisses the bill as to the slaves and personal property in said deed mentioned; but that so much of said decree as relates to the property conveyed to the appellant by said Preston and wife, is erroneous. The said decree is therefore reversed with costs, &c.—and this court proceeding to render such decree as said Circuit court ought to have rendered, it is adjudged, ordered and decreed that said bill be wholly dismissed, with costs, &c.

284 *Bayly's Adm'r v. Chubb.

January Term, 1862, Richmond.

1. Judicial Notice—Acts of Congress.—The acts of Congress in relation to the District of Columbia must be taken notice of by the state courts, without proof, as all other public acts of Congress are taken notice of.

2. Negotiable Paper—Notice of Protest—Congressman.—Notice of protest of a negotiable note is left at the dwelling house of a member of Congress in Washington, after the adjournment of Congress and after he had left the city; and it appears that he kept up his domicile in the district which he represented, and it was his habit to leave Washington directly Congress adjourned. The proof of notice is not sufficient.

This was an action of debt in the Circuit court of Accomack county, brought by Charles St. John Chubb surviving partner of the firm of Chubb brothers, against Thomas H. Bayly in his lifetime, and upon his death revived against William T. Joynes administrator with the will annexed of said Bayly. The action was against the defendant endorser on a note in the following words:

\$1200. Washington, May 24, 1854.

Ninety days after date I promise to pay to Thomas H. Bayly or order, twelve hundred dollars, for value received, payable at Riggs & Co.'s banking house.

B. T.

The declaration treats the paper as a negotiable note, and sets out the demand, non-payment, protest and notice, in the ordinary form of an action of debt against the endorser of a negotiable note.

Upon the trial the defendant, by his counsel, objected to the note and protest being given in evidence to the

285 *jury, on the ground that there was no evidence to show that the note was a negotiable note, on the footing of a bill

of exchange, by the law in force at Washington at the time it was made. The court being of opinion that the note was "negotiable by the general mercantile law," overruled the objection, and admitted the note and protest in evidence; to which the defendant excepted.

It was proved that Bayly was a member of Congress, representing the Accomack district in this State, from 1844 to his death in June 1856. That during the whole of that period he had his general domicile on his plantation in Accomack. That his plantation was carried on by him during his service in Congress. That his dwelling on said plantation was kept open during his absence, by his housekeeper, and that such was the case in the summer of 1854. That the defendant's testator had a general agent in Accomack during his absence from that county, whose habit it was to forward to him all the letters that came to him during his absence, such letters being received and forwarded nearly every week; but this agent had no authority to make or endorse commercial paper, or to receive or waive notices of protest.—That it was the general habit of the defendant's testator to leave Washington immediately after the adjournment of Congress, and not to return until the commencement of the next session. That in the year 1854 the said testator kept house in Washington, in a house rented and furnished by him. That Congress adjourned on the 7th day of August, 1854; immediately after which, the testator left Washington, with the whole of his white family and some of his servants, and went to the White Sulphur Springs, sending his other servants to Accomack. That when the testator left Washington, he tendered the use of his house there to Francis Doyle and William Collins, who occupied it, with the

286 furniture, until the *commencement of the next session of Congress in December 1854. That those persons paid no rent for the house, occupying it only as a courtesy from the testator; but they paid the gas bills, and furnished their own supplies. That the defendant's testator returned to Washington with his family, at the commencement of the next session of Congress, when he resumed possession of the house, and occupied it until the end of that session, when he broke up finally, and sent his furniture away. That the said note was protested for non-payment on the 25th day of August, 1854; and that notice thereof to the defendant's testator was left at the said house in Washington—and that on the said 25th day of August he and his family were at the White Sulphur Springs.

The court, on motion of the plaintiffs, instructed the jury that the notice of demand, non-payment and protest was sufficient to charge the defendant's testator as endorser, to which the defendant excepted. After verdict for the plaintiff, the defendant moved for a new trial; which the court refused, and gave judgment on the verdict. The defendant again excepted, and obtained a supersedeas to the judgment.

Joynes, for the appellant.

J. Alfred Jones, for the appellee.

DANIEL, J. The note upon which the suit was brought was dated at Washington and made payable at a banking house in that city; and we must look to the law of that place for the rule by which to ascertain the true nature of the contract entered into by the endorser. No proof of that law having been given on the trial the first question presenting itself is, whether said law is one of which the Circuit court was bound to take notice judicially.

As a general rule no court takes 287 judicial notice of a *foreign law; and this rule has very properly, I think, been recognized as determining the question of how far the courts of any one of the states formerly composing the United States were bound to take notice of the laws of any other one of those states. The relation of the United States to each other in regard to all matters not surrendered to the general government by the constitution, were those of foreign states in close friendship, each being sovereign and independent; and the courts have very generally held that, therefore the laws of one state were to be proved in the courts of another only as other foreign laws. 1 Greenl. on Ev. § 489.

In section 490 of the same work, however, the author states that, because of the reciprocal relations between the national government and the several states, the courts of the United States take judicial notice of all the public laws of the respective states, whenever they are called upon to consider and apply them; and in like manner the courts of the several states take judicial notice of all public acts of Congress, including those which relate exclusively to the District of Columbia, without any formal proof. I have been unable to find any case in which the latter member of the foregoing proposition, so far as it relates to the District of Columbia, has been in terms judicially announced by the supreme court of any one of the states, though it seems to me that it must be as the author has stated it.

By the 8th section of the 1st article of the constitution of the United States, the Congress was clothed with exclusive legislation over the District which should become the seat of the government of the United States; and by the 6th article it is declared that the constitution and the laws of the United States made in pursuance thereof, shall be the supreme law of the land, and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding.

288 *The District of Columbia having become, by the cession of Maryland and Virginia and the acceptance of Congress, the seat of the government of the United States, it is difficult to conceive on what grounds it is to be said that a public act of Congress in relation to said district, passed in the exercise of its exclusive legislation over said district, is not a law of which the courts of the states were bound, to take

notice, judicially. It is by comity only that contracts made in one state are enforced by the courts of another state according to the laws of the former; and no state is bound to enforce a contract made in another state which is contrary to its general policy and laws. But it is obvious that a state court in enforcing a contract made in the District of Columbia according to the *lex loci contractus* cannot proceed upon any notion of comity; in as much as if it did it would have a right to disregard such law if found in conflict with the law of the state; and this right it could not exercise without violating the constitution, the *lex loci contractus*, in such case, being a law of Congress, which, if to be noticed at all, is to be observed as a supreme law, and binding upon the court though it should be in conflict with the laws of the state. In other words, if in enforcing a contract made in the District of Columbia a state court is bound to notice, at all, the laws of the place, regulating such contracts in the District of Columbia, it must treat them as it does any other public acts of Congress passed in pursuance of the constitution, which it is required to administer, to wit, as supreme public laws of the land—laws which the court is presumed to know and is bound to notice without requiring them to be first proved.

The act of Congress to which reference is had above, is an act passed the 27th February, 1801, by which it is declared that the laws of the State of Virginia as they now exist, shall be and continue in force in that part of the District of Columbia which was ceded by the said states to the United States, and by them accepted for the permanent seat of government; and that the laws of the State of Maryland as they now exist, shall be and continue in force in that part of said district which was ceded by that State to the United States, and by them accepted as aforesaid. Brightly's Digest 251. At the time of the passage of this act the statute 3 and 4 Anne ch. 9, in relation to promissory notes, was, as is conceded, and as is seen from the reports of several decisions of the Supreme court of Maryland, cited at the bar, a law of that State; and by that statute, all notes in writing payable to any person or persons, his, her, or their order, are assignable or indorsable over in the same manner as inland bills of exchange are or may be; and all persons to whom such notes are indorsed or assigned may have their actions thereon against the maker or any of the persons that indorsed the same in like manner as in cases of inland bills of exchange. By this law, thus made the law of the city of Washington, the indorsers, if duly protested and notified by protest, were liable on the note on which the suit was brought, in like manner as they would have been on a regularly protested inland bill of exchange; and by the 10th and 11th sections of ch. 144, Code 1849, an action of debt is given when any note or writing by which there is a promise, or undertaking, or obligation to pay money,

if the same be signed by the party who is to be charged thereby or his agent. And it is further declared that upon any such note which on its face is payable at a particular bank or a particular office thereof for discount and deposit, or the place of business of a savings institution or savings bank, and upon any bill of exchange, whether such note or bill be payable in or out of this State, if the same be protested, an action of debt may be maintained and judgment given jointly against *all liable by virtue thereof, whether drawers, indorsers or acceptors, or against one or any intermediate number of them, for the principal and charges of protest, with interest thereon from the date of such protest.

If the steps in relation to the protest and notice have been regular there would thus, as I conceive be nothing wanting to maintain the action. The protest is in regular form, and the only question remaining to be considered is as to the sufficiency of the notice.

None of the cases cited by counsel, comprehend in their decisions all the points in respect to notice arising out of the proofs in this; though several of them bear a close resemblance to it in some important features. Thus in the case of *P. Chouteau v. Daniel Webster*, 6 Metc. R. 1, in which the notice was held sufficient to charge the indorser, when the note on which the suit was brought, which was payable at New York, fell due, the indorser, Mr. W. was at Washington attending to his duties at a session of Congress, as a senator from Massachusetts. His general domicile and place of business was in Boston, where he at all times had an agent who had the charge and management of his business affairs in his absence; though the holder of the note had no notice that he had such agent, nor had the indorser requested that notice should be sent to him at Boston. Notice of the non-payment of the note was seasonably put into the post office at New York, directed to the indorser at Washington, where letters addressed by mail to members of the senate during the session of Congress, were taken from the post office by officers charged with that duty and delivered to the members in their places when the senate was actually in session, and on other days were delivered by those officers at the members' lodgings. In that case, as has been seen, the senate was in session, and Mr. Webster was in Washington at the time the notice was sent. In this case Congress had adjourned

291 *and the indorser had left Washington, a few days after the adjournment and some ten or fifteen days before the note was protested; and it was proved that it was his general habit to leave Washington immediately after the adjournment of Congress, and not return until the commencement of the next session. So in the case of *Graham v. Sangston*, 1 Maryland R. 59, the indorser at the time of the maturity of the bill was a member of the general assembly of Maryland, then in session, and boarded at a hotel in Annapolis, the seat of

government; and the notary gave notice by leaving the notice at the room of the indorser in the hotel; but whether the indorser was in Annapolis on the day that the notice was given did not appear; nor was there any proof in respect to the general domicile of the indorser. The notice was decided to be sufficient.

In the last case the fair inference from the facts is, that the indorser must in fact have received the notice—the notice being left at his lodgings where he was then staying in attendance upon the legislature. The case would apply here if in this case Congress had been in session at the time the notice was left at the house of Bayly in Washington.

The residence of a member of Congress at Washington during the session of Congress is a matter required by law; and so long as the session continues it is but just and reasonable to infer that the member is where the discharge of most important public duties demands of him that he should be. It was on such grounds, mainly, that the court in *Chouteau v. Webster*, justified the notice to the indorser in that case.

Strong, however, as are the reasons on which this case was decided, it is opposed by the case of *Walker v. Tunstall*, 3 How. Mis. R. 259. In that case the indorser, Robert J. Walker, was a member of the United States senate; the senate was

in session; and he was proved to
292 *have been in Washington attending to his duties of senator at the time of the protest; notice of which was sent in good time by mail directed to him at Washington. The proofs in this cause tended to show that Mr. Walker had a general domicile in the State of Mississippi; and in passing upon certain instructions given in the court below, the supreme court of Mississippi held in such a state of facts, that when the indorser has a residence in the state which he represents the notice should be sent to such residence; and if his residence is not known due diligence should be used to ascertain the same; and that notice sent to Washington city is not sufficient. The cause being remanded for a new trial, that trial was had, and a verdict and judgment obtained in the court below in favor of the indorser. The plaintiff in the action then appealed, and we have a report of the case on its second hearing in the Supreme court of the state in 2 *Smeedes & Marsh*. R. 638. It now appearing from the additional facts proved on the second trial, that the indorser had no general domicile, or known place of residence or business, at the time of the protest, the court held that notice sent to him at Washington city was sufficient to fix his liability. The two decisions of the court are not in conflict; and their joint result is to declare that notice sent to a member of Congress who has no known place of residence, is good if directed to him at Washington, whilst Congress is in session, and he is there engaged in the discharge of his official duties; but that such notice is not sufficient if he has a

known place of residence, except upon a failure of the notary to ascertain the residence after having used due diligence to ascertain it.

It seems to me, that the rule declared in *Chouteau v. Webster* is the more reasonable one, but, seeing, that in the opinion of learned and able judges, it is deemed too broad already, I do not feel disposed
293 to extend it still *further than any case has yet gone, and make it embrace a notice directed to a member of Congress at Washington after the adjournment of Congress, and after the member had in fact left the city. The presumptions which uphold the notice during the session of Congress seem to me to have nothing to sustain or justify them after the body has adjourned. The presumption is then the other way. It is then but reasonable to suppose that the members have left the city and gone to their respective homes; and it is difficult to believe that any notary in Washington could remain for many days ignorant of the adjournment of Congress. The indorser had been, at the time of the protest, for more than ten years a member of Congress; punctual in his habit of attending Congress during its session, and regular in his habit of leaving Washington immediately after the adjournment and of not returning until the commencement of the ensuing session. Very little diligence used by the notary in enquiring of the citizens of Washington, would (we must believe) have acquainted him with the fact, if he did not already know it, that the indorser was a member of Congress from Virginia, having his general domicile in that State, and residing in Washington only during the sessions of Congress; that Congress had adjourned and that he had as was his habit, left the city. It does not appear that any enquiry of the kind was made. The fact that the note was dated at Washington it is well settled does not dispense with due diligence to ascertain the residence of the indorser in cases where, if the note were dated elsewhere such diligence should have been used. Upon a view of all the facts I do not think that the notice was sufficient; and the court it seems to me erred in giving the instructions complained of, and in refusing to set aside the verdict and grant a new trial. It seems to
294 me that the judgment should be reversed, *the verdict set aside, and the case remanded for a new trial.

ALLEN, P., and ROBERTSON, J., concurred in the opinion of Daniel, J.

MONCURE, J., dissented. He thought the notice sufficient.

Judgment reversed.

295 *Smith's Adm'r v. Lloyd's Ex'x.

January Term, 1862, Richmond.

(Absent, LEE, J.)

1. Pleading and Practice—Debt on Bond—Excuse for Non-Production of Bond.—In action of debt upon a

*Pleading and Practice—Profert Excused.—In *Simmons v. Trumbo*, 9 W. Va. 302, it was said: "The court

bond, plaintiff to excuse the non-production of the bond, in answer to oyer craved by the defendant, says the bond is filed in another court; that he applied to that court for it, that his application was opposed by the defendant, and was refused by the court. This is a sufficient excuse for not producing the original bond.

2. **Same—Same—Same—Excuse May Be Ore Tenua.**—An excuse for not producing the original bond sued on may be *ore tenua*.
3. **Same—Same—Same—Excuse in Form of Plea.**—In this case the excuse is made in the form of a plea, which is demurred to. The demurrer does not authorize the court to decide upon errors in the declaration.
4. **Same—Demurrer to Plea—Effect on Declaration.**—A demurrer to a plea can only operate upon the declaration, as a demurrer to the whole thereof; and if any one count is good, the demurrer as a demurrer to the declaration must be overruled.
5. **Same—Demurrer to Declaration.**—In considering a demurrer to a declaration, where oyer is craved of the bond sued upon, the court can only look at the declaration and bond, and if words in the bond without the addition of extraneous facts, are insensible, they will be treated as surplusage.
6. **Same—Conditions Precedent—Setting Out the Performance.**—The setting out the performance of a condition precedent in the language of the condition is sufficient.
7. **Same—Maturing at Rules—Failure to Give Oyer When Craved.**—If the bond or deed sued on is not filed with the declaration, and the defendant appears at rules and craves oyer of it, which the plaintiff does not give, and the defendant will not plead without oyer, the clerk may properly take the rules without regard to the craving of oyer, so that the case may be ready to be disposed of at the next term of the court.

296 *This was an action of debt in the circuit court of the county of Alexandria, brought in September 1852, by John L. Pascoe, administrator de bonis non with the will annexed of Joseph Smith deceased, against John Lloyd, and afterwards revived against his executrix, upon the following paper:

"Whereas a suit is now pending in the Circuit court for the county of Alexandria—John Lloyd against the bailiff, Charles Scott, on a writ of replevin, in which Jonathan Schofield claims to have an interest, and the amount in controversy being five thousand dollars, arrearages of rent, interest and costs, I hereby agree, in case

properly refused to grant the defendant oyer of the bonds, the excuse for not making proof of them, alleged in the declaration, that they were in the defendant's possession, being a sufficient excuse. Smith's Adm'r v. Lloyd's Ex'or, 16 Gratt. 295."

Same—Statute—Effect on Special Demurrer.—The several subsequent cases cite the principal case as authority for the proposition that the effect of the enactment of section 31, ch. 171 of Code of 1849 (Code 1887, § 372), was to abolish special demurrers. Norfolk, etc., R.Co. v. Ampey, 93 Va. 123, 25 S.E. Rep. p. 226; Coyle v. B. & O. R. Co., 11 W. Va. 107; Kern v. Zeigler, 18 W. Va. 715; Reynolds v. Hurst, 18 W. Va. 651; Spiker v. Bohrer, 37 W. Va. 261, 16 S. E. Rep. 576; Cook v. Dorsey, 38 W. Va. 200, 18 S. E. Rep. 470.

I succeed in said suit to the amount in controversy, and hold myself bound to secure satisfactorily, on real estate in the town of Alexandria, (which is to be kept insured by me until the debts are paid), to Joseph Smith the sum of eleven hundred dollars, to William Veitch and Benoni Wheat, lately trading under the firm of William Veitch & Co., the sum of two hundred and fifty dollars, and to Thomas K. Beale and James M. McCrae the sum of nine hundred and fifty dollars, (they being first duly authorized to receive the said amount), in the manner following, to wit: In case of recovery to the full amount as aforesaid, I will secure satisfactorily, to the several parties as hereinbefore mentioned, the sums as stated, bearing an interest of six per cent. per annum, after the 1st of May, 1828, which interest is to be paid annually.

And I further agree to redeem and pay off to the said parties herein mentioned, or to their heirs or assigns, the sums they are hereby severally entitled to receive, at the expiration of ten years from the time the said suit now depending may be decided, reserving to myself the right and privilege of paying off the said principal debt and all the interest that may be due thereon, at any time I may think proper after the date hereof, and fully releasing *the securities herein promised; or in case I should recover a part of the amount in controversy, I hold myself bound to pay to the parties aforesaid, such proportion as the amount recovered may bear to the amount in controversy. And for the faithful performance of which I hereby bind myself, my heirs and executors.

Witness my hand and seal this the 25th April, 1828.

John Lloyd. [Seal.]

The amended declaration contained two counts, in neither of which is there a proffer of the paper. The first count after setting out the paper, alleges that the replevin suit referred to in it, had been finally decided more than ten years before the institution of this action, in favor of John Lloyd, for whom a judgment had been rendered for the full amount in controversy in the suit; whereby the said Lloyd became liable to pay to Joseph Smith and the plaintiff as his representative the said sum of eleven hundred dollars with its interest.

The second count did not set out the paper, but referred to it, and charged that among other things Lloyd thereby bound himself to pay to Smith within ten years after the decision of the case against Scott, the sum of eleven hundred dollars, with legal interest from the 1st of May, 1828, until paid, "the plaintiff's testator being first duly authorized to receive the same." And it averred that the suit had been finally decided in favor of Lloyd more than ten years before the institution of this action; and that the plaintiff as administrator, &c., of Smith, was duly authorized to receive from Lloyd the said sum of eleven hundred dollars, with interest thereon as aforesaid.

The defendant demurred to the plaintiff's

declaration, and also craved oyer of the writing obligatory in the declaration mentioned, and of the condition thereof. And

the plaintiff joined in the demurrer; 298 and for excuse *for not producing the bond he says—"The plaintiff in answer to the oyer craved by the defendant of the original bond upon which this action is founded, and for reason for not producing it, says that the original bond is now on file in the Circuit court of the United States for the county of Washington, in the District of Columbia; that the plaintiff has applied to the said court, since the institution of this suit, for said original bond; that said application was opposed by the defendant; and that the court therefore refused to deliver to the plaintiff the said original bond; and so it is impossible for the plaintiff to produce said bond after the use of all means in the power of the plaintiff to produce it. And this he is ready to certify. Wherefore he prays judgment, &c." The defendant demurred to the plaintiff's excuse; and the court sustained the demurrer; and there was judgment in the action for the defendant. Whereupon the plaintiff applied to a judge of this court for a supersedeas to the judgment; which was awarded.

F. J. Smith, for the appellant:

The question presented by the record is as to the sufficiency of the excuse for the non-production of the original of the obligation sued on.

The requirement of the production of an original paper upon which an action has been brought, as authorized by the technical proceeding of craving oyer, rests on the exercise of an undoubted right, and on the supposition of a real desire, by the defendant, that the paper should be produced, and further, that its inspection is needed, for some substantial grounds of defence.

To demand oyer (or to hear it read) was complied with (we are told in the books) in the days of oral pleading, by having the paper called for read aloud in open court—since the establishment of written pleading, by delivering a copy of the instrument to the defendant.

299 *In this case, after oyer was demanded, the plaintiff, as he states in his excuse, applied for the original obligation to the court, where it was deposited, and was there met by the defendant, who opposed said application, and defeated the same, and thereby prevented the plaintiff from obtaining possession of the bond.

Now, whilst as a general rule the defendant, on a demand for oyer, has a right to require the production of an original paper, yet the exceptions to the requirement are as well established as the rule itself.

The excuses for not making profert rest on the broad principle that the law requires no man to perform an impossibility.

Thus, if an obligation has been destroyed by fire or other accident, has been lost, is in the possession of the adverse party, or

is deposited in another court, the plaintiff may rely on either of these excuses to justify not making profert.

Thus, Lord Coke says,—“And if the deed remain in one court, it may be pleaded in another court, without showing forth, quia lex non cogit ad impossibilia.” See 3 Thomas Coke, chap. vi, title pleading, top p. 405, margin 373; Wymark's Case, 5 Coke's R. 74; Doctor Leyfield's Case, 10 Coke's R. 92. In the last case the principle is laid down, that in cases of necessity the production of an original paper, upon oyer, will be dispensed with. In that case the deed was destroyed by fire.

The same doctrine is fully recognized in Read v. Brookman, 3 T. R. 151, in which the counsel on both sides concede it to be law, and the court so decide, that when the deed, of which oyer is demanded, has been pleaded, and remains in another court, or where it is in the possession of the adverse party, that such excuses will be sufficient for not making profert of the original. These, however, are only two of the instances illustrating the principle that

in cases of necessity, or where it is impossible *for the plaintiff to make

profert of the instrument, the excuse will be sufficient. See 2 Chitty's Pleading, top p. 148, margin 197. See also Taylor's adm'x v. Peyton's adm'x, 1 Wash. 252; Waller's ex'ors v. Ellis, 2 Munf. 88. See Judge Tucker's opinion, p. 96, sanctioning the rule as laid down in Read v. Brookman; Anderson v. Barry, 2 J. J. Marsh. R. 265; Moore's ex'or v. Paul, 2 Bibb's R. 330; Butler v. State, 5 Gill & John. R. 577.

Does not this case, then, fall within the principle, as established by these authorities, and is not the excuse pleaded by the plaintiff for not making profert of the bond sued on, amply sufficient?

The bond is filed in another court; that court is beyond the limits of Virginia; application has been made to it for the bond by the plaintiff, and the court refuses to deliver it. The plaintiff's attempt to obtain it is resisted by the defendant, thereby defeating the effort. These facts are admitted by the demurrer to the excuse of profert. Is it not then to require the plaintiff to perform an impossibility, by insisting on his producing the bond sued on? and does not such a requirement, under the circumstances, come in direct conflict with the maxim quoted by Lord Coke, “lex non cogit ad impossibilia?”

Is not this case as strong, to all intents and purposes, as if this bond were in the possession of the defendant? and yet in that case it will hardly be pretended that the excuse would be held to be insufficient.

Robert E. Scott, for the appellee:

There are two questions involved in the case. 1st. On the demurrer to the declaration. 2d. On the sufficiency of the excuse for not producing the bond sued upon. But the demurrer to the declaration was not passed upon by the court below, and therefore it only comes up upon the rule that

where issue is taken upon a demurrer it goes back to the first error.

301 *1st. The agreement shows that it was made with Schofield, and the undertaking is to pay Smith, and the other parties mentioned—"they being first duly authorized to receive the said amount." This was a condition precedent; and both the counts of the declaration are defective in failing to aver that the plaintiff's testator was duly authorized to receive the money. There is no averment of the sort in the first count; and the only averment in the second count is that more than ten years has elapsed since the decision of the replevin case, and the plaintiff as administrator, &c., is duly authorized to receive the amount. This is not an averment that the testator was authorized to receive it. The averment should state how he was authorized. To say simply he was duly authorized involves both law and fact; for due authorization involves law, and the how authorized is therefore necessary to be stated.

2. At the first blush the excuse for not producing the paper would seem to be pretty full. But it is most carefully worded. There were in fact three suits on the same paper, in the same court, at the same time. Our defence was that the paper had never been in their possession; and that they had never executed the releases which was the consideration of the agreement. The paper had been put into the hands of Schofield, and had not been delivered by him; and neither of them was ever duly authorized to demand payment.

The agreement promises to pay several sums to several parties, and it required all to be authorized to receive the sums of money specified to be paid to each.

The court will see how cautiously this excuse is gotten up. The bond was filed in the replevin court; but by whom it does not say. On what grounds the plaintiff asked for the paper is not stated. On what grounds the application was opposed is not stated. On what grounds the application was refused, is not stated. When the

302 *excuse is considered in connection with the paper some light will be thrown on the controversy. The paper says, being first duly authorized to receive the amount. If the paper had averred that the bond was filed by them we should have been satisfied. If they had said that they were entitled to it that would have satisfied us. Then must we not presume that when the motion was made for the delivery of the bond, issue was made up upon that application; and must we not further presume that it was rightly decided? If there could be a state of facts which would justify the judgment of the court are we not bound to infer that they existed?

Deeds and other writings are often used on the trial of a case, and are filed among the papers; but this does not deprive the true owner of his property. He may be required to produce them on a trial; but when the case is ended he has a right to recapture them. No court can rightfully withhold

them from him. Buller, *Nisi Prius*, p. 49, 251, 253, says: There being but one law day of a term during the term every party may take advantage of the deed; but after the term the owner may have it. Even those deeds which become a part of the pleadings, after the term the owner is entitled to them. When a deed is denied, then until that issue is determined the deed is impounded. If determined against the deed it remains impounded forever; but if the issue is found in its favor then the owner is entitled to it. This is in respect to those deeds made part of the record by the pleadings. And there never was any question of the owner's right, where the deed was merely used as evidence. And to the same effect is 1 Tidd's Pract. 586, 587, 9 ed.; 3 Thomas' Coke 404, 405. It is true that a party may make an excuse for not producing a deed if it is in another court. But it is not enough to say it is among the papers in another court; because they may be there in a thousand ways.

303 But it must be in *another court in a manner to preclude the party from obtaining possession of it. Then in pleading this excuse the plaintiff must go further than merely to say it was filed in the papers. It is clear this bond was not a part of the pleadings; for it recites the pendency of that suit. The excuse should have gone further and showed how it remained there.

The counsel for the appellant has referred to several cases. They only show that a party may be excused from making profert in a proper case, and will be allowed to proceed in such a case without it. Our statute dispensing with profert, protects the interest of the defendant; and the plaintiff is still bound to produce the deed if it is in his power. In considering his power must you not consider his right to it? and should he not be required to aver his right to it?

The cases cited on the other side are in conformity with the views I have presented. They say that the deed should have been so pleaded as to have become a part of the record, or be bonds of such kind as would render them a part of the record, and which it would be improper to withdraw; as statute bonds, bonds given in the cause, and the like.

MONCURE, J., delivered the opinion of the court.

The principal question to be decided in this case is, as to the sufficiency of the excuse for not giving oyer of the writing obligatory on which the action is founded. The declaration, or rather the amended declaration which is regarded as the commencement of the pleadings in the case, made no profert, but the defendant craved oyer, of the said writing obligatory; according to the provision in the Code, chap. 171, sec. 9, which makes it unnecessary in any action to make profert of any deed, but declares that a defendant may have oyer in like manner as if profert were made. The excuse for not giving oyer is in these words:

304 *The plaintiff, in answer to the oyer craved by defendant of the original bond upon which this action is founded, and for reason for not producing it says that the original bond is now on file in the Circuit court of the United States for the county of Washington in the District of Columbia; that he the plaintiff has applied to the said court, since the institution of this suit, for said original bond; that said application was opposed by the defendant; and that the court therefore refused to deliver to the plaintiff said original bond; and so it is impossible for the plaintiff to produce said bond, after the use of all means in the power of plaintiff to produce it. And this he is ready to verify. Wherefore he prays judgment, &c."

To this excuse there was a demurrer which the court sustained, and the plaintiff waiving the leave granted him to plead any further excuse, judgment was rendered for the defendant.

It was a general rule of the common law that where a party in pleading claimed or justified under a deed and was presumed to have it in his possession, he was bound to make profert of it, or a sufficient excuse for not doing so. 1 Chit. pl. 365. The rule had its origin in the solemnity attending the execution of deeds, and the dignity formerly attached to such instruments. One reason assigned for the rule was, that the court might be enabled by inspection to judge of the sufficiency of the deed. Another was, to enable the adverse party to have oyer of it and better make his answer or defence. Stephens in his work on pleadings, p. 441, assigns a different one from these, which, as he says, have long since become obsolete though in practice profert was still continued to be made.

Whatever may have been the origin or reason of the rule, it had long been considered in England as matter of form and not of substance, the statute 4 Anne, c. 16 *having expressly declared that the omission of profert should be ground only of special demurrer, 1 Chit. pl. 641; until, at length in 1852, it was altogether abolished by 15 and 16 Vict. c. 76, § 55, which provides that "it shall not be necessary to make profert of any deed or other document mentioned or relied on in any pleading; and if profert shall be made it shall not entitle the opposite party to crave oyer of, or set out upon oyer, such deed or other document." 3 Rob. Prac. 507. Our Code, enacted a few years before, did not go so far; but only dispensed with the necessity of making profert, while it retained the right of craving oyer in like manner, as if profert were made.

So that now, when a party craves oyer of a deed under which his adversary claims or justifies, the latter must produce it, or give a sufficient excuse for not doing so; and the question as to the sufficiency of the excuse for not giving oyer is precisely the same as was the question formerly as to the sufficiency of the excuse for not making profert. The question to be considered in

this case therefore is, whether the excuse made for not giving oyer is sufficient according to the settled principles of law in regard to profert.

An excuse which, from a very early period was allowed as sufficient was, when the deed had been pleaded and remained in another court. A deed was supposed to remain in court during all the term at which it was pleaded, but no longer; unless the opposite party during that term plead in denial of it; in which case it was supposed to remain in court till the action was determined. Steph. 88. Another excuse allowed from a very early period was, when the deed was in the hands of the adverse party, or had been destroyed by him. It was at one time doubted whether the loss of a deed was a good excuse for not making profert; and the jurisdiction of equity in such cases

306 is founded on the idea which *formerly existed that there was no remedy at law. But in Read v. Brookman, 3 T. R. 151, it was held by the court of King's Bench that it was a sufficient excuse for not making profert of a deed that it was "lost and destroyed by time and accident." This is a leading case on the subject, and placed it on the true ground, which is that the law compels no one to do an impossibility. Indeed Lord Coke had placed it on the same ground in assigning as a reason why a deed remaining in one court may be pleaded in another, without shewing forth, *quia lex non cogit ad impossibilia*. Wherever therefore a party cannot produce a deed, at least unless his inability proceed from his own wilful act, he is not bound to give oyer of it. We regard this as a true test, though we do not mean to say it is the only one.

Let us apply this plain and simple test to the present case, and see whether according to it the excuse here given is sufficient. The formula of stating the excuse in the approved precedents of pleading is very general; as, that the deed has been lost or destroyed by accident; or, that it is in the possession of the defendant, &c.; and that therefore, the plaintiff cannot produce the same to the court. 1 Chit. Pl. 349; 2 Id. 439; Steph. 441. In this case the excuse is stated very fully and formally, and the substance of it is; that the original bond on which the action was brought was then on file in the Circuit court of the United States for the county of Washington in the District of Columbia; that the plaintiff had applied to the said court since the institution of this for said bond; that said application was opposed by the defendant; and the court therefore refused to deliver the bond to the plaintiff; and so it was impossible for the plaintiff to produce it after the use of all the means in his power to do so. This excuse comes fully up to the requisition of the test before stated, and not only shows an impossibility on the part

307 *of the plaintiff to produce the deed, but that such impossibility has been occasioned by the act of the defendant himself, who, by demurring to the excuse, ad-

mits the truth of it. We are therefore of opinion that the excuse is sufficient.

It is not necessary for the excuse to show that the party making it is entitled to the custody of the deed, but on the contrary that he is not so entitled, or is otherwise unable to produce the deed. Nor is it necessary for the excuse to show that the plaintiff is entitled to recover the money mentioned in the deed and claimed in the action. The right to such recovery must be tried under the general issue or some other issue directly made up for the purpose; and not in a collateral enquiry, the only object of which is to ascertain whether oyer ought to be given of the deed. It is supposed that a defendant who craves oyer desires to have it, and will himself do nothing to prevent his having it. His object in craving it is, to be better able to make his defence after he gets it, and not to make his defence in the act of craving it.

An excuse for not producing a deed may be made in the declaration, or it may be made in another form after oyer is craved by the defendant. Suppose the declaration contains neither profert nor any excuse for not making it, and the defendant appears at rules when the declaration is filed and craves oyer, as he did in this case; what ought then to be the course of proceeding? Ought oyer to be given or a good excuse for not giving it made before the defendant is required to plead? or may the clerk proceed, as he did in this case, to mature it for trial at the next term by giving a rule to plead, and entering a judgment in the office by nil dicit? If the original deed be filed with the declaration, as is generally the case, the defendant should at once take oyer of it and demur or plead at his election; but

if the deed be not so filed, and the defendant will not *plead without oyer, the clerk may properly take the rules, as he did in this case, without regard to the craving of oyer, so that the case may be ready to be disposed of at the next term of the court unless there be good cause for a continuance. If an excuse for not giving oyer can be made at rules its sufficiency can only be determined by the court, and there is no reason for making it until the next term of the court after oyer is craved.

But it was argued by the counsel for the defendant in error that though the excuse in this case be sufficient, the demurrer thereto goes back to the declaration, which is faulty, and the judgment should therefore for the defendant.

It is true as a general rule that on demurrer the court will consider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it. But to this rule there are exceptions; as when the plaintiff demurs to a plea in abatement, in which case the court, deciding against the plea will give judgment of respondent ouster, without regard to any defect in the declaration. So the court, in examining the whole record to adjudge according to the apparent right, will consider only the right in matter of substance, and not in

respect of mere form, such as should have been the subject of special demurrer. Steph. 162-4. We think that this case also is an exception, and that in deciding on the demurrer to the excuse the court ought not to go back to the declaration. The excuse is a mere collateral matter, certainly standing on no higher ground than matter of abatement. The law prescribes no mode of making it. It may be made as well ore tenus as in writing. And the objection to it may be made as well orally as by a formal demurrer. If made orally, the objection would of course not reach back to the declaration and make it necessary for the court to pass upon its *sufficiency.

It can have no such effect if made formally by demurrer. There can be no legal difficulty, and generally no inconvenience, in presenting the question on both sides ore tenus. It is a question for the court to decide, (unless an issue of fact be made up thereon for the jury), and may be disposed of by its rules and orders like any other collateral question coming up for its decision in the course of legal proceedings before it. The case is analogous to a proceeding to enforce the production of an instrument not under seal on which an action or defence may be founded and which the court may require to be produced for the inspection of the adverse party. 3 Chit. Gen. Prac. 433, 619; 2 Arch. Prac. 219. An error of the court in deciding the question when it comes up orally would be liable to review and correction by an appellate court, as well as when it comes up formally by written excuse and demurrer. In the former case the point could be put upon the record by a bill of exceptions. In the latter it would be put there by the pleadings, and the decision of the court thereon which would be entered in the order book.

Even if the demurrer to the excuse operated as a demurrer to the declaration it would be to the whole declaration, and not to each count severally. As the craving of oyer and excuse go to the whole, so also must the demurrer to the excuse, if it goes to the declaration at all; according to the principle of the case of Ward v. Sackriddle, 3 Caine's Rep. 263, referred to in 1 Rob. Pr. (old) 290. That principle is, that a demurrer by the plaintiff to the defendant's plea cannot operate as a demurrer by the defendant to the plaintiff's declaration to any greater or less extent than the plea of the defendant was pleaded to the declaration.

If therefore a declaration contain two counts the first of which is confessedly bad, and the plea of the defendant is to the whole cause of action, extending as well to the first *count as to the second; upon a demurrer by the plaintiff to this plea, judgment cannot be given for the defendant upon the ground that the first count is bad. In this view of the case we would have to consider it as upon a demurrer to the whole declaration; and we must so consider it, because there was a demurrer to the declaration which was not decided upon by the Circuit court otherwise than

by giving judgment for the defendant on his demurrer to the excuse. The whole record is before this court; and if upon the whole, judgment ought to be for the defendant, the judgment of the Circuit court must be affirmed. We will therefore proceed to consider the case upon the demurrer to the declaration.

It is a general demurrer, and indeed could not have been otherwise, the action having been brought since the enactment of the Code which abolished special demurrers. And it is a demurrer to the whole declaration, and must therefore be overruled if either count be good. We think both counts are good, at least in substance.

As to the first count; a formal objection is taken to it which would be unavailing if well founded, to wit: that it sets out the cause of action by way of recital. But it is not even well founded. The *quod cum*, as it was called, might always have been used, and generally was, in actions *ex contractu*, though not in actions of trespass. But the chief objection taken to the first count is, that it does not aver performance of a condition precedent, to wit: that the plaintiff's testator was first duly authorized to receive the amount demanded in the action. This condition precedent is supposed to be created by the use of these words in parenthesis, "(they being first duly authorized to receive the said amount)," which follow the agreement to secure on real estate the several sums of money to the several parties mentioned in the instrument.

In deciding upon the demurrer we
311 *must construe the instrument by itself, and cannot look to the cases in 4 Peters 205, 9 Id. 418, and 12 Id. 145, or any thing else dehors the instrument, for explanation. So construing it, the words in parenthesis are insensible, and cannot affect the obligation of the express promise to pay the money. They must be treated and rejected as surplusage. An obligation is construed most strongly against the obligor. He must take care to use intelligible words to express any condition precedent he may wish to impose on his obligation. Of course, the obligee is duly authorized to receive a sum of money which the obligor expressly promises to pay him; there being nothing in the instrument to show how or by whom the obligee is to be otherwise duly authorized. If the words can derive such explanation from the light of extrinsic facts as would give them effect, it devolves on the obligor to allege and prove the facts in his defence. The shifting of the burden of allegation and of proof is the only consequence of his neglect to express his intention plainly, provided he has so expressed it as that, with the aid of extrinsic facts any effect at all can be given to it. The instrument is not a deed *inter partes* between Lloyd and Schofield. The latter is not a party to it, and his name is not so mentioned therein as to show that he has any interest in it.

As to the second count, the only objection taken to it is that it does not sufficiently

aver performance of the condition precedent, supposing the words in question to create one. It avers such performance in the very words of the condition, to-wit: that the plaintiff "is duly authorized to receive" of the said John Lloyd the said sum of \$1100 with interest thereon as aforesaid. It is a general rule that a breach of a covenant or other contract may be assigned in the very words of the contract. 3 Rob. Prac. 590-597, 4 Id. 8. And that is generally the best and safest mode of assigning it. In

312 Martyn v. *Clue, 83 Eng. C. L. R. 681, Lord Campbell said, in answer to an objection to an assignment of this kind, "No authority was cited to show that an allegation of the breach following the words of the covenant was insufficient; and we find no principle for so holding. The defendant must be taken to have understood the application of the covenant he chose to make." A breach need not be assigned in the words of a covenant, but may be assigned in equivalent words; as in Fletcher v. Peck, 6 Cranch's R. 87, 127, cited in 3 Rob. Pr. and 4 Id. 6, where it was objected to the declaration that the covenant was that the legislature had a right to convey, and the breach was that the legislature had no authority to convey. Marshall, C. J., said: "It is enough that the words of the assignment show unequivocally a substantial breach. The assignment under consideration does show such a breach. If the legislature had no authority to convey, it had no right to convey." Generally the same rules which apply to an assignment of breaches also apply to an averment of performance of a condition precedent. If there be any difference the rules which apply to the latter are less stringent than those which apply to the former. The courts, especially in England, have gone very far in sustaining the sufficiency of averments of performance of conditions precedent. 3 Rob. Prac. 571, 578.

It is true that it is sometimes insufficient to follow the words of the contract, but it is necessary to be more specific. And it is also true that there are cases which decide that the declaration should not present for the determination of the jury what is matter of law; or partly of law and partly of fact; as that a party was duly appointed administrator; or was duly appointed receiver; but it should state what in particular was done; so that if the fact be admitted, the court can determine whether he was duly appointed; or, if issue be joined on the allegation, the jury can answer as to its truth. 3 Rob. Prac. 530 and the cases cited.

313 *But whether or not, according to the strict and technical rules of pleading, the averment, being in the very words of the deed, is sufficient; or should have been more specific; or should have been only of matter of fact; certainly the defect, if there be one, is only of form and not of substance, and, since special demurrers have been abolished, is not now ground of demurrer. The Code, ch. 171, § 31, provides

mits the truth of it. We are therefore of opinion that the excuse is sufficient.

It is not necessary for the excuse to show that the party making it is entitled to the custody of the deed, but on the contrary that he is not so entitled, or is otherwise unable to produce the deed. Nor is it necessary for the excuse to show that the plaintiff is entitled to recover the money mentioned in the deed and claimed in the action. The right to such recovery must be tried under the general issue or some other issue directly made up for the purpose; and not in a collateral enquiry, the only object of which is to ascertain whether oyer ought to be given of the deed. It is supposed that a defendant who craves oyer desires to have it, and will himself do nothing to prevent his having it. His object in craving it is, to be better able to make his defence after he gets it, and not to make his defence in the act of craving it.

An excuse for not producing a deed may be made in the declaration, or it may be made in another form after oyer is craved by the defendant. Suppose the declaration contains neither profert nor any excuse for not making it, and the defendant appears at rules when the declaration is filed and craves oyer, as he did in this case; what ought then to be the course of proceeding? Ought oyer to be given or a good excuse for not giving it made before the defendant is required to plead? or may the clerk proceed, as he did in this case, to mature it for trial at the next term by giving a rule to plead, and entering a judgment in the office by nil dicit? If the original deed be filed with the declaration, as is generally the case, the defendant should at once take oyer of it and demur or plead at his election; but

if the deed be not so filed, and the defendant will not *plead without oyer, the clerk may properly take the rules, as he did in this case, without regard to the craving of oyer, so that the case may be ready to be disposed of at the next term of the court unless there be good cause for a continuance. If an excuse for not giving oyer can be made at rules its sufficiency can only be determined by the court, and there is no reason for making it until the next term of the court after oyer is craved.

But it was argued by the counsel for the defendant in error that though the excuse in this case be sufficient, the demurrer thereto goes back to the declaration, which is faulty, and the judgment should therefore for the defendant.

It is true as a general rule that on demurrer the court will consider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it. But to this rule there are exceptions; as when the plaintiff demurs to a plea in abatement, in which case the court, deciding against the plea will give judgment of respondeat ouster, without regard to any defect in the declaration. So the court, in examining the whole record to adjudge according to the apparent right, will consider only the right in matter of substance, and not in

respect of mere form, such as should have been the subject of special demurrer. Steph. 162-4. We think that this case also is an exception, and that in deciding on the demurrer to the excuse the court ought not to go back to the declaration. The excuse is a mere collateral matter, certainly standing on no higher ground than matter of abatement. The law prescribes no mode of making it. It may be made as well ore tenus as in writing. And the objection to it may be made as well orally as by a formal demurrer. If made orally, the objection would of course not reach back to the declaration and make it necessary for the court to pass upon its *sufficiency.

It can have no such effect if made formally by demurrer. There can be no legal difficulty, and generally no inconvenience, in presenting the question on both sides ore tenus. It is a question for the court to decide, (unless an issue of fact be made up thereon for the jury), and may be disposed of by its rules and orders like any other collateral question coming up for its decision in the course of legal proceedings before it. The case is analogous to a proceeding to enforce the production of an instrument not under seal on which an action or defence may be founded and which the court may require to be produced for the inspection of the adverse party. 3 Chit. Gen. Prac. 433, 619; 2 Arch. Prac. 219. An error of the court in deciding the question when it comes up orally would be liable to review and correction by an appellate court, as well as when it comes up formally by written excuse and demurrer. In the former case the point could be put upon the record by a bill of exceptions. In the latter it would be put there by the pleadings, and the decision of the court thereon which would be entered in the order book.

Even if the demurrer to the excuse operated as a demurrer to the declaration it would be to the whole declaration, and not to each count severally. As the craving of oyer and excuse go to the whole, so also must the demurrer to the excuse, if it goes to the declaration at all; according to the principle of the case of Ward v. Sackride, 3 Caine's Rep. 263, referred to in 1 Rob. Pr. (old) 290. That principle is, that a demurrer by the plaintiff to the defendant's plea cannot operate as a demurrer by the defendant to the plaintiff's declaration to any greater or less extent than the plea of the defendant was pleaded to the declaration. If therefore a declaration contain two counts the first of which is confessedly bad, and the plea of the defendant is to the whole cause of action, extending as well to the first *count as to the second; upon a demurrer by the plaintiff to this plea, judgment cannot be given for the defendant upon the ground that the first count is bad. In this view of the case we would have to consider it as upon a demurrer to the whole declaration; and we must so consider it, because there was a demurrer to the declaration which was not decided upon by the Circuit court otherwise than

by giving judgment for the defendant on his demurrer to the excuse. The whole record is before this court; and if upon the whole, judgment ought to be for the defendant, the judgment of the Circuit court must be affirmed. We will therefore proceed to consider the case upon the demurrer to the declaration.

It is a general demurrer, and indeed could not have been otherwise, the action having been brought since the enactment of the Code which abolished special demurrers. And it is a demurrer to the whole declaration, and must therefore be overruled if either count be good. We think both counts are good, at least in substance.

As to the first count; a formal objection is taken to it which would be unavailing if well founded, to wit: that it sets out the cause of action by way of recital. But it is not even well founded. The *quod cum*, as it was called, might always have been used, and generally was, in actions *ex contractu*, though not in actions of trespass. But the chief objection taken to the first count is, that it does not aver performance of a condition precedent, to wit: that the plaintiff's testator was first duly authorized to receive the amount demanded in the action. This condition precedent is supposed to be created by the use of these words in parenthesis, "(they being first duly authorized to receive the said amount)," which follow the agreement to secure on real estate the several sums of money to the several parties mentioned in the instrument.

In deciding upon the demurrer we
311 *must construe the instrument by itself, and cannot look to the cases in 4 Peters 205, 9 Id. 418, and 12 Id. 145, or any thing else dehors the instrument, for explanation. So construing it, the words in parenthesis are insensible, and cannot affect the obligation of the express promise to pay the money. They must be treated and rejected as surplusage. An obligation is construed most strongly against the obligor. He must take care to use intelligible words to express any condition precedent he may wish to impose on his obligation. Of course, the obligee is duly authorized to receive a sum of money which the obligor expressly promises to pay him; there being nothing in the instrument to show how or by whom the obligee is to be otherwise duly authorized. If the words can derive such explanation from the light of extrinsic facts as would give them effect, it devolves on the obligor to allege and prove the facts in his defence. The shifting of the burden of allegation and of proof is the only consequence of his neglect to express his intention plainly, provided he has so expressed it as that, with the aid of extrinsic facts any effect at all can be given to it. The instrument is not a deed *inter partes* between Lloyd and Schofield. The latter is not a party to it, and his name is not so mentioned therein as to show that he has any interest in it.

As to the second count, the only objection taken to it is that it does not sufficiently

aver performance of the condition precedent, supposing the words in question to create one. It avers such performance in the very words of the condition, to-wit: that the plaintiff "is duly authorized to receive" of the said John Lloyd the said sum of \$1100 with interest thereon as aforesaid. It is a general rule that a breach of a covenant or other contract may be assigned in the very words of the contract. 3 Rob. Prac. 590-597, 4 Id. 8. And that is generally the best and safest mode of assigning it. In 312 *Martyn v. *Clue*, 83 Eng. C. L. R. 681, Lord Campbell said, in answer to an objection to an assignment of this kind, "No authority was cited to show that an allegation of the breach following the words of the covenant was insufficient; and we find no principle for so holding. The defendant must be taken to have understood the application of the covenant he chose to make." A breach need not be assigned in the words of a covenant, but may be assigned in equivalent words; as in *Fletcher v. Peck*, 6 Cranch's R. 87, 127, cited in 3 Rob. Pr. and 4 Id. 6, where it was objected to the declaration that the covenant was that the legislature had a right to convey, and the breach was that the legislature had no authority to convey. Marshall, C. J., said: "It is enough that the words of the assignment show unequivocally a substantial breach. The assignment under consideration does show such a breach. If the legislature had no authority to convey, it had no right to convey." Generally the same rules which apply to an assignment of breaches also apply to an averment of performance of a condition precedent. If there be any difference the rules which apply to the latter are less stringent than those which apply to the former. The courts, especially in England, have gone very far in sustaining the sufficiency of averments of performance of conditions precedent. 3 Rob. Prac. 571, 578.

It is true that it is sometimes insufficient to follow the words of the contract, but it is necessary to be more specific. And it is also true that there are cases which decide that the declaration should not present for the determination of the jury what is matter of law; or partly of law and partly of fact; as that a party was duly appointed administrator; or was duly appointed receiver; but it should state what in particular was done; so that if the fact be admitted, the court can determine whether he was duly appointed; or, if issue be joined on the allegation, the jury can answer as to its truth. 3 Rob. Prac. 530 and the cases cited.

313 *But whether or not, according to the strict and technical rules of pleading, the averment, being in the very words of the deed, is sufficient; or should have been more specific; or should have been only of matter of fact; certainly the defect, if there be one, is only of form and not of substance, and, since special demurrers have been abolished, is not now ground of demurrer. The Code, ch. 171, § 31, provides

that "on a demurrer (unless it be to a plea in abatement) the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed misleading or insufficient pleading or not, unless there be omitted something so essential to the action or defence that judgment, according to law and the very right of the cause, cannot be given." The important words, "whether it has been heretofore deemed misleading or insufficient pleading or not," were added at the last revisal, and seem to be a very material extension of the operation of the law. The most that can be said of the defect in question is, that it might have been deemed insufficient pleading before the enactment of the Code; and not that anything is omitted in the declaration so essential to the action that judgment according to law and the very right of the case cannot be given.

We are therefore of opinion that the words in parenthesis do not create a condition precedent, the performance of which it is necessary for the declaration to aver, and therefore the first count is good; and if they did, that performance of the condition precedent is sufficiently averred in the second count, which is therefore good; and one, if not both, of the counts being certainly good, the demurrer to the declaration cannot be sustained.

The result of the foregoing opinion is that the judgment must be reversed, the excuse for not giving over sustained, the demurrer thereto overruled, and the defendant required to answer without having over.

Judgment reversed.

314 *Barksdale & als. v. Neal.

January Term, 1862, Richmond.

(Absent, ALLEN, P., and LEE, J.)

1. Return upon Summons—"Executed in Person"—Effect.*—A return upon a summons, "executed in person," signed by the deputy sheriff with his own name and that of his principal, shows that the summons was actually served on the defendants; and therefore if it is defective the defect can only be taken advantage of by plea in abatement.†

*Return on Summons—Return on Notice—Distinction between.—In *Bowyer v. Knapp*, 15 W. Va. 291, the court said: "JUDGE MONCURE, in *Barksdale et al. v. Neal*, 16 Gratt. 316, says: 'There is a manifest difference between a return on a summons and a return upon a notice. A summons is directed to an officer, and contains a mandate to which his return of "executed" is a response that the thing commanded has been done. A notice is not directed to any officer, but to the party on whom it is to be served. It contains no mandate, and therefore a return of "executed" simply is no response, but unmeaning.' We think there is a manifest difference between a notice and a summons for the same reasons above stated, and for the additional reason that the one emanates from the court or its officer, and the other from a party or parties to the suit."

†For the statutes on the subject see the opinion of JUDGE MONCURE.

2. Same—"Executed"—Effect—Quere.—QUERE: If a return upon a summons of "executed" merely, would be held to show it was served on the parties.

The case, as to the question involved, is stated in the opinion of Judge Moncure.

Macfarland and Roberts, for the appellants.

Marr, for the appellee.

MONCURE, J. This is a supersedeas to a judgment of the circuit court of Halifax county, reversing a judgment of the county court setting aside and reversing an office judgment confirmed of the latter court in an action of debt, brought by the defendant against the plaintiffs in error, on a promissory note. The summons was directed to the sheriff of Halifax county, and was returned, "Executive in person. Fielder Cage D. S. for James R. West, Sheriff." The common order was entered at February rules 1858, (to which the summons was 315 returnable),* and was confirmed at the following March rules, and the office judgment, not having been set aside, became final on the 22nd of the same month. A motion was made, on notice, to set aside and reverse this judgment on various grounds; and it was accordingly set aside and reversed at the following July term of the county court. The judgment of reversal was, itself, afterwards reversed by the circuit court; to whose judgment a supersedeas has been awarded by a judge of this court; and that is the case now under consideration.

The only error assigned in the judgment of the circuit court is that the plaintiffs in error, who were defendants to the action in the county court, do not appear to have been served with the process summoning them to answer. If they do appear to have been so served then there is no error in the judgment; as the Code ch. 171, § 18, provides that a defendant, on whom the process summoning him to answer, appears to have been served, shall not take advantage of any defect in the writ or return, unless the same be pleaded in abatement; and there was, in this case no plea in abatement. The only evidence in the record of service of the process on the defendants is the return thereon, which is clearly sufficient, unless there be some requisition of law not therein complied with which makes it insufficient. The following provisions of the Code embrace all the requisitions of law upon the subject.

Chap. 49, § 28. "Every officer to whom any order, warrant or process may be lawfully directed, shall make true return thereon of the day and manner of executing the same, and subscribe his name to such return. Where the service is by a deputy, such deputy shall subscribe to the return his own name as well as that of his principal." "Any officer failing to comply with this section shall forfeit \$20, and if he make a false return, shall forfeit therefor \$100."

316 *Chap. 170, § 5. "The process to

commence a suit shall be a writ commanding the officer to whom it is directed, to summon the defendant to answer the bill or action."

Chap. 170, § 6. "Any summons or scire facias against any person may be served as a notice is served under the 1st section of chap. 167; to which end the clerk issuing such process, unless otherwise directed, shall deliver or transmit therewith as many copies thereof as there are persons named therein on whom it is to be served. No judgment by default on a scire facias shall be valid if it become final within one month after the service of such process."

Chap. 167, § 1. "A notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person; or, if he be not found at his usual place of abode, by delivering such copy and giving information of its purport to his wife or any white person found there, who is a member of his family and above the age of 16 years; or, if neither he nor his wife, nor any such white person be found there, by leaving such copy posted at the front door of said place of abode. Any sheriff or sergeant thereto required, shall serve a notice within his bailiwick, and make return of the manner and time of service; for a failure so to do he shall forfeit \$20. Such return, or a similar return by any other person who verifies it by affidavit, shall be evidence of the manner and time of service."

The supposed defect in the return in this case is, that it does not state the manner and time of service. Admitting that to be a defect which might be pleaded in abatement, yet, there having been no plea in abatement, is it a fatal defect even after judgment by default?

A return of "executed," made by an officer whose duty it is to execute the process, shows that it was served on the defendant according to its mandate, and it will be presumed that the service was in the mode prescribed by law. The officer acts under oath, and is bound by bond with surety for the faithful discharge of his official duties. He not only incurs the specific penalty imposed by law for any failure, but is bound for all damages sustained by any person in consequence thereof. The law gives him credit for knowing his duty, or binds him for all the consequences of not knowing it. It also gives him credit for an intention to do his duty, until the contrary be shown. When, therefore, process comes to his hands for execution, and he returns it "executed," it appears from the return to have been served on the defendant within the meaning of the Code chap. 171, § 18.

That brief form of return was almost universally used on *capias ad respondendum* on which no bail was required. Indeed the statute directed the officer in such case to return the writ "executed," I. R. C. 1819 p. 491, § 42. It was also the form of return of a *scire facias*; Id. 506, § 66; and of a summons, when that was the proper process

instead of a *capias*. Id. § 68. Formerly, a subpoena in chancery was not required to be served by delivering a copy. I. R. C. 212, § 74. Afterwards, when the decree nisi was embodied in the subpoena, it was directed to be served by delivering a copy; but still it appears that a return of "executed" was sufficient, without stating that a copy was delivered, Sess. Acts 1825-6, p. 15.

There is a manifest difference between a return upon a summons and a return upon a notice. A summons is directed to an officer, and contains a mandate to which his return of "executed" is a response that the thing commanded has been done. A notice is not directed to any officer, but to the party on whom it is to be served. It contains no mandate, and therefore a return of "executed," simply, is no response, but unmeaning. The manner of

service, whether by an officer or another person, must be stated; the only difference being, that the simple statement of an officer is sufficient, while the statement of another person must be upon oath. This difference the Code makes, chap. 167, § 1. It did not formerly exist, but the statement was required to be on oath, whether made by an officer or another person. And the reason was, that the officer, in serving a notice, did not act as an officer but as any other person. 1 Hen. & Munf. 206.

There is one case in which a return on a summons, of "executed," simply, would perhaps be fatally defective, even after judgment by default; and that is the case of a summons against a corporation, the manner of serving which is prescribed by the Code, chap. 170, § 7; which expressly declares that "service on any person under this section shall be in the county or corporation in which he resides; and the return shall show this, and state on whom and when the service was, otherwise the service shall not be valid." This difference of expression, in regard to an individual and a corporation, indicates a difference of legislative intention in the two cases; and that while, in the latter, the failure of the return to comply with the direction of the law will invalidate the service, in the former it will at most be a defect which, to be taken advantage of, must be pleaded in abatement, if it appears that the defendant was served with the process. There seems to be some reason for the difference in the fact that process against a corporation cannot be served personally on the defendant, but only on some person in lieu of the defendant. However this may be, the law seems to have made the difference, and the courts must execute the law as it is written. It will not do to say that what the law has expressed in the one case, may be implied in the other. *Expressio unius, alterius est exclusio*.

In this case the return is not "executed," merely, but "executed in person;" that is, on the defendants in person; and its meaning is, that the summons was served by delivering them

a copy. The only defect, if any, in the return, is the omission of the words "by delivering a copy;" and the question is, whether this is not a defect which, to be taken advantage of, must be pleaded in abatement. If it be not, the provision in the Code, chap. 171, § 18, must indeed have a very limited operation, and almost every judgment by default might be liable to be reversed for a defect of the return on the process. If the return, to be valid, must show, literally, that the process was executed in one of the many modes prescribed by law, then the only defects to which the provision could apply would be the omission to state the time of service, and where the service is by a deputy, the omission to subscribe to the return his own name as well as that of his principal. Of course these defects, if no other existed in the return, would be covered by the provision. But one of them to-wit the omission to state the time of service, seems to be more important than the defect, if any, which exists in this case. For by omitting to state the time of service, the defendant may be disabled from proving the falsity of the return by proving an alibi. At least the provision should apply whenever it appears from the return, though defective, that the summons was actually served on the defendant that is, so served as that he was notified to appear and answer; whether by delivering a copy in the mode prescribed by law, or by reading the summons to the defendant, or informing him of its contents. In such case the defendant having actual notice, and such notice as always was sufficient service of process before the enactment of the present Code, has a full opportunity of appearing and making his defence, not only on the merits but even by plea in abatement, and therefore has no good ground of complaint. In the present case the return shows that the summons 320 was actually served *on the defendant in person, and according to the views above presented the provision aforesaid applies.

I am therefore of opinion that there is no error in the judgment of the Circuit court and that it be affirmed.

DANIEL and ROBERTSON, Js., concurred in the opinion of Moncure, J., except as to the effect of a return of "executed" merely; as to which they expressed no opinion, deeming it unnecessary to do so, to a decision of this case.

Judgment affirmed.

321 *Gibson v. Beckham & als.

October Term, 1862, Richmond.

1. **Official Bonds—Administrators—Case at Bar.**—A will is offered for probate in the proper court, and it is proved by one of the three subscribing witnesses; which is ordered to be certified. At the next term of the court the executors renounce, and the widow relinquishes her right to administer, and administration c. t. a. is committed to G, who executes his official bond with sureties in the

proper form. **Held:** The bond is valid, and binds the administrator and his sureties for his default.

2. **Judgment—Erroneous—Bonds under it Valid.**—

Where a court has cognizance of the subject matter, its judgment, though it may be erroneous, is not void. It is binding until it is set aside or reversed, and cannot be questioned incidentally; acts done and bonds taken under it bind the obligors.

3. **Statutory Bonds—Unauthorized Conditions Inserted—Omissions—Effect.**—

Where a court or officer has authority or capacity to take a bond and makes a mistake by omitting some condition prescribed, or inserting a condition not authorized or illegal, unless the statute by express words, or necessary implication, makes it wholly void, the bond is not void; the good shall not be vitiated by the bad; and the bond may be sued on, so far as the conditions are good, as a statutory bond.

4. **Official Bonds—Recital of Facts—Obligors Estopped to Deny.**—

When the court has cognizance of the

***Judgments—Erroneous—Binding.**—It is a well-settled principle of law that, if a court has cognizance of the subject-matter, its judgment, though it may be erroneous, is not void; and, further, it is binding until it is set aside or reversed; nor can it be questioned collaterally. It follows that acts done and bonds given under authority of such judgments bind the obligors.

This proposition laid down in the principal case, after an exhaustive and critical review of the Virginia cases on the point, has been approved by many subsequent cases, citing the principal case as authority. See *Ballard v. Thomas*, 19 Gratt. 22, and *foot-note*; *Chapman v. Com.*, 25 Gratt. 727; *Shelton v. Jones*, 26 Gratt. 898, and *foot-note*; *Pannill v. Calloway*, 78 Va. 304; *Lemmon v. Herbert*, 92 Va. 558, 24 S. E. Rep. 249; *Leach v. Buckner*, 19 W. Va. 43; *Cardoza v. Epps* (Va.), 23 S. E. Rep. 297; *Findley v. Findley*, 42 W. Va. 381, 26 S. E. Rep. 496.

See also, cases cited and discussed in the principal case, and *foot-note* to *Pulaski Co. v. Stuart*, 28 Gratt. 873.

†**Statutory Bonds—Unauthorized Conditions Inserted—Effect.**—

In *Holiday v. Myers*, 11 W. Va. 294, the court said: "Although the condition of the bond is not so extensive as the statute requires, yet if it contains a material part of the conditions required, the bond is not void, but binds the obligors to the extent of such condition or conditions, and when the bond contains conditions or provisions, not required by the statute, and some of those which are required, it is valid and binding to the extent of the latter." *Gillespie v. Thompson et al.*, 5 Gratt. 123; *White v. Clay's Ex'or*, 7 Leigh 68; *Fox & Vowles v. Mountjoy, Ex'or, etc.*, 6 Munf. 26; *Pratt v. Wright et al.*, 18 Gratt. 175; *Gibson v. Beckham et al.*, 16 Gratt. 321; *Porter, Ex'or, v. Daniels et al.*, and cases there cited, 11 W. Va. 250."

The principal case is also cited as authority on this point in *Jackson v. Hopkins*, 93 Va. 604, 24 S. E. Rep. 234; *Reed v. Hedges*, 16 W. Va. 194; *State v. Purcell*, 31 W. Va. 63, 5 S. E. Rep. 311, 313, 314.

See generally, monographic *note* on "Statutory Bonds" appended to *Goolsby v. Strother*, 21 Gratt. 107.

‡**Official Bonds—Recital of Facts—Obligor Estopped to Deny.**—See principal case approved in *Shelton v. Jones*, 26 Gratt. 898.

See generally, monographic *note* on "Official Bonds."

subject matter, or capacity to take a bond, and takes a bond which on its face is valid, but contains a recital of facts necessary to its validity, as in the cases of the election and induction into office of a sheriff, the presence of the justices named as obligees, and the like, the obligors shall be estopped from denying the truth of such recitals.

This was a bill filed in the Circuit court of Culpeper county, by Armistead and Fountain Beckham, two of the legatees of John Beckham deceased, against Jonathan C. Gibson, as administrator with the will annexed of John Beckham, and his 322 sureties in his official bond, *for a settlement and distribution of the testator's estate. The only question in the case of any general importance, was whether the sureties in Gibson's official bond were liable for his acts. The facts are stated by Judge Allen in his opinion.

The Circuit court, in June 1859, made a decree against the sureties for the sum of \$7,165.29, with interest on \$2,843.97, a part thereof, from the 20th of June 1856, until paid. And from this decree Thomas G. Gibson, one of the sureties, applied to this court for an appeal, which was allowed.

The case was most elaborately argued by Morson, for the appellant, and Green, for the appellees.

ALLEN, P. The principal question in this case is whether the securities of Jonathan C. Gibson, who qualified as the administrator with the will annexed on the estate of John Beckham deceased, are bound by the alleged administration bond. On the 23d of November, 1831, the last will and testament of John Beckham, deceased, was exhibited to the County court of Culpeper, and proved by the oath of one of the subscribing witnesses thereto; which was ordered to be certified. At the December term following, the executors named in the will refused to take upon themselves the burthen of the execution thereof; and the widow having relinquished her right of administration, on the motion of said Gibson, administration c. t. a. was granted to him on said estate, he having qualified and entered into bond with security according to law. At the December term of said court 1837, six years after the grant of administration, the said last will was again produced to the court and proved by another subscribing witness; and the codicil annexed to the will, having been proved to be in the handwriting of the testator, there being no

323 subscribing witness to the *codicil, the same was ordered to be recorded. The administration bond is regular on the face thereof, conforming to the requisitions of the statute prescribing the form of a bond to be executed by an administrator c. t. a. Upon these facts it is insisted that the bond was void, because the court had no authority, as the matter stood at the time, to commit said estate to an administrator c. t. a.

The law in force when the will was first

exhibited for probate, is to be found in the R. C. of 1819. 1 R. C. § 21, p. 379, provides that before granting a certificate of probate of any will the executor or administrator c. t. a., shall in open court take the oath set forth, and also give bond, &c.; and by the 23d section of the act it is declared, that the power of executors over their testators' estates before probate of the will, is not thereby restrained, but shall continue as theretofore. These provisions of the act were so construed by this court in *Monroe v. James*, 4 Munf. 194, as to mean that a sale by an executor named, who at the time had not qualified, and died before qualifying by giving bond and security, is void as against the executor who afterwards qualified; but it was said by Cabell, Judge, that as an executor derives his power from the will, at common law nothing was required to invest him with the full exercise of that power for almost every possible purpose, but an acceptance of the trust; and as he may become complete executor by giving bond, and ought to do so, after intermeddling with the estate, the law so far regards him as executor, as to consider his acts valid for the present; and they would become irrevocably so provided he should perfect his character as executor, by afterwards giving bond. If he refuses or fails he is considered as having refused the office; and the refusal relates to the death of the testator. As to him the will is considered as having never been made. In consequence of the difficulty encountered

324 *in this case the law was amended by the Code of 1849, to conform to the judicial construction. Code, ch. 30, § 1, p. 540, enacts that a person appointed executor, shall not have the power of executor until he qualifies as such, by taking the oath and giving bond in the court in which the will is recorded, except that he may provide for the burial of the testator, pay reasonable funeral expenses, and preserve the estate from waste.

It is argued with much earnestness, that the record of the probate court shows that this will was not recorded. That no one can have the powers of an executor until he qualifies in the court in which the will is recorded; and therefore it is concluded, that the record of the will is the commission to appoint. The error of the argument, consists as it seems to me, in substituting the mode in which the authority is exercised for the authority itself; the correctness of the judgment of the court upon a certain state of facts in the particular case, with the authority of the court to take cognizance of the subject matter submitted to it. The court of probate is a court of record, and a judgment rendered by it, upon a subject cognizable before it, is conclusive, and cannot be questioned incidentally. These principles have been repeatedly adjudicated in a variety of cases in this court; and I am not aware of any conflict of decision in this tribunal, where the mere question of authority was involved. Cases have arisen upon the validity of bonds taken by

such tribunals, where for some departure from the prescribed form, the bonds were held to be invalid, either for the particular purpose for which they were sued on, or void entirely. But there is no case which decides, that the validity of the bond can be impeached, where the authority to take it existed, and the bond was in due form. In the *Commonwealth v. Jackson's ex'or*, 1 Leigh 485, the form of the bond perhaps was unexceptionable; but the Hastings court of Williamsburg was *acting upon a subject matter over which it could not take cognizance. Its jurisdiction did not attach, and its order and the bond taken by it were null and void. So in *Manna v. Flinn*, 10 Leigh 93, the court held that the grant of administration as upon an intestacy where a will exists, though not ostensible, was void, or a nullity quoad the executor. The appointment of an executor vests the personal estate in the party so appointed. The legal title was vested in him. He derives his power from the will, and, as we have seen, at common law nothing was required but an acceptance of the trust, to invest him with almost almost full power for every possible purpose. The right thus conferred by the will could not be divested by a court of probate. The case falls into that class, where the order is held to be void, because the subject matter was not within the cognizance of the court. That is to say that there should be the estate of a decedent and no representative to take charge of it. In that case there was a representative taking under the will, capable under our statute of doing some acts before qualification, requiring only the qualification prescribed by statute to exercise full power for every purpose, and whose qualification related back to the death of the testator. Whether however the court did not go too far in holding in that case that the appointment was absolutely void, and this incidentally in a contest between other parties, might deserve serious consideration if the question should again arise; especially as the judges delivering opinions concede that payments made to an administrator in such case might have been good whilst the executor remains unknown; 1 Wms. on executors, 369; and do not seem to have had their attention called to the condition of the bond required of an administrator, by which he is required to render up his letters of administration upon the appearance of a will. In view of the exception admitted and this provision

326 of *the statute, it would be worthy of enquiry whether the committing the administration would in any sense be held void as it respected third persons whose rights would be affected thereby, however it might be in a contest with the executor. See on this head, 1 Wms. on executors, 147; and for the propositions that the probate is merely operative as authenticated evidence, and not at all as the foundation of the executor's title, for he derives all his interest from the will and the property vests in him from the testator's death. See 1 Wms.

on executors, p. 159. These are the only cases decided in this court to which we have been referred, where the bond or administration were treated as void for want of authority to act on the subject matter. In *Fisher v. Bassett*, 9 Leigh, 119, the true state of facts was not such as to justify the exercise of the authority in that case to grant administration. Yet as the court had general jurisdiction to grant administration, when there was an unrepresented estate of a dead man in question, the court having cognizance of the subject matter, must determine for itself whether the circumstances justify the exercise of its jurisdiction in the particular case; and the grant is valid until revoked or the order is reversed. So in *Burnley v. Duke*, 2 Rob. R. 102, upon a question of authority it was held, in conformity with *Fisher v. Bassett*, ubi supra, that where administration and administrations d. b. n. were granted by a court which upon the facts should not have taken jurisdiction, the grants were valid, the orders standing unreversed, and the grants unrevoked. And further that when the grant to the administrator d. b. n. expired by his death, and the estate was unrepresented, it was competent for the court which might in the first instance have rightfully exercised jurisdiction, to make a valid grant; and the sureties in the last administration bond were bound. In *Hutcheson sheriff v. Priddy*, 12 Gratt.

327 85, administration had been *committed to the sheriff before the expiration of three months from the death of the decedent; but it was held that the case fell within the principle of the cases referred to; and the grant was not void, although the court, having jurisdiction to commit an estate to the sheriff for administration, may have erred upon the facts in making the order at the time it was made. And in *Andrews v. Avery*, 14 Gratt. 229, it was decided that administration granted where the deceased lived and died out of the state and left no estate within it, is not void; the judge who delivered the opinion of the court remarking, that the subject matter being within the jurisdiction of the court, to wit, the appointment of a personal representative to a decedent who is without one, the court making the appointment will be considered as having adjudged the question of jurisdiction in the particular case; and the order will not be void. A similar conclusion was arrived at in *Cox v. Thomas*, 9 Gratt. 323, as to a judgment of a circuit court upon a different matter, but where the authority of the court to act came into question.

These seem to be all the cases in this court, where the authority of the court came directly into controversy; and tried by the principle so uniformly affirmed, what is the effect upon the case under consideration. The order in question was made by a court whose general jurisdiction over the subject matter and of this particular case is not questioned. There was a decedent and this court was the proper one to take pro-

bate of his will. A paper purporting to be the will of the deceased was exhibited at the November term 1831, for probate, and was proved by the oath of one of the three subscribing witnesses thereto; which was ordered to be certified.—The other subscribing witnesses were not examined, nor was any proof produced that the codicil revoking a legacy was in the handwriting of the testator. At the following

328 *term of the court, the executors named in the will refused to accept, the widow relinquished her right to administration, and thereupon administration with the will annexed was, on motion of Jonathan C. Gibson, committed to him, and he thereupon gave bond and qualified. The will in this case was exhibited for probate before the passage of the act of 1834-5. Sess. acts, p. 43. In the case of *Worsham's adm'r v. Worsham's ex'or*, 5 Leigh 589, it was decided by the whole court, (for Brockenbrough who did not sit, had decided the cause in the court below, and his sentence was affirmed), that before the act aforesaid, a testament of personal estate might be well proved by a single witness. It was in consequence of this decision and at the suggestion of the court, that the act of 1834-5 was passed requiring the same proof in cases of wills of personality as of realty. This will so far as the duties of the executor or administrator c. t. a. were concerned, was a testament of personal estate. The real estate was specifically devised. The court then had the case of a decedent, with the will exhibited of the testator so proved as to justify the recording of the will as a will of personality, and the grant of letters testamentary. That proof was entered on its record and, as the record recites, ordered to be certified. At the following term the executors refused to take upon themselves the burthen of the office, and the widow relinquished her right to administer; and then the estate was committed. The subject matter (Judge Moncure observes in *Andrews v. Avery*, ubi supra), to bring a case within the jurisdiction of a court of probate, "is the appointment of a personal representative to a decedent who has none, and whose personal estate is therefore without an owner. The validity of an order making an appointment must depend on the existence of that state of facts." By this refusal of the ex-

329 ecutors named, the *personal estate was left without an owner. It was the duty of the court to take some order for its preservation. There was no controversy about the will or administration, to remind them of the necessity or propriety of appointing a curator to take care of it, pending any such controversy. It is manifest that the executor named and the widow supposed the action of the court had placed the matter in a condition for administration; and I think it equally clear the court so considered and adjudged when the estate was committed to an administrator c. t. a. The only matter required as to the body of the will was an order to record it, as a will

of personalty, on the proof by one witness; though it would have been irregular, perhaps erroneous, to grant administration in the then state of the proof until action of some kind was had on the codicil which revoked a legacy. But this if an error, was an error in the judgment of the court upon a question arising upon a matter of which they had full cognizance, and could not be enquired into incidentally. The order was never reversed, the grant remains unreversed; by virtue of it, the administrator c. t. a. has possessed himself of the estate, and I think it cannot be alleged in favor of the sureties, that the grant was merely void. I think the principle of the cases referred to governs this case, and fully justify this conclusion.

The position of the appellants does not receive much support, if any, from that class of cases cited, in which bonds taken by virtue of some statute were held to be invalid. For in this case the bond is regular, pursues the form prescribed by law for the bond of an administrator c. t. a. The objection is not that it is defective on its face, but that there was no authority to take it. In the cases bearing on this subject, some confusion has arisen from judges not at all times distinguishing between the words void and voidable or defective.

330 But a *careful examination of the cases themselves, and looking to the subject really discussed and the points decided clears up the obscurity. With the exception of one case hereafter adverted to, it will, I think, be found, that there is no conflict in the decisions of this court on the subject, or discordance with the principle affirmed in the class of cases already commented on. In *Stuart v. Lee*, 3 Call 421, the bond was taken by a proper court and was made payable to the Governor, instead of the justices. The suit was in the name of the successor of the governor; and the plaintiff assigned a breach for the benefit of the party injured. The bond was in the penalty of £10,000. As the law then was the bond should have been made payable to the justices, and the penalty prescribed was £1,000. The court decided that as the bond was not taken pursuant to law, no action could be maintained thereon by the plaintiff in his character of Governor or successor in office only. So in *Branch v. Commonwealth*, 2 Call 510, the bond was taken for collection of taxes under an act which had expired. It was held the sureties could not be made liable for taxes collected under a subsequent law. They were not liable under their contract. In *Frazier v. Frazier's ex'or*, 2 Leigh 642, the decree was against the surety in an administration bond, taken on committing the estate to an administrator c. t. a. The bond executed was in the form of the bond prescribed for an administrator of an intestate and not that for an administrator c. t. a., and of course contained no condition for the benefit of legatees. The stipulation to administer the goods, &c., according to law, was held not to embrace the surplus assets payable to

legatees or distributees; but only extended to disbursements made in the expenses of administration and the payment of debts; that if it went further and embraced legatees and distributees there would have been no necessity for the further provision

331 *for the benefit of legatees and distributees. It was therefore held that upon this statutory bond no suit in law or equity could be maintained for the benefit of and at the relation of a legatee. The court did not decide that the bond was void or would have been voidable if put in suit by a party, as a creditor, for whose benefit there was a stipulation in the condition. *Roberts v. Colvin*, 3 Gratt. 358, followed *Frazier v. Frazier*, and held that as the bond in that case contained no provision for the benefit of creditors, the sureties were not liable.

Morrow v. Peyton, 8 Leigh 54, does decide the broad proposition that a bond not conforming to the requisitions of the statute was void as to all purposes. The case even supposing it should be recognized as a binding authority, would not affect materially the present case. For here the grant was to an administrator c. t. a., and the bond is such as the law requires in such case. In *Morrow v. Peyton*, after the death of an executor who had qualified, administration was committed to an administrator d. b. n. c. t. a., but the bond was in the form prescribed for administration d. b. n. of an intestate, instead of an administration d. b. n. c. t. a. The form of the bond adopted did contain a condition for the benefit of creditors; and creditors were suing; but the court in the decree says that the administration bond was void on the authority of *Frazier v. Frazier*, and the securities were not bound by it. *Tucker, P.*, towards the conclusion of his opinion merely remarks on that branch of the case, that the bond was void on the same authority. The great question in that case was whether, when two administrators execute a joint administration bond, one is surety for the other. Upon this proposition the three judges differed, each delivering a separate opinion.—*Brockenbrough* and *Tucker* holding the affirmative, *Brooke* the negative. On the other parts of the case the other judges concurred with *Tucker*.

332 We have seen all *that he said on the question under consideration, and it is clear that he was misled from a hasty consideration of the case of *Frazier v. Frazier*. It certainly did not decide that the bond was void or invalid for any purpose provided for in the condition. But the decision and opinion of *Green, J.*, was carefully restricted to the case of the legatee suing, and for whom no provision had been made. Had not the court in *Morrow v. Peyton*, been misled by this mistake in the effect of the decision in *Frazier v. Frazier*, I do not for a moment suppose they would have decided that such a bond was void entirely and the sureties not bound by it.

In the *United States v. Bradley*, 10 Peters R. 343, the general question was discussed

by Judge Story who delivered the opinion of the court. He draws the distinction between bonds given to parties who have a capacity to take, and bonds given to parties having no capacity to take. The former may be good in part, the latter are wholly void. And he further remarks that there is no distinction between bonds containing conditions not *malum in se*, but illegal at common law; and those containing conditions which are illegal by express provision of statute. At common law a bond conditioned to do several things may be void for illegality as to one part, and yet be good as to the other part. 2 Thos. Coke p. 19, n. P. The same rule applies to bonds taken by virtue of a statute unless indeed the statute expressly or by necessary implication avoids it to all intents and purposes. Accordingly it was held in that case, in accordance with many English authorities, that the bond taken by a public officer having a capacity to take, with some good conditions and others not authorized by law, was valid to the extent of the good condition. So this court decided in *Aylett v. Roane*, 1 Gratt. 282, that a bond of indemnity taken according to the act of 1819, 1

R. C. ch. 134, § 25, p. 533, but omitting 333 the provision *for the protection of the purchaser of the property as required by the act of 1828, Sup. R. Code 272, was a good statutory bond to protect the sheriff from the action of the claimant of the property, the bond containing the condition required by law for his protection.

In *Almond, &c., v. Mason, &c.*, 9 Gratt. 700, the will after a bequest of property real and personal to his wife for life or widowhood, directed that at her death or marriage, his executor should sell the whole of his estate and divide the proceeds. One of the executors died, the power of the other was revoked, and the estate was committed to an administrator d. b. n. c. t. a. But the bond he executed did not embrace land as the law required where the executor was authorized to sell real estate. The court below dismissed the bill as to the sureties. This court reversed the decree, holding that as after the termination of the life estate, the administrator took possession of and sold the personal estate, and as the bond contained a condition for the benefit of legatees, the sureties were bound so far as the goods, chattels and credits would extend. So in *Pratt v. Wright*, 13 Gratt. 175, it was decided that although the condition in a guardian's bond was not as extensive as the statute requires, yet as it relates to a part of his duties, the bond is not void, but binds the obligors to the extent of the condition. *Daniel, J.*, in his opinion refers to *United States v. Bradley*, *ubi supra*, and cites many other authorities to the same effect. It is manifest therefore that this court in *Morrow v. Peyton*, intended to place their decision on this point upon the authority of *Frazier v. Frazier* alone, supposing through inadvertence, and because the novel and interesting question as to the liability of the executors under the

joint bond had diverted attention from the minor questions arising on the record, that

Frazier v. Frazier ruled this branch 334 of the case. *I do not therefore regard Morrow v. Peyton as an authority on this proposition.

Nor is it necessary to invoke the aid of another class of cases cited in argument to support the validity of this bond. Cases where there was a clear capacity to take such bond, and the bond fulfilled all the requirements of the statute; but contained recitals essential to its validity, and it was held that the obligors were estopped from denying the truth of such recitals. Of this class was the case of Franklin v. Depriest, 13 Gratt. 257; Monteith, sheriff v. Commonwealth, 15 Gratt. 172, and many other cases referred to in the argument.

From these three classes of cases decided by this court, may be deduced the following principles: First, that where a court has cognizance of the subject matter, its judgment, though it might be erroneous, is not void; it is binding until set aside or reversed, and cannot be questioned incidentally; acts done and bonds taken under it, bind the obligors and sureties as well as principals. Second, where the court or officer has authority or capacity to take a bond, and makes a mistake by omitting some condition prescribed, or inserting a condition not authorized or illegal, unless the statute by express words or necessary implication makes it wholly void, the bond is not void; the good shall not be vitiated by the bad, and the bond may be sued on so far as the conditions are good as a statutory bond. Third, where the court has cognizance of the subject matter or capacity to take a bond, and takes a bond which on its face is valid, but contains a recital of facts necessary to its validity, as in the cases referred to of the election and induction into office of a sheriff, the presence of the justices named as obligors and the like, the obligors shall be estopped from denying the truth of such recitals. These principles firmly established are essential to the security of the public and individuals.

Bonds of sheriffs, clerks and other 335 *officers of administrators, &c., are taken in the absence of those who may be most affected by the acts of such functionaries, and should be sustained unless clearly made invalid by law. Nor do I perceive how the surety, as has been argued, can occupy any higher ground than his principal. It is his intervention which has enabled the principal to act; and he should be bound to the extent of his obligation for him.

On the whole I am of opinion, that the order of the court committing administration t. c. a. to said Jonathan C. Gibson, was not void, and therefore the bond taken from him was valid and binding on all the obligors.

The other judges concurred in the opinion of Allen, P.

Decree affirmed.

336

*Goodwyn & als. v. Myers.

October Term, 1862, Richmond.

1. **Ejectment—Damages—Improvements—Both Claims Passed on by Same Jury.**—In actions of ejectment if there is a claim by the plaintiff for mesne profits and damages for waste, and by defendant for improvements under §§ 30 and 32 of chap. 135 of the Code, both claims must be passed upon by the same jury.*

2. **Same—Function of Jury Sworn to Try Issue.**—Where the statements are filed with the declaration and plea, the jury sworn to try the issue in ejectment may make all the enquiries required, at the same time that they try the issue; or the enquiries may, if the court should so order, be made by the same jury after the verdict on the title is recorded; or by a new jury to be empanelled.

3. **Same—Value of Plaintiff's Estate without Improvements—Ascertained by Separate Jury.**—If defendant claims for improvements on the land, the plaintiff may at any time before a judgment is rendered on the assessment of the value of the improvements, though after the jury which tried the issue or passed upon the defendant's claim for improvements has been discharged, require that the value of his estate in the premises, without the improvements, shall also be ascertained. And this enquiry is to be made by another jury.

4. **Same—Same—At What Time.**—The value of the plaintiff's estate in the premises without the im-

See principal case cited in Witten v. St. Clair, 27 W. Va. 766.

*The statutes are quoted in the opinion of ALLEN, P.

†**Ejectment—Value of Plaintiff's Estate without Improvements—Ascertained by Separate Jury—Right Waived.**—Corr v. Porter, 33 Gratt. 289, was a case of ejectment in which the court allowed the same jury which tried the case on the merits to assess the value of the land in controversy, and also to fix the amount of the rents and profits for which the defendant was liable. An objection, based upon the decision in the *principal case*, was taken by the defendant to this action of the court. But the court said: "A sufficient answer to this objection is found in the conduct of the defendant himself. After the jury had rendered a special verdict on the title, they were detained by the court for the purpose—first, of assessing the value of the defendant's improvements; second, the value of the premises without such improvements; thirdly, the rents and profits for which defendant was liable. The defendant made no objection to this mode of proceeding. He not only acquiesced in what was done, but he seemingly approved it, for he was represented by counsel, and introduced his testimony upon all these issues. If he was not willing that the same jury should make all the inquiries, good faith required, he should make his objection known then and there. Having taken his chances before that jury, he cannot be heard to say that a different jury ought to have been empanelled to try one of the issues. The defendant had the right to waive the point, and we think he has waived it. Without undertaking, therefore, to say what force there would have been in the objection if made in due time, it was too late first to urge it after the verdict was rendered and the court was about to pronounce its judgment."

See generally, monographic *notes* on "Ejectment."

provements, is to be ascertained as at the time when the assessment of the value of the improvements was made.

This was an action of ejectment in the Circuit court of the city of Richmond, brought by Caroline L. Goodwyn and others against George Myers, to recover a lot of land near Rockets. The case was tried on the 24th of November 1856, when the jury returned the following verdict: "We the jury find that the plaintiffs had a right to the possession of the premises in the 337 declaration *described, at the commencement of this action, and that their estate was in fee simple; and we further allow the defendant for his improvements, over and above the damages to which the plaintiffs are entitled, the sum of twelve hundred and fifty dollars."

The court made an entry suspending judgment upon the verdict; and on the 29th of November at the same term, but after the jury had been discharged, the plaintiffs moved the court to require that the value of their estate in the premises in the declaration demanded, without the improvements, be ascertained according to law. This motion having been opposed by the defendant, the court took time to consider of its judgment until the next term: And at its next term the court overruled the motion; and then entered up a judgment upon the verdict: And the plaintiffs excepted. From this judgment the plaintiffs applied for a writ of error, which was awarded.

It does not appear from the record that the plaintiffs had filed any claim for meane profits, or that the defendant had filed a claim for the value of his improvements; but it was stated on the argument that they were filed two or three days before the cause was tried."

Howison, for the appellants:

The counsel for the appellee seems to yield the point that the word "when" in the Code, ch. 136, 10, means "if" or "in case that." And by this concession he surrenders the only ground of logical construction on which the appellee's case can stand: For there is certainly nothing in the Code requiring that the same jury shall at the same time pronounce a verdict upon the value of the defendant's improvements and the value of the plaintiff's land.

They insist, however, that "the 338 act plainly intends that *all enquiries of this kind are to be made by the jury which tries the issue." So far is this from being true, that the Code expressly gives the power to either party to prevent the jury which tries the issue from trying any other question. Chap. 135, § 34, provides that "on the motion of either party the court may order the assessment of such damages and allowance to be postponed until after the verdict on the title is recorded." Thus securing to either party the intervention of at least two juries if he require it. Chap. 136, does provide that the same jury shall decide upon the damages of the plain-

tiff for detention of his land and the value of the defendant's improvements; but it does not provide that the same jury shall decide the value of the plaintiff's land. *Epressio unius est exclusio alterius*. It may with fairness be argued, that the express provision for the same jury to decide upon the damages and improvements, and the omission of any such requirement for ascertaining the value of the land, show that it was not the intention of the law to require the same jury to make all these enquiries; but to leave the matter to the sound and reasonable discretion of the court. Certainly, had it been the intent of the law to compel all these enquiries before the same jury, it would have been easy so to provide: Six words would have accomplished it.

But we are not left to conjecture here. The words of the law, by their own plain meaning, forbid the construction that the same jury is required. Chap. 136, § 11, says the value of the land shall be ascertained "in the manner" hereinbefore provided, &c. Now the word "manner" means "mode" or "method." It is not a specific but a generic term. It requires only that such mode of trial shall be adopted as was previously mentioned; i. e., a trial by jury; and whether the same jury or another and entirely different jury make the enquiry, it would still be "in the manner" provided for.

339 *The court cannot leave out of view the fact that the whole of chap. 136, from § 10, inclusive, was not proposed by the revisors, but was added by the committee of the legislature, and taken from the revised statutes of Massachusetts. It cannot therefore be insisted that the same jury for all these enquiries was in the mind of the legislature, or that they expected them all to be made at the same time.

The counsel insist that it would be unjust and inconvenient to have the enquiries made by different juries. How it could be unjust I do not see, unless he could show that one body of twelve men would be just, and another body of twelve men would be unjust. No "leaning" of a jury one way or the other is to be presumed; and assuredly if any such leaning existed it would be a powerful reason for having two juries one to pass on the defendant's improvements, and the other to pass on the value of the plaintiff's land. For if the first jury had leaned in favor of a high valuation of the defendant's improvements it would lean against a high valuation of the plaintiff's land; and thus injustice would necessarily be done. Counsel use the singular argument, that the opening of a new street or hotel may increase the value of the land, and hence the necessity for having both valuations at the same time. To this I answer that if from any cause the value of the plaintiff's land has been increased it is just that he should have such increased value, and can be no loss to the defendant. But in truth such an argument is merely abstract; for according to the terms and practice of courts it is impossible that more than

an interval of a few days or weeks can elapse between the valuations. In the case at bar an interval of only four days would have occurred if the court had allowed the plaintiffs motion.

The argument from inconvenience has very little weight. I have shown that 340 the law absolutely secures *two juries to either party if he desires it. To that extent of inconvenience therefore either may be subjected, and to that extent of additional time and expense the state has assented. But in truth as juries are now obtained and have been for years no practical inconvenience would be suffered.

Counsel err in saying that the appellant maintains that he may "at any time after the rendition of the verdict elect to have his estate valued." The law, chap. 136, § 12 clearly limits his action to the time before judgment is rendered on the assessment of the value of the improvements. And the appellant was fully within this limit, having made his motion only four days after the verdict and many weeks before any judgment was rendered in the case.

Finally counsel in their ingenious argument, have passed over without notice, what seems to me the most important view of the case, and one which clearly requires the reversal of the judgment and the granting of plaintiff's motion. The record does not show that the defendant made any claim whatever for improvements; and of course if the case stood on the printed record the judgment allowing for the improvements is erroneous. But by consent, the original papers have been brought up, from which it appears that the defendant's claim for improvements was never filed until the very day the trial commenced, and was then filed without leave of the court and without good cause shown for the delay. Sec. chap. 135, § 32. This makes it apparent that the plaintiff had no sufficient notice of the defendant's claim, and hence could not have been prepared to meet it with counter evidence. This will account for the fact that the plaintiff did not sooner make his motion to have the value of his land assessed. After the verdict, however, he made his motion without unreasonable delay, and it would work the grossest injustice to 341 give to the defendant *all the advantage of his improvements and yet cut off the plaintiff entirely from the just and equitable privileges which our law of ejectment intends to secure to him. His right to have the value of his land assessed is given in express terms by the law; and I ask when and how has he forfeited this right?

I submit that the judgment ought to be reversed, and the cause sent back to the Circuit court of Richmond, with directions to allow the motion of the plaintiffs and have the value of their land without the improvements assessed by a jury, as said value was on the 29th November 1856.

August & Randolph, & Sands, for the appellee:

The question in this case is whether a plaintiff in ejectment, after the rendition of the verdict and the discharge of the jury, may elect to have a new jury impanelled for the purpose of ascertaining the value of his estate in the premises without the improvements.

In the case under argument, the verdict was rendered, and the jury was discharged, on the 24th of November, 1856, and on the 29th of the same month the plaintiffs moved to impanel a jury for the purpose of making the enquiry above mentioned.

The act of assembly enacts that "where the defendant shall claim allowance for improvements as before provided, the plaintiff may by an entry on the record, require that the value of his estate in the premises without the improvements, shall also be ascertained." Code ch. 136, § 10.

The appellant maintains that the word "where," in the above provision must be taken to mean "if," "in case that," &c., and that the plaintiff may therefore at any time after the rendition of the verdict, elect to have his estate valued. Supposing

342 that "where," means "if," in *this section, it does not follow that the plaintiff has the term to make his election. Such a construction is opposed to the obvious policy of the statute, and is unjust and inconvenient.

The act plainly intends that all enquiries of this kind are to be made by the jury which tries the issue. Thus if the plaintiff claims mesne profits he must file a statement of his claim with his declaration, and the jury which tries the issue must pass upon the claim. Code ch. 135, § 30. The act expressly says that if the jury find in his favor "they shall at the same time, unless the court otherwise order, assess the damages for mesne profits." The jury must not only be the same, but they must assess the mesne profits "at the same time" they find their verdict.

If the defendant intends to claim allowance for his improvements, "he shall file with his plea, or at a subsequent time before the trial, (if for good cause allowed by the court), a statement of his claim therefor in case judgment be rendered for the plaintiff." Code ch. 135, § 32. In such case the damages of the plaintiff and the allowance to the defendant shall be estimated and the balance struck, thus showing the intention to make them the act of the same jury; and the court is only authorized to postpone the assessment until the verdict is recorded, but not to cause the assessments of the plaintiffs' and defendants' claims, to be made by different juries.

The next chapter authorizes the defendant "at any time before the execution of a decree or judgment to petition for an assessment of the value of his improvements and "thereupon," the court may impanel a jury to assess the damages of the plaintiff and the allowances to defendant for such improvements." Code ch. 136, § 1.

Here it is expressly required that the claims of both parties shall be passed upon

by the same jury. The 6th section requires the jury to strike a balance between the parties.

343 *If there be any reason for requiring the same jury to try the claims of the parties for meane profits and improvements, must not that reason equally apply to the claim of the plaintiff or an assessment of the value of his estate, less the improvements.

Would it not be both unjust and inconvenient to require one jury to assess the value of the improvements and to permit another jury to assess the value of the estate without the improvements.

There is nothing about which men differ so much as in estimates of this kind, one man or one jury inclining to a high estimate, and the next individual or jury leaning in the opposite direction. If the same standard be applied to both plaintiff and defendant, no great injury will result, even though the jury may err, but if a high standard of valuation be applied to the land by one jury, and a low standard of valuation be applied to the improvements by another jury, or vice versa, the errors of the two so far from compensating each other, will aggravate the injustice done.

Nor is this the only species of injustice which may result from assessments by different juries. In a city where the opening of a street, the location of a hotel, or some other unlooked for occurrence, may materially change in a short time the value of property, great injustice may be done by permitting an interval of time to elapse between the assessment of the improvements and the assessment of the value of the estate less the improvements. The latter value is to be estimated as of the time of the enquiry. Code ch. 136, § 11. Now suppose, as has been actually done in the case, a new street be opened, making the lot accessible from another quarter, and very much increasing its value, and that the plaintiff, who, when the lot was of comparatively little value, had no wish to sell it, now becomes desirous of forcing it upon the defendant, at its enhanced price,

344 he may according *to the counsel for the appellant, have a jury impanelled, assess the lot, elect to relinquish it, and throw it upon the defendant. Nor is there any mutuality between the rights of the parties, the defendant loses his improvements, unless they are assessed by the jury which tries the issue; but the plaintiff, if he does not like this jury, may pass it by, and without assigning any reason for his omission to have the assessment made, he may at pleasure call for another jury to assess his estate.

This mode of proceeding leads not only to injustice and inequality, but to inconvenience. The commonwealth is put to the expense of two juries, the court and its officers are put to the trouble of two trials, the plaintiff has an undue share of the time of the court to the detriment of other suitors equally entitled to trial time with himself, and there is a possibility

of a disagreement on the part of the second jury, and of still further trouble, expense, and delay.

It will observe that the statute gives the plaintiff time after the assessment to make his election to relinquish his estate or not. This would have been unnecessary if he had been entitled to the same indulgence with reference to the time of making the assessment, and shows the intention not to confer it on him. We maintain, therefore, in view of these considerations, that the judgment is right, and should be affirmed.

ALLEN, P. The plaintiffs in error brought ejectment to recover a lot of land in this city, claiming to be the owners in fee. It does not appear by the printed record that they filed with the declaration a statement of the profits and other damages they meant to claim; or that the defendant had filed with his plea, or at subsequent time before the trial, with the leave of the court, a statement of his claim for improvements. It is said in argument that such statements on either side were filed 345 within two *or three days before a jury was sworn to try the issue, and that this is shown by some memorandum endorsed on or filed with the original papers. On the 24th of November 1856, the jury sworn to try the issue returned a verdict that the plaintiffs had a right to the possession, and that their estate was in fee simple; and they allowed the defendant for his improvements, over and above the damages to which the plaintiffs were entitled, the sum of \$1,250. For reasons appearing to the court judgment on this verdict was suspended. On the 29th of November 1856, during the same term and before any judgment was entered, but after the jury had been discharged and had dispersed, the plaintiffs moved the court, by an entry on record, to require that the value of their estate in the premises in the declaration demanded, without the improvements, be ascertained by impanelling a jury for the purpose. The motion was held under advisement until the following term, when the court overruled the motion, and entered up judgment upon the verdict according to law. The plaintiffs excepted to the decision overruling their motion, and have brought the case to this court by a writ of superseas.

By the R. C. of 1819, ch. 118, § 1, it was provided that the demandant in a writ of right, if he recover his seisin, may also recover damages, to be assessed by the recognitors of assize, for the tenants withholding possession of the tenement demanded. By an act passed April 6th, 1838, Sess. acts p. 75 provision was made for the assessment of damages for meane profits; the act providing that in the trial of all actions of ejectment, if the jury find a verdict in favor of the plaintiff, it shall be lawful for them to assess damages for the meane profits, &c.; provided that such damages shall not be assessed unless the plaintiff file with his

declaration a statement showing the amount of profits and other damages which he means to claim. These provisions 346 were for the benefit of *the defendant or plaintiff, and the jury that tried the issue, also assessed the damages. The enquiry was simple and not complicated with any question as to the value of improvements, and could be made by the recognitors of the assize or the jury sworn to try the issue upon the question of possession or title in ejectment, without materially interfering with the trial of the main question in issue.

By an act concerning delinquent and forfeited lands passed March 10th, 1832, Sess. acts p. 61, § 7, provision was made that whenever any judgment or decree should be entered for the recovery of land, or the possession thereof, situated in any of the counties lying west of the Alleghany mountains, it should be lawful for the tenant to produce evidence, tending to show that he or those under whom he claimed, have bona fide settled and seated such lands &c., and have made valuable and permanent improvements thereon, over and above the value of the use and occupation thereof; and if satisfied of the probable truth of such allegations, the court was empowered to suspend the execution of the judgment or decree until the same could be enquired of by a jury which should be empanelled and sworn well and truly to ascertain the reasonable additional value given to such recovered land by the permanent improvements over and above a reasonable allowance for the use and occupation of the land; the amount ascertained to constitute a lien on the land. But the act was to be construed as not to authorize a valuation of improvements so as to reduce the value of the plaintiff's land below the actual value of the same without improvements at the time of eviction.

This law, it will be observed, looked at the assessment of the allowance to the defendant for improvements as always to be made after judgment or decree by a jury specially impanelled and sworn to 347 such enquiry. *This was the condition of the law when the attention of the revisors was directed to this subject. They reported two bills embracing the various provisions contained in the previous laws, with some substantial alterations, and with modifications as to the manner of carrying the law into effect.

In the Code ch. 135, § 30, is found the provision for the plaintiff. If the plaintiff file with his declaration a statement of the profits and other damages he means to demand, and the jury find in his favour, they shall at the same time, unless the court otherwise order, assess the damages for mesne profits, and also damages, for any destruction or waste of the buildings or other property. So far the law is in accordance with the previous laws. This enquiry, being for the benefit of the plaintiff alone, is to be made by the jury which tries the issue, unless the court should otherwise order. The act is silent as to

the mode of assessment when the courts did otherwise order, but as the law gave the plaintiff a right to such an assessment, it would be competent for the court, under its general powers to empanel juries to ascertain facts, and from analogy to other portions of the act, to direct another jury to be empanelled to make such assessment of the damages. The 32nd section takes up the case of the defendant, and provides, that if he intends to claim allowance for improvements he shall file with his plea, or at a subsequent time before the trial, (if for good cause allowed by the court), a statement of his claim therefor, in case judgment be rendered for the plaintiff. The 33rd section declares that the damages of the plaintiff and the allowance to the defendant for improvements shall be estimated and the balance ascertained and judgment therefor rendered as prescribed in the 136th chapter. That chapter as will be seen, as reported by the revisors, was copied in a great measure from the act of March 10th, 1832. The 34th 348 *section of chapter 135, provides that on motion of either party, the court may order the assessment of damages and allowance to be postponed until after the verdict on the title is recorded.

We thus perceive that when the law was so modified, as to admit the plaintiff, in addition to a claim for damages for mesne profits, to claim also damages for waste and destruction to buildings and the other property, although in general, the assessment was to be made by the jury that tried the issue, the court might order otherwise: a power the court might, and on proper suggestion, would exercise, whenever from the complexity of the questions concerning the title, justice to the parties would be promoted by confining the jury to the main issue, and that alone. But when the defendant filed a statement of his claim to allowance for improvements, the enquiry becomes still more complicated; the amount of damages for mesne profits, for destruction and waste of buildings and other property, the value of improvements, the bona fides of the possession when they were made, their permanence, &c., were all subjects of enquiry, presenting generally questions more numerous and perplexing than those referring to the title to the premises. The court therefore on motion of either party, may order this assessment to be postponed until after verdict on the title is recorded. Until that question was settled it would be uncertain whether there would be any necessity for such assessment. If the plaintiff failed, the time spent and costs incurred, in these collateral enquiries would have been spent and incurred for no beneficial purpose; and the attention of the jury would have been diverted from the main issue, and their verdict from that cause be less satisfactory.

The allowance for improvements was fully provided for by the 136th chapter of Code, p. 613, which embodied the provisions of the act of March 10, 1832, confined

349 *to the counties west of the Alleghany originally, but extended to the whole State by the Code. When damages were to be assessed and improvements estimated before a judgment as provided for in ch. 135, it was to be done as prescribed by ch. 136. The proceedings under this chapter as in the act of March 10, 1832, followed the judgment or decree for the recovery of the land. The defendant against whom the judgment or decree was rendered, might at any time before the execution thereof, present his petition, stating that while he, or those under whom he claimed, were holding the premises under a title believed by him or them to be good, valuable improvements were made thereon, and praying that he be allowed for the same over and above the value of the use and occupation of such land. The court if satisfied of the probable truth of the allegations may suspend the execution of the judgment, and empanel a jury to assess the damages of the plaintiff and the allowance for improvements. The second section directs that the jury, in assessing such damages under this chapter or chapter 135, shall estimate against the defendant the clear annual value of the premises, exclusive of the use by the tenant of the improvements thereon made by himself or those he claims under. The 4th section provides that if the jury shall be satisfied that the tenant, or those he claims under, made, on the premises, at a time when there was reason to believe the title good under which possession of the premises was held, valuable and permanent improvements, they shall estimate in his favor the value of such improvements, &c. The 5th section contains some further directions; and the 6th provides that after offsetting the damages and allowance, the jury shall find a verdict for the balance for plaintiff or defendant, as the case may be, and judgment or decree shall be entered therefor according to the verdict. And the 7th section makes the balance due to *the defendant a lien on the land until paid. The 8th and 9th sections contain provisions for the case of tenant for life or refer to a suit brought by a mortgagee.

This completed the scheme of the revisors as reported to the legislature in chapters 135-6. Revisors report page 697 to 700. By the scheme the jury sworn to try the issue, where statements were filed with the declaration or plea, might, unless the court ordered, or either party so moved, make all the inquiries required; or they might, if the court should so order, be made by the same jury after the verdict on the title was recorded, or, as I construe the act, by a new jury to be empanelled. And where the application was made on petition after judgment, the assessment was necessarily to be made by a new jury. But in either case the assessment of damages and for the allowance for improvements must be made by the same jury. The enquiry is blended; the value of the premises estimated against the defendant, is to be exclusive of his use of improvements made by him; a balance is

to be struck and a verdict for such balance found.

The legislature when deliberating on this subject, could not fail to see, that however correct in principle it might be, to allow the occupying tenant for improvements made at a time he had reason to believe his title was good, and before notice of the plaintiff's claim, yet in carrying out the principle into practice cases of great hardship to the true owner would arise, unless some further protection was provided for him. The balance found by the verdict might be more than the owner could pay down; yet a judgment passed against him for it, and it constituted a lien on his land. In the unsettled portions of the State, to which the law was at first confined, unimproved lands were of no great value; and as sympathy might be felt for the occupying claimant and prejudice entertained against a non-resident proprietor,

351 there *was some risk that cases might arise, in which by the finding of the jury, the owner of the fee would be improved out of his estate; a lien fixed on it for more than it was worth. To guard against such contingencies, the legislature engrafted upon the bills reported by the revisors, the sections under which this controversy has arisen. The 10th section enacts that "when the defendant shall claim allowance for improvements as before provided, the plaintiff may, by an entry on record, require that the value of his estate in the premises, without the improvements, shall be ascertained. By the 11th section, the value of the premises shall be estimated as it would have been at the time of the enquiry, if no such improvements had been made on the premises by the tenant or any person under whom he claims, and shall be ascertained in the manner, therein before provided, for estimating the value of improvements; and by the 12th section, the plaintiff in such cases, if judgment is rendered for him, may at any time during the same term, or before judgment or decree is rendered on the assessment of the value of the improvements, enter on the record, his election, to relinquish his estate in the premises to the defendant, at the value so ascertained, &c. The remaining sections of the chapter provide for that contingency. The word "when" used in the beginning of the 10th section, "when the defendant shall claim," was not intended to prescribe the period at which the plaintiff by entry on record, was to require that the value of his estate in the premises should be ascertained. The acts could not be contemporaneous. And when a petition was filed, as provided for in the 136th chapter, § 1, the plaintiff might not have any notice of it; the petition could be filed at any time before the execution of the judgment or decree. "When," in this as in other instances in the Code, is used in the sense of "if," "in case." The frequent use of this word in its relative sense was the subject of comment *in Pulliam v. Aler, 15 Gratt. 54. The value of his estate is to be

ascertained in the manner therein before provided for estimating the value of the improvements; that is by a jury; that being the way or method provided for making all the assessments and estimates referred to in the two chapters. But there is nothing to show that the value was to be ascertained by the same jury. I incline to think it was not so intended, or else it would have been expressed. This provision, as has been shown, was a new one, forming no part of the scheme reported by the revisors, and not found in the former acts of assembly; and there was good reason why it should not be blended with the other enquiries. This enquiry was of a different character, and the necessity for it would depend on the result of the previous investigation. Until it was ascertained, that there would be a balance in favor of the defendant for improvements, it would be unnecessary to enter into the enquiry as to the value of the land. The jury if confined to the assessment of damages for mesne profits and waste, and to the allowance for improvements, had many perplexing points to settle; such as the bona fides of the tenant in making the improvements, the nature of the improvements whether permanent or temporary, the amount of rents or profits, the damages for waste and destruction. What reason of convenience would there be in perplexing the jury with testimony touching a matter foreign to all the other questions? A matter which if the jury made no allowance for the improvements, they would not be required to consider. It is for the plaintiff to determine whether he will require the valuation, in order to a relinquishment of his estate; and justice would seem to demand that he should know whether any charge would be fixed on his estate, and the amount of it, before incurring the trouble and expense of proving the value of his interest, and consuming

353 ing *the time of the court and jury in what might turn out to be a fruitless enquiry. Such enquiry too if made necessarily before the same jury, might tend to his prejudice upon the other subjects to be investigated. It might be inferred, that he was conscious the improvements were made, when the defendant or those under whom he claims, believed they held under a good title, notwithstanding any efforts of the plaintiff to make the contrary appear. Or it might be ascribed to a more intimate knowledge of the value of the improvements; or the conviction that his claim to damages for waste and destruction was unfounded. Considerations of this kind may exercise an influence over the minds of jurors to an extent of which they themselves are unconscious, and give a coloring to the evidence which, but for such impressions, it would not bear. The plaintiff must enter on the record his election to relinquish his estate, during the same term, if judgment is entered for him, or before judgment is rendered on the assessment of the value of the improvements.

The act I think contemplated all the en-

quiries, as well those relating to damages and allowance for improvements, as those to ascertain the value of the plaintiffs estate in the land, if no such improvement had been made, to be directed to the same period of time. The value of the plaintiffs' estate shall be estimated as it would have been at the time of the enquiry is the language of the act; which I think relates to the enquiry into all the subjects contemplated by the act, as well as this particular one to ascertain the value of the land. All must be made during the same term, in some rare case, owing to a disagreement of the jury or some unforeseen contingency, as in the present case, where the court held the case over for advisement, the enquiry may be postponed; but in such case it would be attended with no difficulty in ascertaining the value as it was at the time when the

354 *estimate for the allowance for improvements was made. The spirit of the act would be carried out; and as it is remedial, giving a remedy for what would otherwise be a crying enormity, the disharmonious of men, by compelling them to pay for improvements they did not make, and perhaps would not have desired, it should receive a fair construction so as to effectuate the intention of the legislature, and do justice to both parties. I think the motion was in time and that the court should have sustained it, and erred in overruling it; and therefore that the judgment should be reversed and the cause remanded; and unless the plaintiffs, when the case is again docketed, shall waive their right, that a jury should be empanelled and sworn to ascertain, what was the value of the estate of the plaintiffs in the declaration demanded, without the improvements, as of the 24th day of November, 1856, the time when the former verdict was found; and upon the coming in of such verdict, if the plaintiffs in person or by their attorney in the cause, enter on the record, their election to relinquish their estate in the premises to the defendant, at the value so ascertained, the court to make all proper entries and render judgment according to law. But if the plaintiffs shall waive their right to require that the value of their estate in the premises, without the improvements, shall be ascertained, the court is to proceed and enter judgment on the verdict so found on the 24th day of November, 1856. Which is ordered to be certified.

The other judges concurred in the opinion of Allen, P.

Judgment reversed.

355 *Jones v. Bradshaw & Others.

January Term, 1863, Richmond.

1. Pleading and Practice—Pleas in Abatement—Statute—When It Applies.—The act Code ch. 171, § 19, p. 711, applies only where the objection to the jurisdiction of the court, is for mere matter of abatement; as where the case is a proper one for a court of equity, but not for the particular court in which the suit is brought: or where the suit ought to be

abated by reason of some circumstances attending the situation of the plaintiff or defendant, or the like.*

2. **Chancery Practice—Bill Alleges Proper Matter for Equity Relief—Allegations False.**†—Where a bill alleges proper matter for the jurisdiction of a court of equity (so that a demurrer will not lie) if it appears on the hearing that the allegations are false, and that such matter does not in fact exist, the result must be the same as if it had not been alleged; and the bill should be dismissed for want of jurisdiction.

3. **Same—Pure Bill of Discovery—Discovery Unnecessary.**‡—The ground of equitable jurisdiction stated in the bill, being the want of a discovery from the defendant; and it appearing from the evidence that as to some material facts alleged the plaintiff had full proof, and as to the others they were merely pretences; the bill will be dismissed at the hearing for want of jurisdiction.

4. **Decrees—Satisfied—Reversed—Action of Lower Court.**—If pending an appeal in the court of appeals, the defendant has satisfied the decree, upon a reversal of it, the Circuit court should make an order of restitution in his favor.

This was a suit in chancery brought in the Circuit court of Lunenburg, and afterwards removed to the Circuit court of Nottoway, by Anderson B. Bradshaw 356 *and Susan his wife, and some twenty-five others, grandchildren of William Hines deceased, against Lewellen Jones. The bill stated a bequest by William Hines of one-seventh of his slaves to his son Thomas Hines for life, and should he leave no lawful heirs of his body, the said slaves to be equally divided among all the testator's grandchildren living at the death of Thomas Hines. It alleged that

"The act says: 'Where the declaration or bill shows on its face proper matter for the jurisdiction of the court, no exception for the want of such jurisdiction shall be allowed, unless it be taken by plea in abatement; and the plea shall not be received after the defendant has demurred, pleaded in bar or answered to the declaration or bill, nor after a rule to plead, or a conditional judgment or decree nisi.'"

†**Chancery Practice—Plea in Abatement—When Necessary.**—In *Green v. Massie*, 21 Gratt. 362, the court said: "It would seem to be well settled, that if the matter of the bill is not proper for the jurisdiction of any court of equity, the objection may be made by plea or demurrer, and it may be taken at the hearing. The plea in abatement is only necessary where it appears that some other court of equity has jurisdiction, rather than that in which the suit is brought. *Jones v. Bradshaw*, 16 Gratt. 355."

As to objections to a bill for want of equity, see *foot-note* to *Green v. Massie*, 21 Gratt. 356.

‡**Chancery Practice—Bill of Discovery—Discovery Unnecessary.**—In *Thompson v. Whitaker Iron Co.*, 41 W. Va. 581, 23 S. E. Rep. 797, the court said: "If the fact that discovery is not indispensable for evidence appears from the bill, answer, or proof, it will be dismissed. *Jones v. Bradshaw*, 16 Gratt. 355; 1 Pom. Eq. Jur. § 229." See also, the principal case cited on this point in *Hale v. Clarkson*, 28 Gratt. 48.

See the principal case distinguished in *Walters v. Farmers' Bank*, 76 Va. 20.

Thomas Hines died without having had a child; and that the plaintiffs were the grandchildren entitled to the slaves on the death of Thomas Hines; who died in the year 1849. That at the death of William Hines, Thomas received several negroes in his lot, some of whom were not recollected, but the plaintiffs remembered the names of three of them, viz: John, Reuben and Lucy, all whom were sold by Thomas Hines in his life time, together with four others whose names were unknown, and passed into the possession of Lewellen Jones, and were in his possession at the death of Thomas Hines. That they do not know where the slaves are; that they cannot prove that Jones had possession of the slaves, or their value or increase, but by a discovery from him. That Jones purchased the slaves from H. E. Shore, who obtained them from the estate of Alexander Scott, who purchased them with full knowledge of the defect of title in Thomas Hines; as did also Jones. They repeat that they do not know by whom they can prove these facts, but the defendant Jones. And they make Jones a defendant and call upon him to say, what price he obtained for the slaves, and what would be a fair hire for them since 1849, of whom he purchased them, how many they then numbered, when he sold them, &c.

Jones in his first answer, without noticing any of the allegations or interrogatories of the bill, insisted that Thomas Hines' title to the slaves was valid. He relied upon the statute of limitations; and that he 357 was a purchaser *for value without notice. The plaintiffs excepted to this answer; and the exception was sustained by the court. In his second answer, he says, that in the year 1849, he thinks in November, he purchased of Henry E. Shore three negro slaves—an old woman named Lucy and her two sons John and Reuben, one about fourteen or fifteen years of age and the other about nine, at the price of \$1,000. That he shortly afterwards sold them, but does not recollect the price. He does not know at what time Thomas Hines died, and cannot say whether or not he was in possession of the slaves after the death of Hines, but does not admit he was. He avers that when he purchased the slaves he had no suspicion of any defect of title to the slaves, or that the plaintiffs had any claim to them. He does not admit that the slaves were derived by Thomas Hines from William Hines, or that the plaintiffs are the grandchildren of William Hines; and he calls for proof.

The plaintiffs objected to this answer; but the court overruled the objection: and the case was referred to a commissioner to report the value of the slaves Lucy and her two sons John and Reuben and the increase of Lucy, if any, at the death of Thomas Hines, and their value at the time of taking the account. Also to enquire and report in whose possession the said slaves were at the death of Thomas Hines, and what would be a reasonable hire for them since the death

of Hines. And the commissioner was authorized to examine Jones on oath. The first report of the commissioner was expected to be by the plaintiffs, and recommended. The second report was that Lucy was of no value in March, 1857, when the report was made, and that the value of John and Reuben was at that time \$2,100. The hires since 1849 were reported at \$770. This report was based solely upon the examination of Jones before the commissioner.

It appears that there was another 358 suit pending in the same court at the same time, between the plaintiffs and Henry E. Shore, in relation to the same slaves; and in this suit depositions had been filed, which by the agreement of the counsel were to be read in the present suit, if the plaintiffs were entitled to introduce evidence, which the defendant denied, on the ground that it was a bill of discovery. These depositions established the facts that the plaintiffs were the grandchildren of William Hines, and that the slaves were slaves derived by Thomas Hines from William Hines. One of these depositions, given in 1853, was that of the defendant Jones, in which he stated that he purchased the slaves Lucy and her children John and Reuben of Henry E. Shore on the 23d of November, 1849, and that he gave \$1,000 for them. These depositions made out the case of the plaintiffs.

In April, 1857, the court made a decree directing the defendant Jones to pay to the plaintiffs the sum of \$2,100, the estimated value of the slaves at that time, and the further sum of \$770 the estimated hires. And from this decree Jones obtained an appeal from a judge of the Circuit court.

John Lyon, for the appellant.

Howard & Sands, for the appellees.

ROBERTSON, J. The only ground for the jurisdiction of a court of equity, in this case, is that a discovery from the defendant was necessary to enable the plaintiffs to recover the slaves in controversy. The bill sufficiently alleges the necessity of such discovery, but the allegation is disproved by the evidence in the cause.

The exhibits from the case of Bradshaw v. Shore and others (including the depositions, which, it is apparent, were read on the hearing of this case), show that the plaintiffs had it in their power to 359 prove, independently of any discovery which they might obtain from the defendant, that, as the grandchildren of William Hines, they were entitled, under his will, to the slaves in controversy, upon the death of Thomas Hines, on the 29th day of November, 1849: that said slaves had been sold by Thomas Hines, as his absolute property, to Alexander Scott, on the 26th day of December, 1840, as shown by his bill of sale warranting the title against all persons whatsoever: that Henry E. Shore afterwards became possessed of them by intermarriage with the widow of Scott, who took them under his will; that Shore held them

as his absolute property, and sold them as such to the defendant, on the 23d day of November, 1849, and that the defendant, under that purchase, took possession of them as absolute owner.

The discovery asked for could not disclose any fact, in addition to these, material to the plaintiffs.

In the absence of proof to the contrary, a jury would have been authorized and required to infer that the defendant was in possession of the slaves at the death of Thomas Hines, when the title of the plaintiffs accrued. He held them a few days previously to that event, claiming to be the absolute owner, and the burthen of proof would have been upon him to show that he had parted with the possession before it happened; for one in possession of property, claiming to be the absolute owner, is presumed to continue to hold it, until the contrary is made to appear.

It is doubtful whether the bill is to be understood as charging that, in addition to the slaves John, Reuben and Lucy, there were four others whose names were unknown, who also went into the possession of the defendant. If it is to be so understood, the allegation was not only wholly unwarranted by the facts, but was obviously so known to be by the plaintiffs themselves. The

defendant makes no reference what- 360 ever to these four slaves in either of his answers, but treats the bill as seeking to recover from him only the three above named, and their increase, if any. In their exceptions to the answers the plaintiffs did not object that the defendant failed to respond as to the four slaves also; nor did they propound any question to him respecting them in either of his examinations before the commissioner. It is manifest that it was well understood, by all parties, that the defendant had nothing to do with these four slaves, and that no discovery was needed or desired by the plaintiffs in reference to them.

The call for a discovery as to the increase of the slaves named in the bill was a mere pretence. There was no increase; and there is no reason to believe that the plaintiffs supposed that there was any. The case of *Armstrong v. Huntons*, 1 Rob. R. 326, is authority to show that a call like this is insufficient to give jurisdiction to a court of equity.

As to the call for a discovery of the value of the slaves, it is enough to say that it was as easy for the plaintiffs as for the defendant to ascertain their value.

Upon the whole case it is quite clear that the demand for a discovery was colorable only, and that a court of equity ought not to take jurisdiction.

But it is insisted that the objection must be made by demurrer, or by plea.

In this case a demurrer could not be sustained because the allegations of the bill are sufficient to show the necessity of a discovery.

No plea was filed putting directly in issue the allegation that a discovery was nec-

essary to the plaintiffs: but the defendant in his amended answer says he is advised that the plaintiffs' proper remedy, if they are entitled to recover at all, would be an action at law, and that they ought not to be permitted to prosecute their
361 *suit in chancery, because they have a full and sufficient remedy at law.

We deem it unnecessary to decide whether this put properly in issue the fact as to the necessity of a discovery; because we think that even if no objection to the jurisdiction were made in any form in the pleadings, it would be competent to the defendant to make the objection on the hearing; and the court should dismiss the bill if it then appeared, from the whole case, that the call for a discovery was colorable merely.

The statute, Code ch. 171, § 19, p. 711, has no application to such a case. It applies where the objection is for mere matter of abatement; as, where the case is a proper one for a court of equity, but not for the particular court in which the suit is brought; or, where the suit ought to be abated by reason of some circumstance attending the situation of the plaintiff, or defendant, or the like.

But the statute does not apply where the objection, instead of merely tending to divert the proceedings to some other equitable jurisdiction, or to suspend them, or to abate the particular suit, is absolutely in bar of the claim to the interposition of a court of equity, and impugns the right to sue in that court altogether.

Accordingly where the case appears on the face of the bill to be proper for the cognizance of a court of law only, and not of any court of equity the statute has been held not to apply. *Pollard v. Patterson*, 3 Hen. & Munf. 67; *Hudson v. Kline*, 9 Gratt. 379; *Beckley v. Palmer*, 11 Gratt. 625.

Where the bill alleges proper matter for the jurisdiction of a court of equity (so that a demurrer will not lie), if it appears on the hearing that the allegations are false, and that such matter does not in fact exist, the result must be the same as if it had not been alleged, and the bill should be dismissed for want of jurisdiction.

362 *In this case, the decree must be reversed, and the bill dismissed.

It having been suggested in this court, that the amount of the decree against the appellant has been paid by him, it will be proper for the Circuit court if that shall be made to appear, to make an order of restitution in his favor, unless cause be shown to the contrary. *Flemings v. Riddick*, 5 Gratt. 272.

The other judges concurred in the opinion of Robertson, J.

Decree reversed.

363 *Insurance Company of the Valley of Virginia v. Barley's Adm'r.

January Term, 1863, Richmond.

1. Statute—Interpretation of "Preceding Vacation."—As actions at law in the county courts are cogni-

zable only at the quarterly terms, so motions to set aside any of the proceedings in the office in such actions are cognizable only at a quarterly term. And therefore the "preceding vacation" referred to in the Code ch. 171, § 51, p. 715, means in its application to such cases, the interval between the quarterly terms of the court.

2. Judgments by Confession—Power of Attorney.*—A power of attorney to confess a judgment may be executed before the action is brought.

3. Same—In Court—In Clerk's Office.—A judgment may be confessed either in court or in the clerk's office, by an attorney in fact, though the attorney is not a lawyer.

4. Common Law—Changed by Statute—Effect of Repealing Statute.†—When a statute changing the common law is repealed, the common law is restored to its former state.

On the 21st day of January 1857 the Insurance Company of the Valley of Virginia sued out from the clerk's office of the County court of Frederick, a summons in debt against John W. Barley and L. E. Swartzwelder, for \$571.00, with interest, and \$2.63 costs of protest. On the same day these defendants executed a power of attorney by which they authorized William L. Bent to confess a judgment for them in a suit pending in the clerk's office of the County court of Frederick, for the amount of the debt, interest and costs of protest. And still on the same day the attorney did confess the judgment, and filed the power with the papers in the office.

364 *On the 13th of February Barley gave notice to the Insurance Company, that on the first day of the next March term of the County court of Frederick, he should move the court to set aside the judgment confessed in the office, for, among other reasons, the following: 1st. Because the power of attorney was executed before the suit was brought. 2d. Because William L. Bent was not an attorney at law, and an attorney in fact cannot confess judgment for his principal. 3d. Because if an attorney in fact could confess judgment in open court, only the defendant himself

*Judgments by Confession.—See *Shadrack v. Woolfolk*, 32 Gratt. 711, and *foot-note*; *Saunders v. Lipscomb*, 90 Va. 652, 19 S. E. Rep. 450.

In *Stringer v. Anderson*, 23 W. Va. 485, it was said: "While the statute makes provision only for the confession of judgment in the clerk's office, it has been held, and such is the uniform practice of the courts, that the defendant may acknowledge the plaintiff's action when the court is in session at any stage of the cause. *Insurance Co. v. Barley*, 16 Gratt. 363."

See generally, monographic note on "Judgments by Confession."

†Common Law—Changed by Statute—Effect of Repealing Statute.—It is well settled that, if the common law is changed by a statute, which is itself afterward repealed, the common law is thereby revived. See the principal case cited as authority for this proposition in *Nickels v. Kane*, 83 Va. 312. *Rose v. Brown*, 11 W. Va. 142; *State v. Mines*, 33 W. Va. 131, 18 S. E. Rep. 471.

See also, in accord, *Booth's Case*, 16 Gratt. 519; *Moseley v. Brown*, 76 Va. 424.

can confess a judgment in the clerk's office.

The Insurance Company appeared at the March term of the court, and made defence; and the motion was continued by consent to the next June term.

At the June term the Insurance Company filed a plea of estoppel to the first ground of objection stated by Barley; to the allowance of which he excepted. On the hearing of the motion, the plaintiff offered to introduce a witness to prove that the power of attorney under which the judgment was confessed, was executed before the suit was brought. But the court refused to permit the plaintiff to examine the witness for that purpose and he again excepted.

It appeared, upon the hearing of the motion, that William L. Bent, at the time he made the confession of judgment, was not and never had been an attorney at law. That he produced the power of attorney to the clerk of the court, and confessed the judgment under it. That there was no proof before the clerk, of the execution of the power; but on the trial of the motion it was admitted that it was executed by Barley and Swartzwelder on the day of its date; and it was filed by the clerk with the papers.

The court refused to set aside the judgment; and the plaintiff again excepted; 365 and applied to the Circuit *court of Frederick county for a supersedeas, which was accorded. And at the June term of the court for 1859, the suit having been revived in the name of Barley's administrator, the Circuit court reversed the judgment of the County court, and set aside the original judgment. And thereupon the Insurance Company obtained from a judge of this court a supersedeas to the judgment of the Circuit court.

Byrd, for the appellant:

The county court of each county is in respect of all its terms, monthly and quarterly, a unit under the constitution and laws of Virginia, and at the former it has the same general jurisdiction, in respect to the trial and determination of motions, that it has at the latter; except as to that allowed by the 5th section of chapter 167, p. 640 of the Code of Virginia, which has no relation to or bearing upon this case. It is therefore respectfully submitted whether under the terms of the 51st section of chapter 171, p. 353, of said Code, pursuant to which it is professed to have been issued, the notice of the 13th of February was not too late to authorize on any ground whatever, the exercise of the authority conferred by that section upon the courts of this commonwealth.

Assuming for the purposes of the argument, contrary to what we allege to have been the fact, viz: that the power of attorney was executed before the institution of their suit against John W. Barley and L. E. Swartzwelder in said County court, we have to remark:

That the right of parties to make and accept confessions of judgment, and thereby to terminate litigation between them, con-

tra-distinguished from the legal means of making its exercise effectual, is not necessarily dependent upon the existence of 366 any express legal provision *authorizing or conferring it, but is one of a fundamental character, resting upon general principles, which inheres in the members of the social body, under our system of jurisprudence, as an inevitable incident to the acquisition and ownership of property, and the free power of managing, controlling and disposing thereof, subject only to such limitations or restrictions as may be at any time expressly imposed by law; and that it may be exercised in any form or mode, which, under existing legal principles or provisions, may be effectual, except so far as directly inhibited by legal enactment. In other words, that it is a right inherent in the members of society, as an inevitable incident to the proprietary system recognized and upheld by our laws, and is not one which depends for its existence upon any special legal enactment—just as does the right of any individual to admit and liquidate the amount of his indebtedness to another by the execution of his bond to that other, or otherwise. In either case the effectual and beneficial exercise of such right depends, more or less upon the means which the law may provide in aid thereof.

That, therefore, the effect of the passage of the 41st section of chapter 171, page 651 of Code of Virginia was not to confer a new right, but to provide an additional mode or means for the practical and effectual exercise of one pre-existent, by imposing in general and unqualified terms upon the several clerks of the various courts of original jurisdiction in the commonwealth, the duty of entering of record in vacation, such confessions of judgment as might be made and accepted by parties in their respective offices, to "be as final and valid as if entered in court on the day of such confession, except merely that the court shall have such control over" the same "as is given by the last section"—the 51st of said chapter 171.

367 *That said right, then, to confess a judgment, being one of a fundamental character, and said 41st section having thus, in general and unqualified terms, provided the means of its effectual exercise before the clerk in his office, the question results, whether, in respect of that mode of exercising said right upon the assumption that said power was executed before action brought, there was, on the said 21st of January, 1857, when the confession of judgment in question in this case was made and entered, any binding and existing provision of law, which, in consequence of its having been so executed, rendered it "void," or so impaired its validity that it was inoperative "to support or authorize a judgment to be confessed."

That to sustain the affirmation of the issue involved in this question, certain former acts to be found, respectively, in sections 106 of chapter 128, page 512, and

in section 12 of chapter 76, page 270, of 1st vol. Rev. Code of 1819, are referred to and relied on by the appellee, notwithstanding they were not merely wholly pretermitted in the revival of 1849, but also directly repealed thereby.

[See section 1 of chapter 216, p. 800 of Code of Va.]

But to obviate this it is insisted, that "the repeal of one statute which repealed a former statute does not revive the first statute;" and therefore it is argued by way of submission, that the mere failure to re-enact the law which has been in force from 1794, does not revive a law which was obsolete, and which was not re-enacted because it was thought unnecessary to prevent a mode of proceeding which had been out of use for more than one hundred years," &c.

To this we reply:

I. That it does not meet the question, because there was not only a failure to re-enact said former acts upon 368 *the adoption of the Code of 1850; but, in addition, they were directly repealed thereby.

[See sec. 1 of chap. 216.]

II. That the rule, that the repeal of a repealing statute, does not revive the original statute, was prescribed by statute, and it is submitted, has always been deemed to be confined in its operation to statutory laws.

III. That a simple but conclusive test, as to whether said old acts were not repealed by the adoption of said Code of 1850, may be found in the inquiry, whether a prosecution could now be maintained under that of them, to be found in 12th section of chapter 76, p. 270, 1st Rev. Code of 1819.

IV. That the failure to re-enact said former acts, did not proceed from the causes, or either of them, suggested by appellee's counsel; and that to suppose it did, would necessarily stultify the revisors who prepared it, and the legislature which adopted said Code of 1849; but from the deliberate intention to abrogate and repeal them in accordance with a change in the policy of Virginia legislation in reference to the collection of debts, consequent upon the changed condition of affairs within the estate.

V. Then more particularly as to what was and was not the effect of the passage of said old acts, so far as the present inquiry is involved:

1. It amounted to a legislative declaration that, under the general practice which had obtained in various modes or forms in the exercise of said right of individuals to make and accept confessions of judgment, that, amongst others which prevailed to some extent through the instrumentality of powers of attorney, "made before action brought," was valid.

2. To provide that thereafter such instruments should be void, and to inhibit, under a penalty, the making of confessions of judgment pursuant thereto.

369 *3. And thereby to constitute that particular mode of exercising said

general right, an exception to said general practice.

4. But that thereby, no general provision of the statute or principle of the common law was repealed; nor was said general right itself abrogated, nor yet its practical exercise impaired, save only to the extent of that exception.

VI. Then as to the effect of the adoption of the Code of 1849:

1. It is submitted, if the practical exercise in one of several modes of a general right, which, upon general principles, inheres in the individual members of society, is inhibited by statute, and in a Code subsequently adopted, professing to embody the entire statutory law of the State, that statute is either wholly pretermitted or directly repealed, or both, whether, in the absence of any legal provision to the contrary, such exercise thereafter of said right is not fully discharged from the restriction so imposed.

And if so, it is most clear:

2. That the effect of the adoption of said Code of 1849 was, wholly, to abrogate said exception so ordained, as above shown by the passage of said former acts, and consequently to restore, relieved therefrom the practical exercise of said general right, and to reinstate it in the same plight that it was anterior to the passage thereof.

VII. That in respect of the suggestion that the particular mode in question of exercising said general right was "obsolete," and the argument sought therein to be deduced therefrom; it has no application in this case, however long that mode has been in disuse; because such disuse was not the result of the voluntary, general consent of society, but in consequence of a penal act prohibiting it.

VIII. That said exception having 370 been thus abrogated, *&c., even upon the concession, for the purposes of the argument, that said power of attorney was made before "action brought;" it follows necessarily, that, so far at least as said former acts are concerned, it was and is a valid instrument, and that the said judgment confessed pursuant thereto, and duly entered of record, on the 21st day of January, 1857, was equally so, and ought not to have been set aside.

As to the alleged grounds of error insisted on, viz:

"That an attorney in fact cannot confess a judgment."

As to this it is to be observed:

I. That the proposition asserted therein is so broadly stated, as to cover all cases of confession of judgment, whether made in open court, or in the clerk's office; and thus viewed, that its refutation is furnished by this court in its action in the case of *Calwells v. Shields, &c.*, 2 Rob. R. 305, in which the validity of an appearance in court, per an attorney in fact, for the purpose of confessing a judgment, and the confession therein of one per such attorney, is fully recognized and sanctioned.

II. It is submitted:

1. That the act of Parliament, Stat. of West. 2d (18th Edward I) chapter 10, did not restrict the appearance by attorney to attorneys at law. (See 1 Tidd's Pr. 62, 63 marginal paging.) But if it did, the argument sought to be deduced in behalf of said Barley, if it proves aught, proves too much, as we have no statute of similar import in Virginia, and, therefore, according to it, even at this day, an appearance in a pending suit therein, can be made only by the party in person.

2. That, although a confession of judgment is certainly important in some respects, it is not so in any sense involving professional skill, &c. The sole function of the attorney per whom it may be made, being merely to pursue the authority
371 clearly conferred on *him by the instrument under which he acts, and if he should not substantially do so, his action is naught.

3. And again, that a simple but clear solution of the question raised by the objection, "that an attorney in fact cannot confess a judgment," may be found in the enquiry, whether a prosecution could have been maintained against the individual who, as an attorney in fact, confessed the judgment referred to in said case of Calwells v. Shields, &c., under the act 1 Rev. Code, 1819, p. 268, sec. 3. chap. 74, and sec. 4, chap. 164, p. 635 of Code of Virginia, for the recovery of the penalty of \$1,500, thereby inflicted upon any person who should presume to appear as counsel, &c., in any court of this commonwealth, without being duly licensed, &c., as such.

4. And that neither the practice nor the common law rule, confining the right to appear to parties in person, ever prevailed in Virginia, or if such was the case, has long since, in the correct sense of that term, become wholly obsolete.

As to the other grounds of error, viz.
"If an attorney in fact may confess a judgment in open court, he cannot do so in the clerk's office."

As to this, it is respectfully submitted:

I. That, as heretofore suggested, the right of parties to make and accept confessions of judgment, is one which has, upon general principles, ever inhered in them, to be exercised in any mode not expressly inhibited by law, wheresoever and whensoever the means existed of making its exercise legally effectual, and that it was not the effect of the passage of said 41st section of chapter 171 to confer the former, but only to provide the latter.

II. That it was clearly the policy of the law to furnish every safe facility for the exercise of said right, and thereby to enable parties, with the least costs and
372 *delay possible, to terminate needless litigation: hence said 41st section provided in broad and positive terms; that such confessions made, in vacation, in the clerk's office, "shall be entered of record by the clerk in the order or minute book, and be as final and valid as if entered in court on the day of such confession, except

merely that the court shall have such control over it as is given by the last section of said chapter" 171—which policy would, to a great extent, be defeated under the construction contended for in behalf of said Barley.

III. That thus the effect of the enactment of said 41st section having been, to the means theretofore existing for the effectual exercise of said pre-existent right, so to superadd, in broad and positive terms, those thereby furnished; it followed eo instanti, as an inevitable legal consequence, in the absence of any provision to the contrary, that, in the use of the latter, any instrumentality might be employed that could be, or was applicable in that of the former. Therefore, if at the time of the passage of said 41st section, through the instrumentality of an attorney in fact, said right of confessing judgment could be effectually exercised in open court, (see said case of Calwells v. Shields, &c.), after its passage, with like effect, it could also be exercised, in vacation, in the clerk's office. But even if it could be considered that the effect of the passage of said 41st section, was not thus merely to furnish the means of its effectual exercise in the clerk's office, in vacation, as contradicting from the said right itself, but also to confer the latter; still, under the broad and unqualified terms in which said act is couched, that the practical result would be the same as that just indicated in regard to the former instrumentality, by or through which it could be exercised in the clerk's office.

IV. Then, it being a general, nay almost an universal canon of law, that how-
373 ever a man may lawfully, in *respect of his own interest, exercise, in propria persona, a right pertaining to himself individually, he may do so per a duly authorized agent; it also follows therefrom, as an inevitable legal consequence, in the absence of any prohibitory provision of law, that, in any case in which a party could, in his own person, effectually resort to the means furnished by said 41st section for the exercise of said right, he could equally do so, per his duly constituted attorney in fact.

[See Paley's Law of Principal and Agent, 28 Law. Lib., pages 1, &c.; Story on Contracts, secs. 125 and 127, pages 135, '6, '7; and Story on Agency, sec. 6, chap. 11.]

V. That therefore, if said John W. Barley and L. E. Swartzwelder could, on said 21st day of January, 1857, in their own proper persons, have effectually exercised said right by the means furnished by said 41st section of chapter 171 of the Code of Virginia; and that they might have done so is alike unquestioned and unquestionable; equally and effectually was it then competent for them to have done so, per their duly constituted and authorized attorney in fact; and consequently, that said power of attorney, which is admitted to be a genuine instrument, was not void but valid, and said judgment confessed and duly entered pursuant thereto was "as final and valid, as if entered in court on the day of such confes-

sion, except merely that the court" was authorized by said sections 41 and 51 of said chapter 171, at its term then next ensuing "to set" it "aside," "and make such order concerning the same as may be just."

VI. Again, therefore, that, so far as appears from the record, there having been no "just ground in law or fact, for the exercise of the supervisory power given by said 41st and 51st sections "over all proceedings in the office during the preceding 374 vacation," in whatever "sense, as applicable to this case, the terms "preceding vacation" may be taken, there was no error in the judgment of said county court "refusing to set aside" that so entered in its office, on confession per William L. Bent, as attorney in fact, upon the 21st day of January, 1857.

VII. That the courts, no more than the clerks in their offices, have power to pronounce, or enter up judgments, except pursuant to law, and therefore the fact alone, that the latter can only enter up a judgment in his office pursuant to said 41st section, does not prove that his functions under that section are exclusively ministerial no more than that those of the former are so in like cases.

VIII. But that it is immaterial whether the functions of a clerk, under said 41st section, are exclusively the one or the other, or compounded of both, because as necessarily incident thereto, he must be taken to be invested with all power and authority essential to the full discharge of the duty thereby imposed upon him in terms so general, positive and mandatory, as to superinduce the practical application of the general rule, that any means which a man may, in his own person, lawfully employ in the exercise of a right which pertains to him in his individual capacity, he may, with equal effect, employ per his duly constituted agent, as has, it is humbly conceived, been already demonstrated in a former part of this note.

IX. Yet, even if it should be considered a consequence of its not having been expressly conferred upon him by said 41st section, that the clerk is not authorized to receive proofs in his office of the execution of such a power of attorney as is involved in this case, &c., and that it was expedient for the full and accurate exercise of the functions thereby so imposed on him, that

375 he should have been invested therewith; that the omission "is but one of those instances of imperfect legislation, of occasional occurrence in Virginia as well as elsewhere, which, so far as that result can be avoided by reasonable construction, is never allowed to defeat, or restrict, in a material respect, the practical operation of a general statute—especially when, as in this instance, the act in question, itself, provides a summary and comprehensive remedy, by which any imposition practised upon the clerk by means of a spurious power of attorney, may be defeated and corrected, if resorted to in due time, and if not, by adopting another

equally efficacious remedy, which, upon general principles, would be clearly applicable to such a case.

The Attorney General, for the appellee:

The act Code edition of 1860, ch 171, § 51, p. 715, provides that the court shall have control over all proceedings in the office during the preceding vacation. Then whether this motion was made in time depends upon the construction to be given to this phrase "the preceding vacation." The jurisdiction of the monthly and quarterly terms are fixed by the act. Code ch. 157, § 17, p. 664. And *Wynn v. Scott*, 7 Leigh 63, shows the jurisdiction of the monthly terms. The jurisdiction of the court at its monthly term over this motion may be tested by the enquiry: If the court had set aside the judgment what would it have done with the case? Clearly the court at its monthly term would have no jurisdiction over it.

For the appellee we shall insist:

1st. That a power of attorney, executed before suit is brought, to confess a judgment, is void, or at least will not support or authorize a judgment to be confessed.

2d. That an attorney in fact cannot confess a judgment.

3d. If he may do so in open court, he cannot do so in the clerk's office.

376 *As to the 1st ground: Ever since 1744 up to 1st July, 1850, we had a law forbidding any confession of judgment under a power of attorney executed before suit brought, and imposing a penalty upon an attorney at law who should confess a judgment under such a power of attorney. [See 5 Hen. St. at Large, 240.] For more than a century such was the law of Virginia. We have no rules and regulations as in England, moulding and adapting them to the purpose of justice, and to prevent fraud of imposition. The rules of the English courts will be found in *Bingham on Judgments*, pp. 39, 40, § 41; 13 Law Libr. But it is insisted, that inasmuch as this law was not re-enacted in the Code of 1849, that a power of attorney, executed before suit brought, is valid. We do not assent to such a conclusion. The repeal of one statute which repealed a former statute, does not revive the first statute, and we submit that the mere failure to re-enact the law which has been in force from 1744 does not revive a law which was obsolete, and which was not re-enacted because it was thought unnecessary to prevent a mode of proceeding which has been out of use for more than 100 years. It is one of the instances of the questions that may arise from the great desire of the revisors to condense into one volume the entire statute law. Now there is no note of the revisors, and nothing in any of the other laws which goes to show that it was intended to restore the English rule on this subject.

2d. Can an attorney in fact confess a judgment? We submit that he cannot; by common law only the defendant in person, could appear in court. It would not permit him to do so by a third person. The

law there authorized him to appear by an attorney at law—an officer of the court removable for misconduct and subject to the control of the court. In Virginia an attorney at law must be licensed—must

377 have a previous "certificate of good character—is amenable to the courts—and must pay a tax for license to practice; and in England, and, as our statute shows, in Virginia, these warrants of attorney to confess judgments are always directed to an attorney at law: Therefore, our statutes, which forbid a confession of judgment on a power of attorney executed before suit brought, impose a penalty on an attorney at law, who shall confess judgment under such a power. But, if an attorney in fact could do it, the law would be evaded, by giving the power of attorney in fact. Besides this, the confession of a judgment is one of the most important acts that can be done in a cause; and, if he may confess a judgment, why not resist a judgment? If under the general doctrine, that a man may do by an agent what he can do himself, he can confess a judgment; so he can defend a suit, or prosecute it: and thus, under a power of attorney, one who is not an attorney at law, can prosecute or defend suits. We are aware that a practice has prevailed of confessing judgment in open court, by an attorney in fact. Robinson, in the 1st volume of his practice, (old ed.) p. 268, states that it is the practice to confess judgment in court by an attorney in fact, on proof in court of the execution of the power of attorney. But the question does not seem to have been considered, and we submit that it violates well settled principles. The mode of proceeding in court is to be settled by the law and practice of the court, and the general principle, that a man may lawfully do by an agent what he may lawfully do himself, does not apply to the proceedings in court—which of necessity must be prescribed by the law, and does not depend on the contracts of parties out of court. The law or course of proceeding in court, cannot be changed by an agreement out of court—only so far as the courts in the absence of statute law may have authorized

378 it. So that it brings us back to the question, whether any "one but the defendant in person, or attorneys at law, can confess a judgment; and we submit, that the common law rule, that only a party in person can appear in court, will be entirely frustrated if a third person may act under a power of attorney. 1 Tidd's Pr. 64.

The policy of the law seems to exclude all but attorneys at law from the management of a suit. Story in his work on Agency, § 25, states the distinction. An attorney at law is an agent to act for his principal in the business of courts; an attorney in fact is an agent to act in pais; and he seems to consider that an attorney in fact is excluded from acting in matters of record or which are to be entered of record. 1 Bac. Abr. Attorney, letter D; Bingham on Judgments, p. 38, 39, 13 Law Libr.; Smith v. Beriton, 1 East. R. 241. In

all the forms of powers of attorney given by Tidd in his practice, not a word is said of a confession of judgment by an attorney in fact. See what he says under the head of warrants of attorneys, p. 591 to the end of the chapter; under the head of judgment by confession and default, p. 606, &c. See Tidd's Forms, p. 181, 185.

3d. If a defendant may confess a judgment in open court, and do so by an attorney in fact, he cannot do so in the clerk's office. We have no statute laws regulating confessions of judgment in court. They are regulated by the common law and the rules of proceeding under it. Until the revisal of 1819, a defendant could not confess a judgment even in person in the clerk's office. Such confession in the office is the mere creature of the statute, and the clerk acts only in a ministerial capacity, and can only take a confession of judgment, where the statute authorizes him, and in the manner prescribed by the statute. The first law authorizing a confession in the office, is in 2 Rev. Code, 585, which provides that "any person in custody in any civil action,"

&c. The next law is in Sess. Acts, 13th

379 March, 1840, p. 46, "authorizing

the defendant in any suit at law or in equity to confess a judgment or decree, &c., for the whole amount of the plaintiff's demand, or such part thereof as the plaintiff in person, or by attorney, may be willing to take judgment for." The next law is, Sess. Acts, 20th March, 1843, p. 50, repealing the former law, and providing that "it shall be lawful for the defendant in any suit at law in actual custody, &c., to confess a judgment for the amount of the plaintiff's demand, or such part thereof as the plaintiff, or his attorney may consent to." The Code of Va., p. 651, § 2: "In any suit, a defendant may confess a judgment or decree in the clerk's office, for so much principal and interest as the plaintiff may be willing to accept a judgment or decree for." We submit then, that only the "defendant" can confess a judgment in the clerk's office. What authority has the clerk in the office to take proof of the execution of a power of attorney? What law authorizes him to decide upon the validity of a power of attorney, its construction and the proof of its execution, &c.? Certainly the law does not give it to him in terms, and it would be a forced inference to invest him with judicial powers: and it is not necessary to carry into effect the intention of the statute. Neither the letter nor the spirit of the law authorizes the clerk to take a confession of judgment from any one but the "defendant;" and, in this case, there was no proof of the execution of the power of attorney—doubtless, because the clerk felt that he had no authority to take it. Suppose that a witness had undertaken to swear to the execution of the power of attorney, and had sworn to what was not true, how would he be prosecuted for forgery? See Robinson's Forms, (new ed.), p. 5, form of confession in office under act of 1840, showing that it is to be by the de-

pendant in person; p. 22, by an attorney under a power of attorney in open court; 97, by party or attorney in open court.

380 *MONCURE, J. This is a supersedeas to a judgment of the Circuit court of Frederick county, reversing a judgment of the county court of said county overruling a motion to set aside a judgment confessed in the clerk's office of said county, by an attorney in fact of the defendants, in an action of debt brought in the said county court. The summons in the action, and the power of attorney to confess the judgment bear date on the same day, to-wit: the 21st day of January 1857, on which day also it appears that the judgment was confessed. The power of attorney recites that the suit in which the judgment was authorized to be confessed was then pending in the said county court. The notice of the motion to set aside the judgment bears date on the 13th of February 1857, and stated that the motion would be made on the 1st day of the March term next, which was the first quarterly term of the said county court after the said confession of judgment was entered. The grounds for setting aside the judgment as specified in the notice were: 1st, because the power of attorney was executed before suit was brought; 2dly, because Wm. L. Bent, (who was impowered to confess the judgment and did confess it), was not an attorney at law, and an attorney in fact cannot confess a judgment for his principal; and 3dly, because if an attorney in fact could confess in open court, only the defendant himself can confess a judgment in the clerk's office. There was a 4th ground, which need not be stated, as it was afterwards abandoned. At the March term of the county court, the notice was proved and docketed, and by agreement of counsel the motion was continued until the June term of said court, when it was heard and overruled. Three exceptions were taken by the plaintiff in the motion to opinions of the court given on the hearing. The 1st was, to the refusal of the court to reject a plea of estoppel filed by the defendant in the motion to the 1st ground set out

381 in the "notice, to wit: "because the power of attorney was executed before suit brought;" the 2nd was to the refusal of the court to permit the plaintiff to examine a witness for the purpose of proving that the power of attorney was executed before the suit was brought; and the 3rd was to the refusal of the court to set aside the said judgment confessed in the clerk's office. The 3rd bill of exceptions sets out all the evidence, which consisted of the judgment confessed in the office, the summons issued in the action, the power of attorney, and the following proofs and admissions, viz: It was admitted that at the time said Wm. L. Bent, made the confession of judgment he was not an attorney at law and never had been. It was also proved by the clerk of the court, that the confession was made by Wm. L. Bent under said power of attorney, which he produced, though there was no

proof before the clerk of the execution of the power. But on the trial of the motion it was admitted that the said power was executed by the defendants in the action, Barley & Swartzwelder, on the day of its date, and that the clerk then filed the power of attorney with the papers. The county court having overruled the motion, the Circuit court awarded a supersedeas to the judgment of the county court; and afterwards reversed it and set aside the judgment confessed in the clerk's office. A supersedeas to the judgment of the Circuit court has brought up the case to this court for revision.

The question to be decided by this court is, whether the judgment confessed in the clerk's office is invalid on both or either of these grounds, viz: 1st, because it was confessed under a power of attorney executed as alleged before the action was brought; or, 2dly because it was confessed by an attorney in fact?

But before I consider these grounds of objection to the said judgment, I will notice an objection taken by the plaintiff in error to the jurisdiction of the county 382 *court to hear the motion at the term at which it was made, to-wit: the next quarterly term after the judgment was confessed. He insists that it ought to have been made at the next monthly term thereafter. The question depends upon the true construction of the Code ch. 171, § 51, which declares that "the court shall have control over all proceedings in the office during the preceding vacation. It may re-instate any cause discontinued during such vacation, set aside any of the said proceedings or correct any mistake therein and make such order concerning the same as may be just." I think that, as actions at law brought in the county court are cognizable only at a quarterly term thereof, Code ch. 157, § 17, so motions to set aside or correct any of the proceedings in the office in such actions, are cognizable only at a quarterly term. The "preceding vacation" referred to in the Code ch. 171, § 51, means, in its application to this case, the interval between the quarterly terms next after and next before the judgment was confessed. The motion was therefore properly made at the next quarterly, and not the next monthly term thereafter. I will now consider the grounds of objection to the judgment, and

First, Is it invalid because it was confessed under a power which was executed, as alleged, before the action was brought?

At common law a power, or warrant, of attorney to confess judgment in an action to be brought after the making of the power, was valid, and was a very common security. See 1 Tidd's Prac. 9th London edition chap. 21 pp. 545-556; Tidd's Forms chap. 21, pp. 181, 183. The common law on this subject was the law of Virginia, modified no doubt by the peculiar practice of our courts, until September 1744, when an act was passed by the colonial legislature reciting that "whereas a practice has of late been introduced of taking bonds, commonly

383 *called judgment bonds, with condition for the payment of money, and a general power to any attorney to appear and suffer judgment to pass against the obligor in any court of record in this colony, in such manner as the attorney thinks proper, thereby ratifying the same, and releasing all errors either in the proceedings or record of the judgment; which practice must be attended with ill consequences, debtors having no previous notice of the time and place of rendering such judgments, whereby they are deprived of an opportunity of making discounts appear against the bond, and are first put to unnecessary law charges, and then obliged to enter into expensive chancery suits for relief." For remedy whereof it was enacted, "that from henceforth all powers of attorney for confessing or suffering judgment to pass by default or otherwise, and general releases of error to be made or given, by any person or persons whatsoever in this colony, before action brought, shall be and they are hereby declared to be absolutely null and void; and if any attorney shall presume to appear for a defendant under such power, he shall for every offence forfeit and pay the sum of five hundred pounds to such defendant." 5 Hen. St. at Large p. 240, §§ 4 and 5. This law continued in force, without any very material charge, until the Code of 1849 took effect. It was embodied in the Code of 1819 in the following form, ch. 123, § 106: "A judgment, or confession, shall be equal to a release of errors; but all powers of attorney for confessing or suffering judgment to pass by default or otherwise, and all general releases of error made or to be made, by any person or persons whatsoever within this commonwealth, before action brought, shall be and are hereby declared to be absolutely null and void." Ch. 76, § 12; "If any attorney, or other person practising as an attorney, shall presume to appear under any power of attorney, made before action brought, for confessing or suffering judgment to pass by default or otherwise, for any defendant in any court of record in this commonwealth, such attorney shall for every such offence forfeit and pay fifteen hundred dollars to such defendant," &c. These provisions of the Code of 1819 were omitted in the Code of 1849, not by inadvertence but by design; the revisors having appended to their report, p. 826, ch. 164, § 12, this note: "Section 12, 1 R. C. p. 270, is omitted as of no value. We do not perceive any good reason why a power of attorney to confess judgment should not be lawful before a writ is sued out as well as after. It is contemplated to omit also the provision on the same subject in 1 R. C. p. 512, § 106." The omission of these provisions in Code of 1849, and the general repealing clause contained in chap. 216, § 1, operated as a repeal of the said provisions and a restoration of the common law. The provision in the Code, chap. 16, § 19, that "when a law which may have repealed another shall itself be repealed, the previous law shall not be revived with-

out express words to that effect, unless the law repealing it be passed the same session," does not apply to the case, but only to a case in which one statute repealing another is itself repealed. When a statute changing the common law is repealed, the common law is restored to its former state. I am therefore of opinion the judgment is not invalid on the ground first mentioned.

Secondly, Is it invalid because it was confessed by an attorney in fact?

That a judgment may be confessed in court by an attorney in fact, is a proposition which cannot now be successfully denied. Such has been the uniform practice in this county from the earliest period down to the present time. It is referred to in the following terms in 1 Rob. Pr. old ed. p. 268: "It frequently happens that the defendant confesses judgment without being present in court, and without having

385 any attorney at law to make *the confession for him. This is effected by a power of attorney under the hand and seal of the defendant, whereby he constitutes some particular person his attorney to make the confession. This power of attorney states the style of the suit, the name of the court in which it is pending and the amount for which judgment is to be confessed. Upon the power of attorney being produced in court and proved by an attesting witness, the confession is entered accordingly." In Robinson's Forms, p. 71, No. 49, a form is given of such a confession, which has no doubt been generally used since it was published. In *Calwells v. Shields, &c.*, 2 Rob. R. 305, a judgment confessed by an attorney in fact was the subject of controversy, but the validity of the judgment was not questioned in the argument of counsel, which was very elaborate, nor in the opinion of the court. On the contrary both seemed to proceed on the assumption that the judgment was valid. That the legislature, with a full knowledge of the universality of this practice, has never prohibited or changed it, amounts almost to a statutory confirmation.

Then may not a judgment be confessed in the clerk's office by an attorney in fact? That it may, is not shown by long practice as in the case of a judgment confessed in court, because confessions in the office are of comparatively recent origin. Until 1819 a judgment could only be confessed in court, and a debtor in custody was often subject to long confinement before he could confess judgment and take the benefit of the insolvent laws. To remedy that evil, an act was then passed, providing that any person in custody, in any civil action, on any original or mesne process, and desirous to avail himself of the privileges thereby given to insolvent debtors, may confess judgment in the clerk's office, at any time during vacation, for the whole amount of the plaintiff's demand in his writ or declaration set

386 forth and costs, or such *part thereof as the plaintiff may be willing to accept a judgment for. Such judgment so confessed shall be entered of record by the

clerk, shall be final, shall have the same validity as if entered in open court; and the defendant may thereupon discharge himself from confinement in the same manner as if the judgment had been rendered in court. 2 R. C. p. 585. Under this act the judgment would of course be confessed by the defendant in person; as, being in custody, he would of necessity be present; and therefore the question never arose whether the confession could be by an attorney in fact. In 1840, however, an act was passed making it lawful for a defendant in any suit, either at law or in equity, to confess a judgment or decree in the clerk's office of the court in which the same may have been instituted, for the whole amount of the plaintiff's demand with costs, or for such part thereof as the plaintiff in person or by attorney may be willing to take judgment or decree for, &c. Acts of 1839-40, p. 46. But this act remained in force a very short time, having been repealed by the act of March 20, 1843. Sess. acts p. 50, § 4. There was no law for confessing a judgment in the clerk's office except the 1st section of the last mentioned act which confined the right to a defendant in actual custody under original or meane process, as under the act of 1819 before mentioned. And such continued to be the law until the Code of 1849 took effect; in which there is this provision—"In any suit a defendant may confess a judgment or decree in the clerk's office for so much principal and interest as the plaintiff may be willing to accept a judgment or decree for. The same shall be entered of record by the clerk in the order or minute book, and be as final and as valid as if entered in court on the day of such confession, except merely that the court shall have such control over it as is

387 given by the last section of this chapter;" being the section giving "the court control over all proceedings in the office during the preceding vacation, as before stated. This provision has ever since been in force, and the question I am now considering arises under it.

Why may not a judgment as well be confessed in the clerk's office under this provision, as in court under the common law, by an attorney in fact? There is at least as much reason in the former as in the latter case; and if the long acquiescence of the legislature in the uniform practice which has prevailed in the latter case amounts to a legislative sanction of it then it seems to follow that the legislature intended, by the provisions made on the subject in the Code, to authorize a confession to be made in the office by a defendant not only in person but by an attorney in fact. There is certainly nothing in the terms of the provision itself which excludes such an inference. It does not expressly say that the defendant may confess "in person or by attorney in fact"; nor was that at all necessary. It was sufficient only to say, as it does, that "in any suit a defendant may confess," &c.; and it was more natural that the idea should have been expressed in this brief way, seeing that

to avoid the use of surplus words, was an object much aimed at by the revisors if not by the legislature. The maxim *qui facit per alium facit per se* applies to the case, unless the act be of such a nature that it cannot be done by an attorney in fact. It is a general rule of the common law that whatever a person *sui juris* may do of himself he may do by another. Story on Agency, §§ 2, 6, 11. There are exceptions to the rule, but this case does not seem to be one of them. It does not seem that the act of confessing a judgment is of such a nature that it cannot be done by an attorney in fact. A man may do the most important acts, requiring the exercise of the greatest discretion by an attorney in fact. Why may he not do

388 by the same agency this single simple act of confessing a judgment? It is a mere ministerial act requiring the exercise of no discretion, and no professional or other skill for its performance. Why may it not be as well performed by an attorney in fact as a deed may be executed by an attorney in fact, and acknowledged by him in court, or in the clerk's office, or before a justice, &c.? It may be supposed to have been one of the objects of the legislature, in making this provision, to save unnecessary expense to the parties; and to authorize a debtor to give, and a creditor to receive, a confession of judgment in the office, without the intervention of an attorney at law. It says the judgment may be confessed "for so much principal and interest as the plaintiff may be willing to accept a judgment for." May not the plaintiff signify his acceptance by an attorney in fact? and if so, why may not a defendant confess the judgment by such an attorney? Convenience requires that he should have such power, as much as it requires that a man should have power to make and acknowledge a deed by an attorney in fact. He may not be able to go to the office and confess judgment in person. He may live in a distant county. A judgment is a security, as much as a mortgage or deed of trust, and is often given for that purpose, especially when it is confessed in the office; and it is required to be registered like a deed. Why may not all these securities be given in the same way?

But it is argued that the confession of a judgment, except by the defendant in proper person, is an act which belongs to the practice of the law, and as the law imposes a penalty on any person who shall practice law in any court of this State without being licensed, or without taking the oaths required to be taken by attorneys at law, it necessarily prohibits the confession of judgment by an attorney in fact. The same argument would apply at least as strongly to a confession in court as 389 to a confession in the office. But is the confession of a judgment except by a defendant in person, necessarily and exclusively in the province of an attorney at law? It is an act often done by an attorney at law; and so is a deed often drawn and a debt often collected by an attorney

at law. Are these acts therefore exclusively within his province, and may not any other person draw a deed and collect a debt, and receive compensation for his services too, without incurring the penalty above mentioned? Why for the same reason, may not any other person confess a judgment under a power of attorney, especially when he does that without receiving any compensation for his services? The office of an attorney at law is to prosecute and defend suits, or, as it is expressed, "ad prosequendum, or defendendum, in any court." 1 Com. Dig. Attorney B. 1. To confess a judgment, especially in the office, is neither to prosecute nor defend a suit, but to carry into effect an agreement of parties which can as well be carried into effect by laymen as by lawyers.

It is further argued that no English case can be found which recognizes the power to confess judgment by an attorney in fact, and that all the forms of warrants of attorney to confess judgment, contained in the English form books, refer to attorneys at law and not attorneys in fact. On the other hand it may be said that no English case has been found which denies the existence of such a power. It seems to be the general, if not universal practice in England, for attorneys at law and not attorneys in fact, to act under warrants of attorney to confess judgment; and therefore the forms of such warrants are so prepared in the English form books. They are generally addressed to certain attorneys, by name, of one of the courts, jointly and severally, or to any other attorney of the same court; and authorize them or any of them to appear for the defendant, as of the present or any subsequent

term of the court, receive a declaration 390 *for him in the action (describing it), and thereupon to confess the same action, or else to suffer a judgment by nil dicit or otherwise to pass against him in the action; and after the judgment is entered they further authorize a release of errors to be executed: and a memorandum is endorsed on the warrant, in the nature of a defeasance, setting out any terms or conditions on which the warrant may be given. Tidd's Forms 181, ch. 21. The propriety of addressing such a paper to an attorney at law, instead of an attorney in fact, is manifest from its terms. It contemplates the performance of acts which appropriately belong to the province of an attorney at law. But a mere confession of judgment which a defendant may and often does give in proper person, is a very different and a very simple thing, and may as well be done by an attorney in fact. The form of such a confession is given in Tidd's Forms p. 185, ch. 22; and in Bingham on Judgments p. 35, 13 Law Library. At common law, as a general though not universal rule, a party could prosecute or defend his suit, only in proper person. By the statute of Westm. 2 (13 Edw. 1) ch. 10, a general liberty was given to the parties of appearing by attorney. 1 Tidd's Prac. 92, ch. 4. But a party may still prosecute or defend his suit

in proper person, if he chooses to do so; which however he rarely does, as it is an act requiring professional skill. The mere confession of a judgment however, being an act which requires no professional skill, is generally done by the party in proper person; and not being within the peculiar province of an attorney at law, may be done by an attorney in fact, according to the general principle that what a man does by another he does himself. This I think has always been the law, and of course was so even before the stat. of West. 2, ch. 10.

It is further argued that the law as it was before the Code of 1849 was adopted, 391 imposed a penalty on attorneys *at law only, for confessing judgment under a power made before action brought, which showed the intention of the legislature that such attorneys only, and not attorneys in fact should confess judgments, otherwise the object of the law would be frustrated by the confession of judgment by attorneys in fact under a power made before action brought. The answer to this argument is, that the evil intended to be remedied by the act of 1744, 5 Hen. St. p. 239, before referred to, which was the origin of that law, was the practice which had previously prevailed of taking what were called judgment bonds with a general power to any attorney to appear and suffer judgment to pass against the obligor in any court of record in the colony; and therefore the law properly imposed a penalty on any attorney who should act under such a power. But the law also declared the power null and void, so that it could not be frustrated by the appointment of an attorney in fact, who could no more execute a void power than an attorney at law.

Again it is argued that the legislature could not have intended to give the clerk the power to decide upon the sufficiency and proof of the power of attorney, and therefore the law makes no provision in regard to the manner in which such a power is to be proved. The power to take a confession of judgment is not greater than many powers which a clerk unquestionably has. There is rarely if ever any difficulty in receiving a confession of judgment, as the power is generally plainly drawn, leaving no room for construction, and the clerk if he does not know the parties can easily satisfy himself as to their identity. And if he should make any mistake, or be imposed on in any way, his act is subject to the control of the court, which may set it aside or correct any mistake therein, and make such order concerning the same as may be just. It is said that at least the power of attorney ought to have been proved by an 392 *attesting witness, whereas, in this case, there was no attesting witness and no proof at all before the clerk of the execution of the power, which was simply received and filed by him. The law does not require that there should be an attesting witness, nor prescribe the mode of proof. 1 Tidd's Pr. 546. The defendant in the action who moved to set aside the judgment,

admitted, on the trial of the motion, that the power of attorney was executed by himself and his co-defendant on the day of its date, and did not pretend that it was executed under any mistake or misrepresentation, or that the debt was not justly due; but based his claim for relief solely on the ground of mere technicalities. I think they do not sustain it, and that the law as well as the justice of the case is against him. I am therefore of opinion to reverse the judgment of the Circuit court and affirm that of the County court.

The other judges concurred in the opinion of Moncure, J.

Judgment reversed.

393 *Harvey v. Skipwith & als.

April Term, 1868. Richmond.

1. **Pleading and Practice—Breach of Contract—Action in Tort—Contract Stated in Count.**—The hirer of a slave puts him to a dangerous employment in violation of the contract of hiring, and the slave is injured. In an action by the owner against the hirer for the injury to the slave, the stating the contract in the count, and the injury as done in violation of the contract, does not prevent the count being in tort.
2. **Slaves—Injury to—Suit by Reversioners.**—Persons owning a reversionary interest in a slave may sue for an injury done to him whilst held by the life tenant.
3. **Same—Same—Same—Descriptio Personarum—Case at Bar.**—A husband who has survived his wife and has qualified as her administrator, may unite with the other joint owners of the reversion of a slave for an injury done to him; and the description of him in the commencement of the declaration as administrator of his deceased wife, will be considered as mere *descriptio personarum*; the declaration stating the interest in the property as his, and the injury done to his property.
4. **Same—Same—Same—Defence.**—The fact that the life tenant has received back the slave from the hirer, before the action is brought by the reversioners, constitutes no defence to their action.
5. **Same—Same—Breach of Contract—Negligence of Slave—Effect of.**—If a hired slave is put by the hirer to a dangerous employment, in violation of the contract of hiring, and is seriously injured whilst thus employed, the hirer is liable for the damages, notwithstanding the slave may have been negligent or imprudent, or have acted in disobedience of the orders of the hirer in respect to such employment, and notwithstanding such negligence or imprudence or disobedience may have been the proximate cause of the injury.

***Descriptio Personarum.**—In *Goshorn v. County Court*, 42 W. Va. 790, 26 S. E. Rep. 453, the court said: "The first matter that attracts attention is why these plaintiffs should sue, as executors of J. H. Goshorn, deceased, for the price of hogs bought by themselves of Armstrong, and sold to the county court. It is evidently a contract in their own right, and they must be regarded as suing *in suo jure*, though the description of executors be added to their names as plaintiffs. Such matter of description may, however, be treated as surplusage, and therefore a harmless error. See 3 Lomax, Ex'rs, marg. p. 371; 8 Rob. Prac. (New Ed.) 518; *Rose's Adm'x v. Burgess*, 10 Leigh 186; *Harvey v. Skipwith*, 16 Gratt. 393; *Clarkson v. Booth*, 17 Gratt. 490, 497."

dience of the orders of the hirer in respect to such employment, and notwithstanding such negligence or imprudence or disobedience may have been the proximate cause of the injury.

This was an action on the case in the Circuit court of the city of Richmond, by Robert Skipwith and others 394 *against Robert Harvey. The declaration was filed at July rules 1858, and contained two counts. In it Robert Skipwith, George N. Skipwith, Wm. Skipwith and James M. Whittle administrator of Cornelia L. Whittle deceased, who was Cornelia L. Skipwith, complain of Robert Harvey, &c. For that heretofore, &c., the plaintiffs were the owners and proprietors of the reversion of a slave named Jefferson, in which Mary Skipwith held a life estate; and that the defendant had hired the said slave from Mrs. Skipwith for the year 1853, at the price of one hundred and forty dollars; but upon the distinct understanding and agreement that the said slave should not be employed in or about the blasting of rocks or using powder, or expose to hazard of life or serious injury from being thus dangerously employed. That the defendant in violation of his agreement did employ the said slave about the blasting of rocks or using powder, thereby exposing him to danger; and in consequence thereof on the 28th day of May, 1853, the said slave while engaged in and about the blasting of rocks and using powder, was seriously injured by an explosion of the powder so being used, and had both his eyes so injured as to destroy the sight thereof, &c.

The second count after stating the title of the plaintiffs to the reversion and the life estate of Mrs. Skipwith, and her possession of the slave Jefferson as in the first count, omitted the statement as to the hiring of the slave by the defendant from the life tenant; and instead thereof, charged—That the defendant not having obtained therefor the permission and authority of Mrs. Skipwith or the plaintiffs, but against the express injunction and request of Mrs. Skipwith, did wrongfully employ the said slave in and about the blasting of rocks and using of powder. In consequence whereof, &c., as in the first count. To the damage of the plaintiffs fifteen hundred dollars.

395 *At the November term 1858, of the court, the defendant tendered two pleas in abatement of the action, which being objected to by the plaintiffs were rejected by the court: and thereupon the defendant excepted. The first plea prayed judgment of the writ because the three first named plaintiffs suing in their individual rights were joined in the action with the plaintiff James M. Whittle suing as administrator of Cornelia L. Whittle deceased. The second plea alleged that the three first named plaintiffs, with Thomas B. Skipwith and James M. Whittle were the owners of the reversion in the slave, in which Mrs. Skipwith was entitled to an estate during

her life. That Thomas B. Skipwith had conveyed and assigned all his interest in the slave including all claim for damages done to the said slave, to the three first named plaintiffs and James M. Whittle; and the objection was that Whittle was not a party plaintiff in his own right.

On the 4th of December, in the same term of the court, the defendant demurred to the declaration and each count thereof; and the plaintiffs joined in the demurrer: and thereupon the office judgment was set aside. And on the 19th of January, the defendant pleaded "non-assumpsit," "not guilty" and "non-damnificatus," "payment," and "accord and satisfaction;" on all which issues were made up. The defendant also tendered a special plea, which was objected to by the plaintiffs and rejected by the court. And the defendant again excepted. This plea alleged that the only contract of hire which he made for the slave was embraced within and evidenced by a writing obligatory executed by the defendant to Mrs. Skipwith, with W. Goddin as his surety; but which was not delivered until the month of April or May, 1853, by which the obligors bound themselves to pay to Mrs. Skipwith on the 1st

of the next January, \$140 for the hire
396 of the said *slave for the year 1853; and moreover covenanted to return said slave to her at the ensuing Christmas well clothed with the customary clothing and furnished with a hat. That the said writing obligatory had been fully paid off and discharged before the institution of this suit; that the slave was returned to Mrs. Skipwith at or before the ensuing Christmas, and was received by her. That if the defendant was liable to any person for the return of the slave in as good condition as when he was received by the defendant, he was liable to Mrs. Skipwith. And that after the payment of the money, and the return of the slave and his reception by Mrs. Skipwith, the said writing obligatory was delivered by her to the defendant before the institution of this suit.

At the spring term of the court for 1859, the court overruled the demurrer to the declaration; and the parties proceeded to a trial before a jury. Upon the trial the plaintiffs introduced as a witness Thomas B. Skipwith, who stated, that the slave injured was one of the slaves held by his mother Mrs. Skipwith, as her dower slaves in the estate of her late husband, and that the witness, and the plaintiffs, and Cornelia L. Skipwith, who had married the plaintiff Whittle, and had died in 1851, were the distributees and entitled to the reversion after his mother's death. The defendant then objected to the competency of the witness; but the plaintiffs having produced a deed by which he had, before the institution of this suit, conveyed and assigned to them all his interest in the slave, including therein all claim for damages for all and every injury of any kind theretofore done to the slave; the court overruled the objection; and the plaintiff excepted.

Upon the cross-examination of the witness Thomas B. Skipwith, by the defendant's counsel, he was asked if the defendant was in lawful possession of the negro
397 *when the accident happened. To which the witness replied he supposed he was, as he had hired him. And thereupon the plaintiffs asked the witness as to the terms of the contract between the defendant and Mrs. Skipwith, the life-tenant of said slave. To this question the defendant objected; the plaintiffs being no parties to that contract. But the court overruled the objection: and the defendant again excepted.

After all the evidence had been introduced the plaintiffs moved the court to give the following instructions:

"If the jury shall believe from the evidence, that the slave Jefferson, in the declaration mentioned, was hired by the defendant for the year 1853 from the life-tenant, upon the promise and agreement of the defendant that the said negro slave should not be employed in blasting rocks or using powder whilst in the service of said defendant, or exposed to hazard of life or serious injury from being thus dangerously employed: and if they believe from the evidence that the defendant took possession of the negro under that contract, and whilst so in his possession the said negro was employed by the defendant, or his agent having control of said slave, in blasting rocks or using powder, or exposed to hazard of life or serious injury from being thus dangerously employed, and was seriously injured whilst thus employed or exposed, by an explosion of powder; then the plaintiffs have a right to recover notwithstanding that the slave may have been negligent or imprudent, or have acted in disobedience of the orders of the defendant's manager in respect to such employment or exposure, and that such negligence or imprudence or disobedience may have been the proximate cause of his injury. But if the jury shall believe that said injury occurred to the said slave whilst he was in the employment of the defendant in pursuance of the contract, then they shall find for the defendant."
ant."

398 *2. "That the plaintiffs cannot recover in this action the value of the life estate of Mrs. Mary Skipwith in the slave Jefferson, or the interest in remainder in the said slave of Thomas B. Skipwith."

The defendant objected to the instructions moved for by the plaintiffs, and moved for six instructions himself. Of these the first three were given by the court. The others were as follows:

4. "The court instructs the jury that the case of *West v. Sweeney* recently decided by the special court of appeals, should not rule their construction of the contract in this case; that the contract declared on in that case is different from this, and that the evidence there given in support of the breach of the contract differs from this; and that in relation to the contract here the jury are to look to the court for the construction of

the contract; and the jury are to determine whether such a contract has been made, and if made whether it has been broken."

5. "The jury cannot find for the plaintiff although they should believe from the evidence that the said slave Jefferson was injured as charged in the declaration; unless they shall further believe from the evidence that the said negro was put to the said forbidden employment by the defendant, or by his agent authorized by the said defendant to put the said slave to such forbidden employment, and if they shall believe that the said slave was put to such employment by the agent of the defendant out of the line of his authority and against the orders of the defendant given to said agent, then they must find for the defendant."

6. "Though the jury should believe from the evidence that the boy Jefferson was employed by the defendant or his agents to drill the hole in the rock, and that he was employed by the defendant or his agents to

bringing up the keg of powder to the place
399 where the superintendent *intended to use it, yet they are not to find for the plaintiffs if they shall further believe that the bringing up of the keg of powder was all that the said negro had to do with the matter of blasting and using the powder, and that after he had delivered the keg it was his orders and in accordance with the general use and custom of the negroes to go back to his regular work, and that his lingering at the place was without the knowledge or consent of the defendant or his agents and against their orders."

The court gave the instructions asked for by the plaintiffs, and the first three instructions asked by the defendant, but refused to give the last three asked by him; the fourth being refused on the ground that the case of *West v. Sweeney*, had not been used during the trial of the cause, and had not been brought before the court. And the defendant again excepted.

There was a verdict for the plaintiffs for \$520—with interest from the 1st day of January 1854, until paid. And thereupon the defendant moved the court to set aside the verdict and grant him a new trial on the grounds—that the verdict was contrary to the evidence—that the rulings of the court on the trial were improper—and that the damages assessed were excessive. But the court overruled the motion, and rendered a judgment on the verdict: and the defendant again excepted; and the court certified that the facts proved on the trial were as set forth in the previous bills of exceptions.

It appears that the slave Jefferson was one of the dower slaves held by Mrs. Mary Skipwith; and that the reversion in said slave belonged to Thomas B., Robert, William M., and George N. Skipwith, and Cornelia L. Skipwith who had married the plaintiff James M. Whittle, and had died in the year 1851. Mrs. Skipwith had for several years previous to 1853, hired slaves to the defendant Harvey, and among
400 them the slave Jefferson. *That her son Thomas B. Skipwith acted as her

agent in hiring out the slaves, and about the commencement of the year 1853, said Thomas B. on his way to Richmond to hire out slaves, met with the defendant, who proposed to hire the slaves again. This was declined at the time; but they met again in Richmond when the defendant remarked to Skipwith that he seemed to have an objection to hiring him the hands. Skipwith told him he had; the negroes had complained to him of being engaged in blasting the year before. Defendant said it was a mistake, that his overseer did the blasting. Skipwith then said that he had orders from his mother not to hire them for blasting, and that he would not hire them to blast or use powder in any way; that white men became careless in using powder and negroes more so. Defendant then said that his overseer did the blasting and that there would be no danger. The bargain was then closed.

It appears further that the defendant was a contractor on the Roanoke Valley railroad, and that the slaves hired from Mrs. Skipwith were hired to be employed on that work. In May 1853, whilst so employed, the slave Jefferson was injured by the unexpected explosion of powder, so that his eyesight was entirely destroyed. The following is the written statement of William S. Davis, the overseer of the defendant, who was a witness for him:

During the years 1852, 1853, and 1854, witness was the overseer or personal superintendent of the defendant's hands, on the line of the Roanoke Valley railroad. Defendant gave witness instructions not to put any of the negroes to work in blasting rock or using powder. He obeyed those instructions and never did put any of the negroes to that part of the work or permit them to be nigh when it was going on. Witness himself always did the blasting, and made use of the powder. The

401 *process of blasting was as follows: A hole was first drilled in the rock. This was sometimes done by one of the negroes; and when the hole was swabbed out with an instrument or brush made for that purpose. By swabbing out is meant cleaning out with a moist brush, and then with a dry one; then a little powder was put in and flashed off to see whether the hole was perfectly dry; this was always done by witness. If the hole was found to be dry, witness then proceeded to load it with powder. Sometimes some of the negroes were sent to bring the keg of powder from its place of safe deposit near, but after they had brought it and put it down they were sent away to their regular work, and had nothing to do with it any further. Jefferson may have sometimes been called upon to do that, but witness does not remember particularly that he did it on this occasion. but thinks it probable that he was. After putting the powder in the hole, witness always called out to the hands, if any were working near, to get out of the way, that he was going to fire the blast; then witness primed the hole, put a slow match to it (lighted),

himself got out of the way and stayed away until it fired off. That was what was meant by blasting—that is, putting the powder in the hole, fixing it up, and firing it off; that was always understood to be its meaning among railroad men. The negroes were never put to that, although, as witness had said, they sometimes drilled the hole and sometimes brought the keg of powder, though most generally witness brought up the powder himself. The hands were generally, or more frequently, of necessity, at work in digging, excavating, or carrying away the earth on the road near where the drilling the holes and the blasting had to be done, but when the blasting was to be done they were always sent away. On this particular occasion, after the hole was bored, witness did not remember whether he or who had drilled the hole; after the hole had been swabbed out, witness tried the hole with a little powder, as usual; the powder flashed off very well, as usual. After waiting about fifteen minutes, which was the usual time, witness went up to the hole again, and set about preparing it for a blast. He apprehended no danger whatever, or he should not have exposed himself to it; everything bore its usual appearance; all the operations had been done regularly and with the usual precautions. After waiting the time generally thought entirely sufficient, he commenced to prepare the hole, did not see Jefferson or any of the negroes about; they had no business to be about, having orders to keep out of the way; but witness has no particular recollection of having given orders on that special occasion, but presumed he did; if he did not, however, such were the general orders, perfectly well understood by all the hands. Witness proceeded to put the powder in the hole, and when the first handful was put in an explosion took place, greatly to surprise of witness; the blast just escaped witness' own head, burning one of his hands severely. Jefferson, it seems, had come up behind witness, and was from behind an embankment of excavated earth overlooking witness at the time. Jefferson was not engaged in blasting rock or using powder at the time the accident occurred.

It appears that the slave Jefferson was at the time of the injury about twenty-two years old, that he was very likely and of very good character; and that he was worth about \$1000. Mrs. Skipwith the life tenant of the slave, was then sixty-two years of age.

The defendant obtained a supersedeas to the judgment from one of the judges of the Circuit court.

Howard and Sands, for the appellant.
Welford and Morson, for the appellees.

DANIEL, J. The demurrer was properly overruled. *There is no misjoinder of counts. Each of the counts is a count in case for a tort. The second is confessedly so; and the statements and allegations in respect to the contract of hiring contained in the first, do not impress

upon that count a different character. The act complained of in the first count, as in the second, is, in its nature, a tort or injury to the reversioners, and the allegation that the wrongful or tortious act was done in violation of a contract with the life tenant, does not make the first count any the less a count for a tort. The gist of the complaint contained in the first count, is, just as obviously as in the second, the doing of the wrongful and injurious act by the hirer, of putting the slaves without the permission of the owners, to a dangerous employment and thereby causing the injury to him, and the loss to the reversioners.

If it be true, as argued, that the life tenant with whom the contract of hiring was made, might have brought and maintained her suit for the entire damage caused by the injury, still it does not follow that the reversioners were compelled to seek through her, a redress for the wrong done to them. On the contrary the authorities are clear that in such case the reversioners may sue in case for the injury to the reversion.

There is no allegation in the declaration, that the cause of action which it sets forth, in any manner, accrued to Whittle in his character of administrator. It is not stated that, at the time of the wrong complained of, his intestate Cornelia L. Whittle (his wife) was the owner in part of the slave in reversion, nor that the title to the slave in reversion, at the time aforesaid, was in Whittle in his representative character, jointly or in common with the other plaintiffs. The addition of the words "administrator of Cornelia L. Whittle deceased, who was Cornelia L. Skipwith," must therefore be treated as a mere designation or description of the person, and does not render the declaration obnoxious to the objection, urged against it, of uniting Whittle as a personal representative with parties asserting claims in their own right.

The first and second pleas, the rejection of which by the court is made the ground of the second and third error assigned, seek to present the same question. They were properly rejected; Whittle was suing in his own right.

The fourth assignment cannot be sustained. There is no conflict or inconsistency between the conduct of the life tenant in receiving the slave and his hire, and the right of the reversioners to maintain their action on the case for the wrong and injury to the reversion of which they complain. In an action of trover and conversion by the life tenant, a plea, relying on such conduct as amounting to an implied waiver of her cause of action, might be made, not without some show of argument in its favor. It might be said, in such case, that the action proceeded on the ground of a destruction of the property of the plaintiff by the wrongful act charged as a conversion, and that a waiver of the conversion was involved in taking back the slave and receiving the hire after the wrongful act: the plaintiff thus evincing, by her acts, a

purpose to treat the property in the slaves as unchanged. Be this as it may, however, it is not perceived on what ground such a plea could avail, even against the life tenant, in action on the case founded upon no alleged conversion of the slave, but proceeding on a subsisting right of property in the slave. A fortiori, such acts of the life tenant cannot be held to preclude the right of the reversioner to maintain an action on the case for the injury inflicted on their interests in the subject.

The question, presented by the fifth error assigned, has been already disposed of in passing upon the demurrer.
405 *The contract of hiring between the life tenant and the plaintiff in error having been properly set out in the declaration by way of inducement, it could not be error in the court to allow it to be proved as laid.

The first instruction given at the instance of the defendants in error, and the giving of which is made the ground of the sixth assignment of error, is plainly right. It asserts the proposition that, if a hired slave is put by the hirer to a dangerous employment in violation of the contract of hiring, and is seriously injured while thus employed, the hirer is liable for the damage, notwithstanding the slave may have been negligent or imprudent or have acted in disobedience of the orders of the hirer in respect to such employment, and notwithstanding such negligence or imprudence or disobedience may have been the proximate cause of the injury. This proposition is fairly deducible from the decision and reasoning of this court in the case of *Harvey v. Epes*, 12 Gratt. 153; and is fully sustained by the cases of *Hooks v. Smith*, 18 Alab. R. 338; *The Mayor and Council of Columbus v. Howard*, 6 Georgia R. 213; *Gorman v. Campbell*, 14 Georgia R. 137; *King v. Shanks*, 12 B. Monr. 410; and *Sims & Smith v. Chance*, 7 Texas R. 561.

The seventh assignment of error is based on the refusal of the court to give the fourth, fifth and sixth instructions asked for by the plaintiff in error. The fourth instruction is plainly without any warrant in the usages and practice of the courts. If the plaintiff in error desired the court to construe the contract of hiring, he should have stated the construction which he wished the court to propound to the jury, or at least have asked the court to declare the true legal import of the contract. Trials at law would be interminable if the courts were bound, at the instance of the parties, to point out to the jury, the particulars in which a case on *trial resembled, or differed from, other cases cited by counsel as precedents.
406

There was no evidence on which to found so much of the fifth instruction as asked the judge to say, to the jury, that if they believed that the slave was put to the alleged forbidden employment, by the agent of the defendant, out of the line of his authority and against the orders of the defendant given to said agent, then they should find

for the defendant. It is true that the witness William S. Davis says that Harvey gave him instructions not to put any of the negroes to work in blasting rock, or using powder. But he says, further, that he obeyed those instructions, and never did put any of the negroes to that part of the work, or permit them to be nigh when it was going on. He goes on, however, afterwards, to say that sometimes some of the negroes were sent to bring the keg of powder from its place of safe deposit near, but after they had brought it and put it down, they were sent away to their regular work, and had nothing to do with it any further; that Jefferson may have sometimes been called upon to do that; that he does not remember that he was called upon on the occasion in question, but thinks it probable that he was; that after putting the powder in the hole witness always called out to the hands, if any were working near, to get out of the way, that he was going to fire the blast. Then witness primed the hole, put a slow match to it himself, got out of the way and stayed away until it fired. That (he continues) was what is meant by blasting—that is, putting the powder in the hole, fixing it up and firing it off; that was always understood to be its meaning among railroad men. The negroes (he proceeds) were never put to that, although they sometimes drilled the hole, and sometimes brought the keg of powder, though most generally witness brought up the powder himself.

There is obviously nothing in the
407 *statements of this witness (who is the one most favorable to the views of the plaintiff in error), tending to show that, in employing Jefferson as he did, he was acting out of the line of his authority or against the orders of Harvey. He was, (as he styles himself in his deposition), "the overseer or personal superintendent of the hands," whose orders they were bound to obey, and the manifest tendency and drift of his evidence is to show that, in employing Jefferson to bring up the keg of powder to the place at which it was to be used in blasting, he was acting in strict conformity with the contract of hiring as understood and construed by "railroad men." And in the sixth instruction the court is asked to say to the jury that this is the true construction of the contract: that is, that though the jury should believe from the evidence that Jefferson was employed to drill the hole in the rock and to bring up the keg of powder to the place where the superintendent intended to use it, yet they should not find for the plaintiffs, if the jury believed further that bringing up the keg of powder was all that the said negro had to do with the matter of blasting and using the powder, and that after he had delivered the keg, it was his orders, and in accordance with the general use and custom of the negroes, to go back to his regular work, and that his lingering at the place was without the knowledge or consent of the defendant or his agents and against their orders. The witness Skipwith who proves the

contract of hiring, states that in his negotiation with Harvey for the hire of Jefferson, Harvey remarked to him that he seemed to have an objection to hiring the hands to him. That witness told him he had; that the negroes had complained to him of being engaged in blasting the year before. That Harvey said this was a mistake, that his overseer did the blasting. That witness then said that he had orders from his
408 mother not to hire them for *blasting, and that he would not hire them to blast, or use powder in any way; that white men became careless in using powder and negroes more so. That Harvey then said his overseer did the blasting, and that there would be no danger; whereupon the bargain was closed.

Now, one of the well received senses or meanings of the word "use" is the act of handling or employing in any manner and for any purpose; and there is no proof that Skipwith knew of the technical and restricted meaning given by railroad men to blasting, or using powder (if indeed such evidence could affect the case), nor that Harvey had referred to such meaning, in contracting, as he impliedly, if not expressly did, that Jefferson should not be put to blasting or using powder in any way. The court I think properly refused to give the sixth instruction.

The eighth and last assignment of error is on account of the court's refusal to grant a new trial. Nearly all of the questions which could arise on a motion for a new trial have been already considered in passing upon the proceedings preliminary to the verdict. Putting the case on the footing most favorable to the plaintiff in error, it is still made to appear that the injury to the slave was the consequence of a breach by said plaintiff of the duty imposed on him by the contract of hiring. The slave is proved to have been worth \$1,000, and he was rendered valueless by the injury; and the life tenant is proved to have been over sixty years of age; and it cannot therefore be truly said that \$520 was much (if any) in excess of the four-fifths of the value of the reversion, which under the instruction of the court the plaintiffs in the action were allowed to recover. The court properly instructed the jury that, the plaintiffs, in the action, could recover nothing in that
409 suit in virtue of the assignment and release to them by Thomas B. *Skipwith of his interest in remainder to the slave. This instruction, however, does not show that Whittle was without an interest in the suit. Jure mariti he was entitled to the interest of his deceased wife in the slave. We have shown that he was not to be regarded as suing as administrator of his wife; and the authorities show that in such a case as we have here he may maintain a suit, in respect to such interest, in his own name, without taking out letters of administration on the wife's estate. *Wade v. Boxley*, 5 Leigh 442; *Henry v. Graves*, supra 244.

Other objections to the proceedings were

stated in the course of the argument, but I deem it unnecessary to say more in respect to them, than that they fail, in my opinion, to disclose any sufficient reason for reversing the judgment.

The other judges concurred the opinion of Daniel, J.

Judgment affirmed.

410

*Harvey v. Skipwith.

April Term, 1868, Richmond.

1. **Pleading and Practice—Process—Defects in—How Waived.***—By appearing and pleading to the action, or by taking or consenting to a continuance, the defendant waives all defects in the process and the service thereof.

2. **Hire Bond—Function of—Parol Evidence.**†—The true function of an ordinary hire bond is not to stipulate for the mode in which the slave is to be employed, but to bind the bailee for the payment of the hire; the execution of a bond or note for the price does not extinguish so much of the contract of hiring as may relate to the manner in which the slave is to be employed; and hence oral evidence showing that there were restrictions as to the mode of employing the slave does not vary or contradict the written instrument, but is consistent with it, and may be properly admitted.

***Pleading and Practice—Process—Defects in—How Waived.**—In the principal case, the court said: "It is a well-established rule that by appearing and pleading to the action the defendant waives all defects in the process and in the service thereof. The cases go further and imply such a waiver from the defendants taking or consenting to a continuance, as fully as they do from his pleading to the action." By so doing he makes himself a party to the record and thereby recognizes the case as in court, and it is too late for him afterwards to say he has not been regularly brought into court.

This rule is recognized as settled as far as Virginia is concerned and was approved in *A. & D. Railroad Co. v. Peake*, 87 Va. 140, 12 S. E. Rep. 348; *Bell v. Farmville, etc., R. Co.*, 91 Va. 140, 20 S. E. Rep. 942; *Morotock Insurance Co. v. Pankey*, 91 Va. 267, 21 S. E. Rep. 487; and in 22 Am. & Eng. Enc. Law (1st Ed.) 168, it was said that the principle, having been settled by many cases in every jurisdiction, is beyond controversy, that whatever irregularities may occur either in the form of the process or in the manner of service, may be waived by the defendant's appearance. Many cases are cited to support the proposition, among which is *Turberville v. Long*, 8 H. & M. 309.

While the West Virginia cases seem to accord with the great weight of authority as to the effect of the appearance of the defendant on a defective service, yet as to the effect of appearance on a fatal defect in the process there seems to be some conflict. Several cases seem to agree entirely with the principal case. See *Steele v. Harkness*, 9 W. Va. 24; *Simmons v. Trumbo*, 9 W. Va. 362; *Witten v. St. Clair*, 27 W. Va. 767; *Layne v. Ohio R. R. Co.*, 35 W. Va. 441, 14 S. E. Rep. 125.

Several other cases only lay down the proposition that, by appearance to the action, in any case, for

†**Hire Bond—Parol Evidence.**—See principal case cited in *Broughton v. Coffey*, 18 Gratt. 191.

This was an action on the case in the Circuit court of the city of Richmond, brought by Mary Skipwith against Robert Harvey, to recover damages for an injury done to a slave named Jefferson hired by the former to the latter, for the year 1853. The action was brought to the October rules 1854, when the declaration was filed; in which after setting out the hiring of the slave by the plaintiff to the defendant for the year 1853 at the price of \$140, it was averred that the hiring was "upon the terms and the distinct understanding and agreement that the said slave should not be employed in blasting rocks or using powder whilst in the service of the said defendant, or exposed to hazard to life or serious injury from being thus dangerously employed."

At the next November term of the court, the defendant not having appeared, a jury was empanelled to "enquire of the plaintiffs damages, and returned a verdict assessing them at \$400; and the court entered up a judgment thereon. On the 25th of November, ten days after the case had been disposed of, the defendant by his attorney moved the court to set aside the verdict and judgment, and to grant him a new trial; and at the same term the court sustained the motion, and ordered a new trial of the action.

At the next term of the court held in May, 1855, on the motion of the defendant the cause was continued, at his costs, to the next regular term of the court. And on the 9th of December, 1857, the defendant, by

any other purpose than to take advantage of the defective execution, or the non-execution, of process, the defendant places himself precisely in a situation in which he would be if process were executed upon him, and he thereby waives all objection to the defective execution or the non-execution of the process upon him. See *Bank of The Valley v. Bank of Berkeley*, 8 W. Va. 301; *Burlew v. Quarrier*, 16 W. Va. 109; *Mahany v. Kephart*, 15 W. Va. 618; *Wandling v. Straw*, 25 W. Va. 701. And this statement of the rule, as far as it goes, is in accord with that laid down in the principal case. But, in *Quesenberry v. People's, etc., Ass'n*, 44 W. Va. 518, 30 S. E. Rep. 76, the court said: "If we notice closely the decisions as to what appearance waives, we find discrepancy. Some say that, by appearance to the action for any other purpose than to take advantage of the defective execution or non-execution of process, the defendant waives objection to 'defective execution or non-execution of process,' placing himself just as he would be if process had been properly served on him. This statement would not make him waive a fatal defect in the process, but only one in its service. *Groves v. County Court*, 42 W. Va. 587, 26 S. E. Rep. 460. Other cases go further, and waive both defect in writ and return. *Layne v. Railroad Co.*, 35 W. Va. 438, 14 S. E. Rep. 123; *Blankenship v. Railway Co.*, 43 W. Va. 135, 27 S. E. Rep. 355; *Harvey v. Skipwith*, 16 Gratt. 410."

But the court continues by saying: "It occurred to me the appearance ought not to waive a defect in the writ, if there is a motion to quash. Would it cure a void writ? I suppose, if there is no motion to quash, appearance would cure a defective, voidable

his attorney, moved the court to quash the writ of summons instituting the suit. This motion the court overruled; and then the defendant in his proper person tendered two pleas in abatement to the writ, which were rejected by the court. The point raised both in the motion and the pleas, was, that the return of the sheriff, shewing that the writ had been served by leaving a copy with defendant's wife, did not state that he gave the wife "information of the purport" of the writ; and that he had not in fact given her such notice.

The defendant then demurred to the declaration and each count thereof, and there was a joinder in the demurrers by the plaintiff; and they were overruled by the court: but no question was made upon them in this court. The defendant also pleaded "not guilty," "non damnificatus," "payment," and "accord and satisfaction," upon which pleas issues were made up. The defendant then tendered a special plea to the action, the same in form and substance with that tendered and rejected in the next preceding case of *Harvey v. Skipwith & als.*, which was rejected by the court. Thereupon the parties went to trial before the jury; when there was a verdict for the defendant; which upon the motion of the plaintiff was set aside, and a new trial directed.

412 *The cause was continued until the May term, 1859; and when it was called for trial at that term the defendant moved the court to sign five bills of excep-

writ, if not a void one. But I did not think that where a defendant moves to quash a writ or return, and is overruled, he must, to get the benefit of the error, retire and plead no further. What reason would forbid his going on with a defense of the merits, which may result in rendering the former error immaterial, or, if defeated, would deprive him of the error in overruling his motion to quash? And I find *Shepherd v. Brown*, 30 W. Va. 13, 3 S. E. Rep. 186, to this in effect, as it holds that appearance to a motion by consent continuances does not preclude a motion to quash the notice for its defects. Hence the claim made in this case that the inherent defect of the writ, if there were such defect, would be waived by after pleading, is not tenable. Nor do I see how a motion to quash a summons is lost by the failure to state in the record that the appearance is only for that purpose. The motion itself tells that it is the first defense. If it fails, why may he not go on with other defense? The right to quash an attachment is not waived by any appearance in the main action. *Dulin v. McCaw*, 39 W. Va. 721, 30 S. E. Rep. 681."

But in *Morgan v. The Ohio River R. Co.*, 39 W. Va. 28, 19 S. E. Rep. 592, a writ of *certiorari* from the circuit court was obtained not within ten days after the judgment. Counsel for the railroad company contended in the court of appeals that the appearance to the writ by Morgan without motion to quash or dismiss because of the ten days' limitation, and an agreement, after a reversal on the *certiorari*, to continue the main action, constituted a waiver of the objection; the order showing that the case was, on appearance of parties, heard on the record and proceedings and argument of counsel. But the court

tions. These were exceptions to opinions of the court given on the former trial of the cause, which were taken at the proper time and prepared during the term, but which by some oversight had not been signed by the judge. The counsel for the plaintiff united in this motion; but the court being of opinion that it had not the power to sign the bill of exceptions at the time the motion was made, overruled it; but gave the defendant the benefit of the exceptions by embodying them in the bill of exceptions taken by the defendant to the opinion of the court overruling the motion. The first of these bills of exceptions was to the opinion refusing to quash the writ, the second to the rejection of the two pleas in abatement, the third to the rejection of the special plea; the fourth refers to an instruction asked by the defendant, which was also asked on the last trial, and the fifth was to the opinion of the court setting aside the verdict, and granting a new trial to the plaintiff. The statement of the facts proved is substantially the same as are stated in the report of the next preceding case of *Harvey v. Skipwith & als.*; it only being stated in this bill of exception, that the witness Thomas B. Skipwith proved that he "concluded with Harvey a contract for the hiring of the negro Jefferson such as is set out in the plaintiff's declaration."

On the trial in May, 1859, the defendant renewed his motions made on the former trial, which were rejected by the court; and exceptions were taken. And when all the evidence had been introduced the plaintiff moved the court to give to the jury an instruction, the same as the first instruction asked for by the plaintiff in the preceding case of *Harvey v. Skipwith & als.*, except that it substituted the words, "plaintiff" for "one life tenant" *and

said: "Such cases as *Harvey v. Skipwith*, 16 Gratt. 410; *Mahany v. Kephart*, 15 W. Va. 609, and the others cited, are not in point. They hold that, by appearance for any other purpose than to take advantage of defective or non-service, the party waives defective execution or non execution of process, the only objects of service being to notify the party of the pendency of suit, which appearance shows he had. It surely does not cure a radical defect in the process or a vital objection going to the very existence of the writ of *certiorari*."

Again, in *Shepherd v. Brown*, 30 W. Va. 13, 3 S. E. Rep. 189, after citing many cases for, and approving, the proposition that, by general appearance, the defendant waived all objections to the defective execution or non-execution of the notice or process, the court continued by saying: "Was the appearance of the defendant and the repeated continuances of the cause for nearly two years a waiver of all objections to the form and sufficiency of the notice? The cases referred to by the counsel for the plaintiff in error to sustain the affirmative of this question are: *Moore v. Douglass*, 14 W. Va. 728, 729; *Brodie v. Clator*, 8 W. Va. 599; and *Roach v. Gardner*, 9 Gratt. 8. These cases do not sustain the position that simple continuances with the defendant's consent would waive defects of substance in plaintiff's pleadings. In each of these cases cited there was affirma-

omitted the last sentence. This instruction was objected to by the defendant, and he moved the court, if the instruction was given, to add to it the sentence in the instruction in the preceding case, omitted by the plaintiff. And the court gave the instruction as thus modified; to which the defendant excepted.

The defendant moved the court to give two instructions to the jury. The first marked A was as follows:

"If the jury shall believe from the evidence that the bond bearing date the 1st day of January, 1853, executed by the defendant Harvey and W. Goddin was not executed and delivered until after the conversations in January, 1853, between the witness Thomas B. Skipwith as the agent of Mrs. Mary Skipwith and the said Harvey in respect to the hiring of said slave Jefferson for the year 1853, deposed to by said Thomas B. Skipwith, then that the jury shall disregard so much of the evidence of said Thomas B. Skipwith as to said conversations, as tends to shew any agreement or stipulation between himself as agent as aforesaid and said Harvey in respect to the hiring of said negro for said year, which is not expressed in said bond."

The second which is marked B is the same as the fifth instruction asked for by the defendant in the case of *Harvey v. Skipwith & als.* These instructions the court refused to give: and the defendant again excepted.

There was a verdict in favor of the plaintiff for \$501 60. And thereupon the defendant moved the court to set it aside, and grant him a new trial, on the grounds—that the verdict was contrary to the evidence, that the damages were excessive, and that the rulings of the court in the progress of the trial, were incorrect and im-

tative action on the part of the defendant which hardly could be construed otherwise than a waiver of all defects in the pleadings of the plaintiff, or, at least, of defects such as the defendant attempted to take advantage of afterwards in the appellate court. That a party may by his acts and agreements waive defects even of substance, these cases settle, but there were no acts or agreements of the defendants in this case that amounted to such waiver, at least, in the court below, when in the case he called especial attention to these supposed defects, and the court sustained him in this position."

So, in this case, the court held that, by appearance to a motion and repeated continuance of the case generally, by consent of parties, the defendant waived any objection which he might have to the notice, because it was not served in time, but he did not thereby preclude himself from moving to quash the notice because it was *fatally defective on its face*.

Same—Same—Same.—But, as would be implied from the above, the defendant is not precluded from appearing to the action for the express purpose of taking advantage of a defective execution or the non-execution of the process. See *Wandling v. Straw*, 25 W. Va. 701; *Hickam v. Larkey*, 6 Gratt. 212; *Wynn v. Wyatt*, 11 Leigh 584; *Bank of Valley v. Bank of Berkeley*, 3 W. Va. 391; *Burlew v. Quarrier*, 16 W. Va. 108.

proper. But the court overruled the motion and rendered judgment on the verdict. And the plaintiff again excepted.

The facts certified by the judge as 414 having been proved *on the trial were substantially the same as is given in the case of *Harvey v. Skipwith & als.*, with the following addition: The bond executed by the defendant Harvey and W. Goddin to Mrs. Skipwith for the hire of seven slaves of whom Jefferson was one, for the year 1853, was produced in evidence by the defendant, and it was proved by Thomas B. Skipwith that this bond was executed some time in April, 1853; and had been fully paid; the endorsements shewing that it was paid off as early as January 5th, 1854.

On the application of the defendant a supersedeas was awarded by a judge of this court.

Howard & Sands, for the appellant.
Welford and Morson, for the appellee.

DANIEL, J. The Circuit court did right, in refusing to quash the writ, and also in refusing to receive the two pleas tendered by the plaintiff in error in abatement of the writ. Objections which do not go to the substance of an action are treated as waived if not made when the occasion for them arises. It is a well established rule that by appearing and pleading to the action the defendant waives all defects in the process and in the service thereof. The cases go further and imply such a waiver from the defendants taking or consenting to a continuance, as fully as they do from his pleading to the action. The object of the writ is to apprise the defendant of the nature of the proceeding against him. The fact of his taking or agreeing to a continuance is evidence of his having made himself a party to the record, and, of his having recognized the case as in court. It is too late for him afterwards to say that he has not been regularly brought into court. Here the plaintiff in error appeared at the November term 1854, by his attorney and moved to set

415 aside the verdict and judgment *rendered against him on a previous day of the term. At the May term in 1855, he moved for and obtained a continuance; and it is not till December, 1857, more than three years after his first appearance, that he seeks by his motion and pleas to raise objections to the service of the process.

The question presented by the plea designated as special plea V is not materially variant from that just adjudicated by the court in *Harvey v. Skipwith & others*, in passing upon plea VI in that case.

There was no error in giving the instruction No. 1 offered by the defendant in error. The principle which it asserts is identical with that propounded in the instruction given at the instance of the defendant in error in *Harvey v. Skipwith & others*.

In the case of *Howell v. Cowles*, 6 Gratt. 393, and *Towner v. Lucas*, 13 Gratt. 705, 723, this court has expressed the opinion that the true function of an ordinary hire bond is, not to stipulate for the mode in

which the slave is to be employed, but to bind the bailee for the payment of the hire; that the execution of a bond or note for the price does not extinguish so much of the contract of hiring as may relate to the manner in which the slave is to be employed; and that, hence, oral evidence showing that there were restrictions as to the mode of employing the slave does not vary or contradict the written instrument, but is consistent with it, and may be properly admitted. The Circuit court, in accordance with these views, properly refused to give instruction A asked by the plaintiff in error.

For the reasons stated, in sustaining the refusal of the Circuit court to give the fifth instruction asked by the plaintiff in error in *Harvey v. Skipwith & others*, the Circuit court did right in this case in refusing to give instruction B.

Waiving all question as to the al- 416 leged irregularity in *the bill of exceptions to the action of the court in setting aside the verdict obtained by Harvey on the second trial in this case, I think that the course of the court was clearly right; as it was, also, in refusing to set aside the verdict rendered in favor of Mrs. Skipwith on the third trial. On both of these trials as in *Harvey v. Skipwith & others*, the main question on which the case turned must have been whether the employment by Harvey, of the slave, to bring up the keg of powder from its place of deposit to the point at which it was to be used in blasting, was in violation of the true spirit and meaning of the contract of hiring. In the declaration in each case it is alleged that the slave was hired and delivered to the defendant upon the terms and the distinct understanding and agreement that the said slave should not be employed in blasting rocks or using powder while in the service of the said defendant, or exposed to hazard of life or serious injury from being thus dangerously employed. The record discloses substantially the same state of the proofs, in respect to the contract of hiring, on all of the trials, with the exception that, what we may fairly infer from the conversation between the witness Skipwith and Harvey detailed by the former to the jury, in *Harvey v. Skipwith & others*, and on the third trial in this case, is, in the certificate of the facts appearing on the second trial in this case, explicitly stated by the court to have been proved; the certificate in that particular being that the witness proved that he "concluded with Harvey a contract for the hiring of the negro Jefferson, such as is set out in the plaintiff's declaration." On each occasion the Circuit court properly refused, as it seems to me, to adopt the narrow and restricted interpretation of the contract contended for by Harvey. I cannot undertake to say that the parties, in view of the danger attending the use of powder by even the most prudent and cautious 417 *persons, and with a knowledge of the notorious improvidence and carelessness of our negro slaves, did not mean to

guard, not only against the employment of the slave in blasting, but also against his being allowed to use or handle powder in any manner. The injury complained of is clearly proved to have been a consequence of a departure by the plaintiff in error from the terms of his contract: a consequence by no means unnatural or extraordinary, but rather affording only another illustration of the dangerous nature of the subject, the use of which by the slave in any way is by the letter of the contract forbidden. I see no warrant for saying that this consequence is one which does not fall within the true scope and purview of said contract.

I see no error in the proceedings, and am for affirming the judgment.

The other judges concurred in the opinion of Daniel, J.

Judgment affirmed.

418 *Roy & als. v. Roy's Ex'or.

October Term, 1868, Richmond.

1. **Wills—Olograph—Signing—Testator's Name at the Commencement.**—In an olograph will the writing of the name of the testator at the commencement of the paper, is an equivocal act, and therefore is not, of itself, a sufficient signing of the paper to constitute it his will.
2. **Same—Same—Same—Endorsement.**—The paper being folded up and endorsed by the testator, with his name as his "R's will," is not a sufficient signing.
3. **Same—Same—Probate—Costs of.**—Such a paper being offered for probate by the nominated executor, and its probate opposed by some of the next of kin, the costs should be paid out of the estate.

This was a supersedeas to the judgment of the Circuit court of Bedford county, admitting to probate a paper writing as the last will of David M. Roy; and it being proved that the paper as well as the endorsement upon it was wholly in the handwriting of David M. Roy, the only question in this court was whether it was so signed by the testator as to make it his will.

The paper is obviously written by a very illiterate man. It commences—I David M. Roy do indever to make my last will and testament. It then proceeds through seven clauses to dispose of his property to his sister Katharine S. Moore wife of Goodrich Moore, and her children, and to his brother Samuel T. Roy. It is then dated September 9th, 1858; and after the date is a clause appointing Goodrich Moore his executor. The testator's name does not appear, except at the commencement.

419 *This writing is upon a sheet of letter paper, commencing on the first page and ending about the middle of the next; and the paper was folded in the form of a letter so that the third page was out-

side, and the words, "David M. Roy's will," is about the middle of the third page when the paper is unfolded. It was found in a pocket book of the deceased which was locked up in his trunk.

The paper was offered for probate by Goodrich Moore the nominated executor therein, and its probate was contested by the nephews of the testator.

Wingfield, for the appellants.

Goggin and Kean, for the appellee.

AJLEN, P., delivered the opinion of the court:

The question presented by the record in this case is whether the paper propounded for probate as the olograph will of David M. Roy has been executed in the mode prescribed by law.

The Code of 1849, ch. 122, § 4, requires that the will shall be signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature.

In Ramsey & als. v. Ramsey's ex'or, 13 Gratt. 664, it was held that the name of a testator at the commencement of an olograph will is an equivocal act, and unless it appears affirmatively from something on the face of the paper, that it was intended as his signature, it is not a sufficient signing under the statute. In that case Judge Daniel, delivering the opinion in which all the judges concurred, after reviewing and commenting upon the decision and opinions of the judges who delivered opinions in the case of Waller v. Waller, 1 Gratt.

454, upon the reports of the revisors, 420 and referring to Judge *Lomax's exposition of the statute, 3 Lom. Dig. 2d ed. § 35, p. 70, observed that "he thought there was no serious difficulty in coming to the conclusion that the act recognizes no will as sufficiently signed unless it appears affirmatively from the position of the signature, as at the foot or end, or from some other internal evidence equally convincing, that the testator designed by the use of the signature to authenticate the instrument."

It appears in this case that the instrument propounded was in the handwriting of the deceased; that it was written on a sheet of letter paper, the body of the writing commencing on the first page and ending about the middle of the next; that the paper was folded so that the third page was outside; that after the death of the deceased the paper was found in a pocket book in a trunk of the deceased; that there were bonds, receipts and other papers in the pocket book; that when found the paper was folded up in the form of a letter, and the words David M. Roy's will endorsed on the back, being about the middle of the third page when the paper is unfolded. The words endorsed were in the hand writing of the deceased. The name of the deceased is not signed at the foot or end of the writing. A date is attached and after the date a clause added appointing an executor.

*See the principal case cited in McBride v. McBride, 2 Gratt. 498; Warwick v. Warwick, 86 Va. 602, 10 S. E. Rep. 843; 2 Va. L. Reg. 470.

See also, Ramsey v. Ramsey, 13 Gratt. 664.

The instrument does not profess to dispose of nor does it appear that it does dispose of the whole of his estate; and it has no residuary clause. Upon this proof the case is nearly alike to the case of *Ramsey v. Ramsey*. The will there had more of the marks of a complete and concluded act than this. In that case he declared he thereby made his last will and testament in the manner and form following. The will disposed of all his estate, appointed an executor to that his last will and testament and revoked all former wills, and was dated. It was carefully preserved, was found in the pocket-book of the deceased locked up in his
421 drawer, *folded up in the form of a letter and sealed with a wafer, but without endorsement of any kind.

It is insisted, however, in this case that the endorsement on the third page in these words "David M. Roy's will," proved to be in the handwriting of the deceased, amounted to a signing in such manner as to make it manifest that the name was intended as a signature to give authenticity to the paper. Or if it cannot be regarded as a signature, that it was intended to recognize the signature of the name in the body of the will as a signing.

The argument pre-supposes that the deceased was aware of the necessity of a signing to give it authenticity and to show that it was a final and concluded act. If so it is very improbable that he would, instead of signing his name at the end of the writing in the usual manner, have written it on the middle of the next page, leaving two half pages blank from where the writing terminated in the middle of the second to the middle of the third page; a space to have written as much nearly as was written in the body of the instrument; or that he should have endorsed these words on the paper for the purpose of making it manifest that the name in the body of the instrument was intended as a signature, when the name itself written at the end of the instrument would have concluded all inquiry as to the intention.

May it not rather be inferred that the paper was a draft for further consideration. It seems that the instrument was not regarded as final when the date was added, for the clause appointing the executor follows immediately thereafter, and the instrument may have been left in its present condition with the view of adding new provisions as they occurred to his mind; as

422 was the case in respect to the clause appointing his executor. It *is an unusual mode of signing or authenticating a paper as a concluded act, by endorsing the name of the person executing in on the back. Such endorsement is usually made as a label or mark to distinguish it from other papers, and probably it never occurred to the deceased that it was to have any other function on this case. It is at the most equivocal, and being so is ruled by the case of *Ramsey v. Ramsey*.

In olograph wills there is no publication by the signing and acknowledgment, and

the attestation of witnesses in the manner prescribed by the statute; the signing is the only evidence that it is a final and concluded act. In an instrument purporting to be an attested will the proof must come up to the requisitions of the law; the court cannot dispense with any of the formalities made essential by the act. In England the signing at the foot or end is alone the index of intention by the statute of Victoria; and the manifest intention of the signature wherever placed is the rule in Virginia, and as was said in *Ramsey v. Ramsey*, it was intended by our legislature to furnish a rule in respect to the signature, which, whilst it would have all the certainty of the British statute, would yet let in wills, which though not signed at the foot or end, might be signed in such a manner as to afford internal evidence of authenticity equally convincing. The endorsement here does not furnish such internal evidence, and I therefore think the Circuit court erred in admitting the paper to probate.

The sentence should be reversed with costs; and this court proceeding to give such sentence in the premises as the Circuit court should have given, it is further declared that the paper writing aforesaid propounded for probate as and for the last will and testament of said David M. Roy deceased, has not been signed by the deceased or by some other person in his
423 presence and by *his direction so as to make it manifest that the name was intended as a signature, and that probate of the paper be refused; and that the costs of both parties in said Circuit court be a charge on and to be paid out of the estate of said decedent.

MONCURE, J. dissented.

Judgment reversed.

424 *The James River and Kanawha Company v. Lee.

Same v. Wortham.

Same v. Macfarland.

October Term, 1863, Richmond.

(Absent, ROBERTSON, J.)

Ejectment—Office Judgment—Enquiry of Damages.—An office judgment in an action of ejectment does

***Ejectment—Office Judgment—Enquiry of Damages.**

—For the proposition that an office judgment in an action of ejectment does not become final without the intervention of a court or jury; but there ought, in every such case, to be an order for an enquiry of damages, the principal case is cited and approved in the following cases: *Smithson v. Briggs*, 33 Gratt. 182; *Hickman v. B. & O. R. Co.*, 30 W. Va. 296, 4 S. E. Rep. 657; *McCann v. Righter*, 34 W. Va. 186, 12 S. E. Rep. 501.

In *Commercial Union, etc., Co. v. Everhart*, 88 Va. 956, 14 S. E. Rep. 886, it is said: "In *James River & Kanawha Co. v. Lee*, 16 Gratt. 429, it is said: 'These cases clearly show that under the Code of 1819 the

not become final without the intervention of the court or a jury; but there ought, in every such case, to be an order for an enquiry of damages.†

These were three actions of ejectment brought in the Circuit court of the city of Richmond, by the appellees against the James River and Kanawha Company, to recover certain parcels of ground in the city of Richmond. The facts in relation to the only point decided by this court are stated in the opinion of Judge Moncure.

A. Johnston and Lyons, for the appellant.
Macfarland & Roberts, for the appellees.

MONCURE, J., delivered the opinion of the court.

These three cases are precisely alike, and present the same questions for decision. They were actions of ejectment brought in the Circuit court of the city of Richmond. In each of them the declaration was filed at rules, on the first Monday in February, 1860, with proof of service of notice thereof

according to law; and thereupon
425 *was entered a rule upon the defendants to appear and plead at the next rule day. At which day, to-wit: on the first Monday in March, 1860, the defendants having failed so to appear and plead, though duly served with a copy of said rule, their default was entered and judgment given against them. At the next term of the court, and after the fifteenth day thereof, the defendants appeared and moved the court for leave to plead to issue, and set aside the office judgment; but the court,

award of a writ of enquiry was necessary in every case of an office judgment against a defendant, except the case of an action of debt upon an instrument of writing for the payment of an ascertained sum of money absolutely and unconditionally. The statute has been extended so as to include indorser as well as drawer of a negotiable note, and in the present statute the words 'action of debt' have disappeared, and 'any action upon a bond or other writing for the payment of money' appear in lieu thereof. The statute means other writings like a bond for the payment of a sum ascertained and certain."

In *George Campbell Co. v. George Angus & Co.*, 91 Va. 438, 22 S. E. Rep. 167, it is said: "An order of inquiry of damages, where it is necessary, is confined to cases where the defendant has not appeared and pleaded. Where an issue is made by the pleadings, and it is tried by a jury, then the jury, at the same time that they try the issue, assess the damages; so that in such case no writ of inquiry is necessary. This is the usual and immemorial practice. Stephen on Pleading, 127; 4 Minor's Institutions (3d Ed.) pt. 1, §65; 1 Barton's Law Practice, 564; *James River & Kanawha Co. v. Lee*, 16 Gratt. 424; *Rees v. Conococheague Bank*, 5 Rand. 326. It will be seen from an examination of the cases relied on by counsel for the plaintiff in error that they were all cases in which no plea had been filed, and the judgment was by default. They are not therefore pertinent to the case at bar." See generally monographic note on "Ejectment."

†See the statutes quoted in the opinion of JUDGE MONCURE.

being of opinion that the office judgment became final on the fifteenth day of the term (under section 44 of chapter 171 of the Code), not having previously been set aside, overruled the said motion; to which opinion and decision of the court the defendants excepted: and they afterwards applied for and obtained a supersedeas to the judgment.

It is contended that the judgment is erroneous on one of two grounds, viz: 1st, that section 44, of chapter 171 of the Code, does not apply to an action of ejectment; and, if it does, 2ndly, that it was competent for the court after the fifteenth day of the term, for good cause shown, to permit the defendants to plead to issue and set aside the office judgment; and good cause was in fact shown.

We will proceed to consider the first of these grounds to wit: Whether the said section applies to an action of ejectment. It is in these words:

"Every judgment entered in the office in a case wherein there is no order for an enquiry of damages, and every non-suit or dismissal therein, shall, if not previously set aside, become a final judgment, if the case be in the general or a Circuit court, of the last day of the next term, or the fifteenth day thereof (whichever shall happen first), and if it be in a county or corporation court, of the last day of the next quarterly term, and have the same effect, by way of lien or otherwise, as a judgment
426 *rendered in the court at such term.

Every such judgment for any plaintiff shall be for the principal sum due, with interest thereon from the time it became payable (or commenced bearing interest) till payment, unless it be in such action as is mentioned in the 11th section of chapter 144, in which case it shall be according to that section."

The above section, it will be perceived, is expressly confined to office judgments in cases wherein there is no order for an enquiry of damages, and the question at once arises, what are those cases? The next two preceding sections answer the question. The 42d section, providing for an office judgment against a defendant in default, directs that "judgment shall be entered against him, with an order for the damages to be enquired into, when such enquiry is proper." The 43d section is in these words:

"There need be no such enquiry in an action of debt upon any bond or other writing for the payment of money, or against the drawer or endorsers of a bill of exchange or negotiable note, or in action of debt or scire facias upon a judgment or recognizance."

Then follows the 44th section before recited, commencing with the words, "Every judgment entered in the office in a case wherein there is no order for an enquiry of damages;" thus obviously referring to the cases mentioned in the 43d section, and having the same meaning as if the 44th section had commenced in these words: "Every judgment entered in the office in an

action of debt upon bond or other writing for the payment of money," &c., as set out in the 43d section. That the 44th section was intended to be confined to those cases, is further shown by the latter branch of the section, which declares, that "Every such judgment for any plaintiff shall be for the principal sum due, with interest thereon from the time it became payable," &c. *The terms "every such judgment" here used, relate to the terms, "every judgment," &c., in the former branch of the section; and the words, "shall be for the principal sum due," &c., are strictly applicable only to such actions as are mentioned in the 43d section.

The 43d section is the only law which dispenses with the necessity for an enquiry of damages; which, therefore, is necessary in every case not enumerated in that section, of an office judgment against a defendant. Before the enactment of that section, such an enquiry was dispensed with, only in an action of debt upon a bond, bill, promissory note, or other writing for the payment of money or tobacco. In every other action in which a judgment was obtained in the office by the plaintiff, an order for an enquiry of damages, was made at the same rule day at which the conditional judgment was affirmed. 1 Rob. Pr. old ed. p. 170. And the law declared, that "all judgments by default, obtained in the office for want of appearance of plea, in which no writ of enquiry shall be awarded, and which shall not be set aside on some day of the next succeeding term; and all non-suits and dismissals obtained in the office and not so set aside, shall be considered as final judgments of the last day of the term, and executions may issue thereupon accordingly," &c. 1 R. C. 1819, p. 508, § 79. There have been several decisions of this court upon the construction of that law; most of which are stated in 1 Rob. Pr. cited supra.

In *Hunt, &c., v. McRae*, 6 Munf. 454, the declaration was in debt for money lent, but said nothing of any contract in writing, and a judgment was confirmed in the office which became final. This court was of opinion, that the judgment was erroneous, in being made final on a declaration claiming a debt due for money loaned, and not alleged to be founded on any specialty, bill, or note in writing. It was therefore
428 reversed, and *the cause remanded for a writ of enquiry to be executed, unless the defendant should plead to issue.

In *Metcalfe v. Battaile*, Gilm. 191, it was held that a negotiable note was not, as to the indorser, a note for the payment of money, within the meaning of the law in question; and that, consequently, judgment could not be rendered in such case, without the intervention of a jury. That was an action of debt against the indorser of the note; whose contract, the court said, was not a writing for the payment of money absolutely, but a collateral contract to pay it under certain circumstances.

In *Hatcher v. Lewis*, 4 Rand. 152, a joint action of debt was brought against drawer and endorsers of a negotiable note, and it was held that an office judgment could not be confirmed against all or either of the defendants without a writ of enquiry.

In *Rees v. Conococheague Bank*, 5 Id. 326, the action was against the maker of a note, which was protested for non-payment, and the protest had this indorsement upon it, "\$550 has been received, at sundry times, on account of the within note, July 19th, 1819." An office judgment was entered for the whole amount of the note, without allowing the credit. There was reason to believe that the plaintiff intended to contest the credit. This court was of opinion, that "a final judgment, when no plea is filed, may be rendered in the office at rules for principal and interest, when the action is founded upon any instrument in writing for the payment of an ascertained sum of money. But if the plaintiff, by any paper filed by himself, shows that the defendant is entitled to a credit, the judgment ought either to be entered subject to such credit, or, if the plaintiff refuses to take a judgment in that way, a writ of enquiry should be awarded." And accordingly the judgment was reversed, and the cause remanded with direction to award a writ of enquiry.

429 *In *Shelton's ex'ors v. Welsh's adm'rs*, 7 Leigh 175, the action was debt upon a decree; and an office judgment was entered and confirmed for the amount of the decree. This court held that it was error to enter judgment in the office without awarding a writ of enquiry.

These cases clearly show that under the Code of 1819, the award of a writ of enquiry was necessary in every case of an office judgment against a defendant, except the case of an action of debt upon an instrument of writing for the payment of an ascertained sum of money, absolutely and unconditionally. The present Code, ch. 171, § 43, seems to have made no other change in this respect than to extend the exception to an action of debt against endorsers, as well as the drawer, of a bill of exchange or negotiable note; and to an action of debt or scire facias upon a judgment or recognizance; in which cases it had been held, as we have seen, that a writ of enquiry was necessary, under the Code of 1819. It follows, therefore, that an order for an enquiry of damages is necessary, under the present Code, when an office judgment is entered against a defendant in ejectment; unless, as is contended, there be something in chapter 135 of the Code, concerning "the action of ejectment," which dispenses with the necessity for such an order. Let us examine that question.

That chapter makes most important and radical changes in the nature of the action of ejectment. It abolishes the fictitious features of the action; requires it to be conducted in the names of the real parties; gives it the effect of a writ of right, as well

as of an action of ejectment under the former law; applies it to the recovery of dower, and to the recovery not only of the principal subject itself of the action, but of the mesne profits, &c., which were formerly recoverable only in an action of trespass therefor, brought after the conclusion of the action of ejectment; makes the

430 judgment in the action *conclusive as to the title or right of possession established therein, subject to a saving in favor of persons under disability; and abolishes real actions. It may well be supposed that a law having such important objects in view would be carefully framed, and would not dispense with any precaution which might be necessary to prevent injustice. Accordingly we find that it contains minute details as to the parties, pleadings, proofs, and other proceedings in the action, and expressly requires the defendant to be served, not only with the declaration, and notice of the filing thereof, but afterwards also, with a rule to appear and plead. It is true that the law authorizes the declaration to be filed at rules, or in court, instead of in court only, as under the old law; and section 12 provides, that "upon filing the declaration with proof of the service of notice thereof as aforesaid, the plaintiff shall be entitled to a rule upon the defendant, to appear and plead at the next rule day if the declaration be filed at rules, or if filed in court to appear and plead within such time as shall be prescribed by the court; and if, upon service of such rule, he shall fail so to appear and plead, his default shall be entered and judgment given against him." But the only object of the law in authorizing these proceedings at rules, seems to be, to place the action of ejectment on the footing of other actions in that respect, and to enable the parties to mature the pleadings and have the case ready to be disposed of at the next term. It could not have been intended, by implication merely, to effect so radical a change in the law as to authorize an office judgment against a defendant in ejectment which would become a final judgment of the succeeding term of the court, by mere operation of law, without the intervention of the court or a jury. It is true, there is in the said chapter no direction for an enquiry of damages after judgment by default is

431 entered at rules; but it is *also true that there is no direction therein that the office judgment shall become final on the last day of the next term or the 15th day thereof, if not previously set aside. In these respects the case was left to be governed by chapter 171, § 42, as to office judgments generally. The direction for an office judgment, implied no direction to dispense with a writ of enquiry. Wherever pleadings are matured at rules, there may be judgment by default at rules. Wherever a writ of enquiry is awarded at rules, it is founded on a judgment by default in the office. So that, a direction in the law that the defendant's "default shall be entered and judgment given against him" at rules, leaves unde-

cided the question, whether a writ of enquiry is to be awarded or not, being perfectly consistent with either alternative.

Anciently, the action of ejectment had no other object but to recover damages by a lessee against any person who ousted him of his term. Afterwards, complete justice was done in the action by applying it to the recovery, as well of the term itself, as of damages for the ouster and detention. Still later, it was used mainly for trying titles, and a string of legal fictions was invented to make it available for that purpose. In this last phase, the title or possession of the subject was the only substantial object of the suit, and damages for the ouster and detention, though still declared for, were merely nominal in the action itself, but were recoverable in a separate action of trespass for mesne profits. The present Code dispenses with the necessity of an action of trespass for mesne profits, and makes the damages recoverable in the action of ejectment. It requires the declaration to claim damages, and provides that "if the plaintiff file with his declaration a statement of the profits and other damages which he means to demand and the jury find in his favor, they shall at the same time, unless the court otherwise order, assess the dam-

432 ages *for mesne profits of the land for any period not exceeding five years previously to the commencement of the suit until the verdict, and also the damages for any destruction or waste of the buildings or other property, during the same time for which the defendant is chargeable." Chap. 135, § 30. Certainly, if such a statement be filed, an order for an enquiry of damages would be necessary. Id. § 31. And so also is such an order necessary, though no such statement be filed, if the right or title of the plaintiff expired after the commencement of the suit; in which case the law provides, that "judgment shall be entered for his damages, sustained from the withholding of the premises by the defendant, and as to the premises claimed the judgment shall be, that the defendant go thereof without day." Id. § 28. In the latter case the plaintiff is certainly entitled to his costs, and the mode of recovering them is by continuing the prosecution of the suit for the damages. He is at least entitled to nominal damages; and the only mode of recovering nominal damages, where there is a judgment by default, is by an enquiry of damages. That a plaintiff is entitled only to nominal damages, is not of itself a sufficient reason why there should not be an enquiry of damages. No action of debt sounds in damages; and yet an order for an enquiry of damages is necessary in every action of debt in which there is an office judgment, except those enumerated in the Code, ch. 171, § 43; and is necessary even in those cases, if there be any apparent uncertainty as to the amount of the debt, or of the credits applicable thereto. The function of such an enquiry is, not only to ascertain the amount of damages, but to remove any uncertainty which may exist as

to the subject in controversy or the amount thereof.

We conclude, upon this branch of the subject, that an office judgment in an action of ejectment, does not become final without the intervention of the court or a jury, but there ought in every such case to be an order for an enquiry of damages; and therefore, that the 44th section of chapter 171 of the Code, is not applicable to such action.

The conclusion to which we have come upon the first ground of error, renders it unnecessary to express any opinion upon the other; and it would be improper to do so, especially as that ground impugns the decision of this court in *Ender's ex'ors v. Burch*, 15 Gratt. 64, which was a unanimous decision of a court of four judges, whereas the court now sitting consists of but three. As, however, the question was argued by the counsel in these cases, and has, to some extent, been reconsidered by the court, (all the members of which were also members of the court that decided that case), it may be proper to state that two of the judges now sitting entertain some doubt of the correctness of that decision, and the court is therefore of opinion that a reargument of the question ought to be heard whenever it may come up for decision before a full court.

In each of the three cases the judgment must be reversed, and the cause remanded to the Circuit court, with instructions to allow the plaintiffs in error to plead to issue if they shall again offer to do so, and for further proceedings therein to a final judgment, in conformity with the foregoing opinion.

Judgment reversed.

434 *James River and Kanawha Company v. Robinson.

January Term, 1864, Richmond.

(Absent, ROBERTSON, J.)

1. **Pleading and Practice—Pleas in Abatement—Ejectment.**—A plea in abatement is admissible in an action of ejectment. The act Code ch. 136, § 13, refers only to pleas in bar of the action.
2. **Same—Same—Pleas in Bar—Quere.**—*Quere:* If a defendant may not plead in abatement and in bar at the same time, the pleas being filed at the proper time.
3. **Same—Same—Waiver of.**—A defendant may waive his plea in abatement and plead in bar to the action.

***Pleading and Practice—Abatement—Bar.**—In *Reynolds v. Cook*, 83 Va. 825, 3 S. E. Rep. 710, it is said: "The defendant, it has been held, may plead in abatement, and may also plead the general issue; but matters in bar of the action can be set up only under a plea of the latter kind. Code 1873, ch. 181, § 13; *Jas. River & Kan. Co. v. Robinson*, 16 Gratt. 434." The principal case is also cited in *Delaplain v. Armstrong*, 21 W. Va. 219. See generally, monographic note on "Ejectment."

4. **Same—Same—Same—Case at Bar.**—A defendant in ejectment admitting that he was mistaken as to the matter pleaded in abatement, and upon this admission submitting the issue upon the plea to the court, at the same time asked leave to file the plea of "not guilty." This was in effect a waiver of the plea in abatement, and he should have been permitted to file the plea of "not guilty."

This was an action of ejectment in the Circuit court of the city of Richmond, brought by Anthony Robinson against the James River and Kanawha Company. The facts are stated in the opinion of Judge Moncure.

A. Johnson and Lyons, for the appellant.
Macfarland & Roberts, for the appellee.

MONCURE, J., delivered the opinion of the court:

This case resembles, in many of its features, the three cases of the James River and Kanawha Company v. Lee, v. Wortham, and v. Macfarland recently

435 *decided by this court. Like them, it was an action of ejectment, brought in the Circuit court of the city of Richmond. The declaration was filed at February rules 1860, with proof of service of notice thereof according to law; and thereupon was entered, a rule upon the defendants to appear and plead at the next rules. The defendants were duly served with a copy of this rule; but, instead of making default as in those cases, they appeared at the next rules, to wit: in March, 1860, and pleaded in abatement the pendency of a suit in chancery for the recovery of the same land claimed in this action. At the succeeding rules, to wit: in April, 1860, the plaintiff replied to the plea in abatement, that the land claimed in the suit was not the same land claimed in the action, as alleged in the plea; and issue was thereupon joined. The next term of the court commenced on the 10th of May, 1860. On the 13th of June, 1860, when the cause was first reached by the court in calling its docket, though after the 15th day of the term, the defendants tendered the plea of not guilty, and moved the court to allow the same to be filed; to which motion the plaintiff objected, and the court took time to consider. The parties then, on the same day, waived their right to have a jury for the trial of the issue jointly on the plea in abatement, and agreed that the whole matter of law and fact arising upon said issue should be submitted to and decided by the court. At the next term of the court, to wit: in December, 1860, the counsel for the defendants, becoming satisfied that the land sought to be recovered in this action was not the same mentioned in the chancery suit referred to in their plea in abatement, and that their said plea had been filed under a mistake, into which they alleged they had been misled by the vagueness of the description in the declaration, admitted the fact to be so; when the parties submitted the case on the issue

436 on the plea in abatement *to the court upon the fact agreed, that the land in

controversy in the suit in chancery was not the same as that in controversy in this action; the counsel for the defendants still insisting upon his right to file the plea of not guilty, and the plaintiff objecting to the filing of the same until the issue of fact submitted to the court on the plea in abatement should be decided by the court. On another day, after the cause was submitted on the fact agreed, the court expressed the opinion that it should find for the plaintiff on the issue on the plea in abatement, and that on such finding it would have to give judgment for the plaintiff for the land in controversy. Thereupon the counsel for the defendants asked leave to withdraw their plea in abatement, and the court, feeling some difficulty upon the point, whether, even if the plea in abatement were then allowed to be withdrawn, the plea of not guilty, which had been tendered by the defendants, could be legally filed, requested of the counsel additional argument upon the point; which was had, and time again taken to consider. Afterwards, the court, having considered the motion for leave to withdraw the plea in abatement and to file the plea of not guilty, was of opinion, "that after the cause was submitted on the facts agreed on the plea in abatement, it became unnecessary to decide on allowing the plea of not guilty to be filed, because if filed it would be proper to try the issue of fact on the plea in abatement before it could try the issue on the plea of not guilty, and if the finding of the issue on the plea in abatement were for the plaintiff, the judgment on that finding would be for the plaintiff for the land in controversy, and hence the plea of not guilty would not be tried. If, on the other hand, the finding were for the defendants, the judgments would be for the defendants, and in like manner, there would be no occasion to try the plea of not guilty.

And in respect to the motion to withdraw the plea in *abatement after the cause had been submitted to the court on the facts agreed on the plea in abatement, and the court had announced its opinion, it was too late then to change the pleading, the court having no more power to "change the issue than it would have if the cause had been tried before a jury, the evidence heard, the jury had retired and returned into court with their verdict, and then the motion was made to withdraw the plea on which the cause was tried and file another;" and therefore the court overruled the motion of the defendants to be allowed to withdraw their plea in abatement, and also their motion to file the plea of not guilty; to which opinion and action of the court the defendants excepted. And the court having given final judgment for the plaintiff for the land in controversy on the issue joined on the plea in abatement, the defendants afterwards applied for and obtained a supersedeas to the judgment.

This court in deciding the three cases before referred to have gone very far towards the decision of this case. It was held in them that an office judgment against the

defendant in an action of ejectment cannot become final by mere operation of law, and without the intervention of the court or a jury, but that an order for an enquiry of damages is necessary. So that if in this case no plea in abatement had been filed but an office judgment entered, the defendants' plea of not guilty, though tendered after the 15th day of the next term, ought to have been received by the court. So also it ought to have been received if the plea in abatement had then or previously been withdrawn. Ought it not to have been received in addition to the plea in abatement? Or had not the defendants a right to waive or withdraw their plea in abatement, and did they not in effect do so?

A plea in abatement is admissible in an action of ejectment, notwithstanding the provision in the Code chapter 135, section 13, which declares, that "the defendant *may demur to the declaration as in personal actions, or plead thereto or do both. But he shall plead the general issue only, which shall be that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff in the declaration." If the law be otherwise, then the plea in abatement filed in this case was a nullity, and when the defendants tendered the plea of not guilty, which in that view was the only plea authorized by the statute, it ought to have been received. But the Legislature did not intend to exclude pleas in abatement in an action of ejectment, and referred only to matters in bar of the action in giving the right to "plead the general issue only." This appears from the whole section, and especially the latter branch of it, which declares that "upon such plea the defendant may give the same matter in evidence and the same proceedings shall be had as upon a plea of not guilty in the present action of ejectment, except as hereinafter provided, and he may also give in evidence any matter which if pleaded in the present writ of right would bar the action of the plaintiff:" thus showing the legislative intention to dispense with the necessity of special pleas in bar of the action by making the general issues sufficiently comprehensive to answer the purpose. It surely could not have been designed, either to take away all defences in abatement, or to make them available under the general issue, in ejectment.

Conceding then that the plea in abatement was admissible and valid, had not the defendants a right to plead not guilty in addition thereto?

It seems to be well settled, at least as a general rule, that where the defendant pleads in abatement, and the plaintiff demurs to it, and the plea is disallowed by the court, the judgment is not final, but only that the defendant answer over. But if the plaintiff take issue upon the plea, and it be found against the defendant, 439 *then final judgment is given against him. 3 Williams' Saund. 211 note (3); 1 Rob. Pr. old ed. 388-9. The reason as-

signed for the difference is that every man is presumed to know whether his plea be true or false, and the judgment ought to be final against him if he pleads a fact which he knows to be false and which is found to be false. But every man is not presumed to know the matter of law which is left to the judgment of the court on a demurrer. *Id.* There are some exceptions to the rule, as may be seen by referring to 1 Com. Dig. Abatement I 14 b. and I 15. If a plea in abatement be tried by the certificate of the ordinary against the defendant, it shall only be that he answer over. *Lat.* 178. So if the defendant pleads infancy, and it is tried by inspection it shall only be to answer over. 1 *Lev.* 163. So where an issue of nul tēil record on a plea in abatement is found for the plaintiff. 1 *John Cas.* 397. So on a failure by defendant to produce a record on such issue. *Ld. Raym.* 550. And upon a replication confessing and avoiding any of the facts of the plea, though defendant join issue and it be found against him, the judgment is only that he answer over. *Id.* 338. Perhaps a question might well be raised whether this case falls under the general rule or one of the exceptions; but it is unnecessary, and may be conceded for the present purpose that it falls under the general rule, and that a judgment for the plaintiff on the issue made up on the plea in abatement, that being the only issue in the case, would be a final judgment for the land in controversy and not a judgment of respondeat ouster.

The Code, chapter 171, section 23, declares "that the defendant in any action may plead as many as several matters whether of law or fact as he shall think necessary." This statute goes farther than the statute 4 and 5 Anne, Ch. 16, is very broad in its terms, and has received a very liberal construction by our courts. See the cases

440 *cited in Code, and 1 Rob. Pr. old ed.

217-8. It is certainly broad enough to embrace a plea of the general issue at the same time with a plea in abatement, and it is not perceived why a defendant may not avail himself of a defence in abatement, which may be a meritorious defence and bona fide made, though under a mistake of fact, without giving up his defence under the general issue. If this be the true construction of the statute, it applies to an action of ejectment as well as other actions, notwithstanding the provision before referred to limiting the right of the defendant to plead in bar, only the general issue, which does not prevent him from pleading in abatement also. Of course if he pleads in abatement he must put in the plea at the proper time, and cannot put it in after he has pleaded in bar. And his plea in bar ought also to be put in at the same time with his plea in abatement or in a reasonable time thereafter. If put in at the next term after the issue is made up at rules on the plea in abatement and before the trial thereof, it would be in good time. Our courts are liberal in allowing defendants to add to their pleas, when justice

requires it and the plaintiff is not thereby subjected to delay; and will do so even though he be subjected to delay, if good cause be shown for not having made the addition earlier. 1 Rob. Pr. old ed. 231.

But without deciding this question, let us proceed to consider the other before stated, which is: had not the defendants a right to waive or withdraw their plea in abatement, and did they not in effect do so?

After pleading in bar, no plea in abatement is admissible, unless it be of something which has happened since the last continuance, and which makes the suit abatable only and does not ipso facto abate it. 1 Rob. Pr. 231, old ed. By pleading in bar, all matter in abatement is waived. *Id.* 164; *Payne, &c. v. Grim*, 2 *Munf.* 297.

441 *And if the defendants, after having pleaded in abatement, voluntarily plead to the action, without judgment of respondeat ouster, it will amount to a waiver of the plea. *Burnham v. Webster*, 5 *Mass. R.* 266. See also 1 Com. Dig. Abatement I. 13. If the defendants in this case had no right to plead not guilty in addition to their plea in abatement, then their tender of the general issue was in effect a waiver of their plea in abatement, according to the authorities before referred to. But they went farther than this in making such waiver "Becoming satisfied that the land sought to be recovered, in this suit was not the same mentioned in the chancery suit referred to in their plea in abatement, and that their said plea had been filed under a mistake into which they alleged they had been misled by the vagueness of the description in the plaintiff's declaration," they "admitted the fact to be so;" and though the parties submitted the case on the issue on the plea in abatement to the court, upon the admission aforesaid as a fact agreed, yet the defendants still insisted upon their right to file the plea of not guilty, while the plaintiff objected to the filing of the said plea "until the issue in fact submitted to the court on the plea in abatement had been decided by the court." After the admission made by the defendants, their plea in abatement was necessarily waived and abandoned, and should have been set aside by the court and the plea of not guilty received. The only conceivable motive for then trying it was to get rid of it and thus open the way for the plea of not guilty. If the defendants had been told by the court when they made the admission, that if the issue upon the plea in abatement were tried thereon final judgment for the plaintiff would have to be given, they would certainly at once have withdrawn their plea, as they might have done. Accordingly, when the court afterwards expressed the opinion that

442 it would have to *give such a judgment, the defendants asked leave to withdraw their plea in abatement, but the court considered the motion then as coming too late. It did not come too late, under the circumstances; and the court ought then to have permitted the plea in abatement to

be withdrawn and the plea of not guilty to be filed.

We are therefore of opinion that the judgment is erroneous and ought to be reversed, and the cause remanded, with instructions to permit the defendants to withdraw their plea in abatement and plead not guilty, and for further proceedings to a final judgment.

Judgment reversed.

443

*Mann v. Parke.

January Term, 1864, Richmond.

1. *Confederate Military Service—Substitutes—Act of Congress—Case at Bar.*—In April 1863, M joins a volunteer company, and is mustered into the service of the Confederate States. In May 1863, he puts in a substitute who is regularly received; the substitute being over forty but under forty-five years of age, and not then liable to military service. In September, M who had been before a millwright working regularly at his trade, was employed as a miller in a large flouring mill, and so continued to be employed. Under subsequent acts of Congress, the substitute becomes liable to military service, and millers and millwrights working at their vocations are exempted. *Held:* That M is exempted.

2. *Same—Conscript Act—Exemption—Habeas Corpus.*—A person who is embraced by the terms of the conscript act, but claims exemption on grounds exempting him from its operation, must assert and prove his claim to the officer having him in charge, in the mode, if any, prescribed by the lawful regulations of the department; and if he fails to obtain his discharge in that way in a reasonable time, then, and not till then, he may complain of being unlawfully detained, and have the benefit of the writ of *habeas corpus*.

The case is fully stated in the opinion of Judge Moncure.

Price, for the appellant.
August, for the appellee.

MONCURE, J., delivered the opinion of the court:

On the 12th day of October, 1863, John Mann presented a petition, supported by his affidavit thereto annexed, to the judge of the Circuit court of Monroe county, representing that he was "held or claimed 444 in custody" by T. F. Parke, an enrolling officer for said county, acting under the directions and authority of Lt. A. F. Matthews, chief enrolling officer for the 12th Congressional district, upon the ground that he is liable to be conscripted and placed in the military service of the Confederate States under the several acts of Congress upon that subject;" alleging "that he is not liable to be so conscripted and held in custody, because he is both a millwright and a miller, actually engaged attending to one of the most valuable mills in Monroe county, or in millwrighting in the mill, and habitually engaged in working for the public at one or the other trade, principally however for the last year as miller;" stating that "the enrolling officers

have conceded this right to exemption as an original right, but say he has lost his right because he joined a company of volunteers about 18 months ago, and after serving for about a month employed a substitute in his place who was then over 40 but not now over 45 years of age, and therefore liable to the late call of the President;" and praying for the award of a writ of *habeas corpus*, directed to the said Parke and Matthews. A writ was accordingly awarded, directed "to Thomas F. Parke, enrolling officer of the Confederate States for the county of Monroe, Virginia;" who forthwith made his return, claiming, "that the said John Mann is lawfully held by him as a conscript, liable to service under what is commonly called the conscript law, and acts supplementary thereto, of the Congress of the Confederate States;" and stating that "he is held upon no other claim." Whereupon the parties being fully heard, it was the opinion of the court "that the said Mann is liable to be conscripted and placed in the military service of the Confederate States, as claimed by the said enrolling officer;" and it was ordered "that he be held in custody accordingly."

There was an agreement of facts, 445 signed by the attorneys *of the parties, in these words: "That the plaintiff, on the 1st day of April, 1862, joined as a volunteer, Capt. Bryant's company of volunteers, and that on the 2nd day of May, 1862, he presented Adam Vance to the company as a substitute, who was received as such; as may be seen by the certificate of Col. Patton, herewith filed as a part of these agreed facts, marked A; that said Vance was then over 40 years of age, but is not now 45 years of age." The certificate of Col. Patton is in these words:

H'd Or's, Dist. Gauley,
White Sulphur Springs,
May 21, 1862.

This is to certify that John Mann has this day furnished a substitute in the person of Adam J. Vance, who has been examined and received by a surgeon of the C. S. A., and who is not subject to military duty in this or any other State. Above Adam J. Vance is now a member of Capt. Thos. A. Byrant's Monroe Artillery.

By order of Geo. S. Patton,
Col. Com'g. Dist. Gauley.
N. Rand,

Lt. & A. A. General.

A bill of exceptions was taken to the opinion of the court, and is in these words: "Be it remembered, that upon the trial of this cause the facts agreed upon and signed by the counsel of the parties on paper marked No. 2 and herewith filed, are certified as a part of the facts of the case. It was also proved, that from September 1862, to the present time, the petitioner has been the miller, skilled and engaged as such, in a large and valuable flouring mill in the county of Monroe, with a large country custom, and that his trade before he became miller was that of millwright, generally employed as such. It was also proved, that

in cases where members of volunteer companies had furnished substitutes, and afterwards became liable to *perform military service, by reason of the substitutes being called into service on their own account, the enrolling officers were directed, by general instructions from the War department, dated subsequent to the time when the petitioner had furnished his substitute, to let the substitute remain in the respective companies to which they were attached, and to enrol those who had employed such substitutes as conscripts. These being all the facts proved, and the court being of opinion, that the petitioner, having become a member of a volunteer company, could not, by afterwards engaging in business as a miller, discharge himself from his voluntary obligation to perform military service; that the substitute furnished by him, only relieved him from such service until such substitute became liable to be called into service on his own account; that at the time the petitioner left his company and engaged in business as a miller, he was not absolutely, but temporarily or conditionally discharged; and that the military authorities, in the exercise of their necessary powers, might detail him from the company to which he originally belonged, and enrol him amongst the conscripts; the court refused to discharge the petitioner, and remanded him to the custody of the enrolling officers. To which opinion of the court the petitioner by his counsel excepts, and prays that his said exception may be signed, sealed, and made a part of the record, which is done accordingly."

The petitioner applied to this court for a supersedeas; which was awarded.

By act of Congress approved April 16, 1862, entitled "an act to further provide for the public defence," and commonly called the conscript law, the President was "authorized to call out and place in the military service of the Confederate States for three years, unless the war shall have been sooner ended, all white men who are residents of the Confederate States, 447 between the *ages of eighteen and thirty-five years, at the time the call or calls may be made, who are not legally exempted from military service." By the 9th section it was enacted, "that persons not liable for duty may be received as substitutes for those who are, under such regulations as may be prescribed by the Secretary of War."

In May 1862, Adam J. Vance, who was then not liable for duty, being over 40 years of age, was received as a substitute for the petitioner in Capt. Bryant's company of volunteers.

By act of Congress, approved September 27, 1862, entitled "an act to amend an act entitled 'an act to provide further for the public defence,' approved April 16, 1862," the President was "authorized to call out and place in the military service of the Confederate States for three years, unless the war should have been sooner ended, all

white men who are residents of the Confederate States, between the ages of 35 and 45 years, at the time the call or calls may be made, and who are not at such time or times legally exempted from military service," &c.

By act of Congress, approved October 11, 1862, commonly called the exemption law, and entitled "an act to exempt certain persons from military duty, and to repeal an act entitled 'an act to exempt certain persons from enrollment for service in the army of the Confederate States,' approved 21st April, 1862," a great many persons were exempted from military service in the armies of the Confederate States. Among the exemptions is one in favor of "all shoemakers, tanners, blacksmiths, wagon makers, millers and their engineers, millwrights skilled and actually employed at their regular vocation in the said trades, habitually engaged in working for the public, and whilst so actually employed: Provided, said persons shall make oath in writing that they are so skilled and 448 actually employed at the time, *as their regular vocation, in one of the above trades, which affidavit shall only be prima facie evidence of the facts therein stated: Provided further, that the exemptions herein granted to persons by reason of their peculiar mechanical or other occupation or employment, not connected with the public service, shall be subject to the condition that the products of the labor of such exempts, or of the companies and establishments with which they are connected, shall be sold and disposed of by the proprietors at prices not exceeding seventy-five per centum upon the cost of production, or within a maximum to be fixed by the Secretary of War, under such regulations as he may prescribe: And it is further provided, that if the proprietors of any such manufacturing establishments shall be shown, upon evidence, to be submitted to, and adjudged of, by the Secretary of War, to have violated, or in any manner evaded the true intent and spirit of the foregoing proviso, the exemption therein granted shall no longer be extended to them, their superintendents or operatives in said establishments, but they and each and every one of them shall be forthwith enrolled under the provisions of this act, and ordered into the Confederate army, and shall, in no event, be again exempted therefrom by reason of said manufacturing establishments or employment therein."

It appears that the petitioner became a miller in September 1862, but on what day of that month does not appear; it having been proved that from September 1862, to the time of trial, he had been the miller, skilled and engaged as such, in a large and valuable flouring mill in the county of Monroe, with a large country custom; and that this trade before he became miller was that of a millwright, generally employed as such.

It further appears that the President has from time to time made all the calls authorized to be made by him by the

449 *conscript law and the act amendatory thereof before mentioned; having in July 1863, as stated in the petition, made the last call, which was for persons between the ages of 40 and 45 years. The effect of this last call was to make Adam J. Vance, the petitioner's substitute, liable for military service on his own account, he being under 45 years of age; so that he could no longer be a substitute for the petitioner.

But while the petitioner thus lost his exemption on the ground of having a substitute, he claimed to be exempt on the ground of being a miller. And the sole question which seems to have been litigated by the parties and decided by the Circuit court upon the facts agreed and proved was, whether he could be exempt as miller under the circumstances; he having become a miller after he had become a volunteer and put in a substitute, though before the latter became liable to military service on his own account; and this is the only question which we will consider and decide. It was not controverted that Adam J. Vance was a proper substitute, at least until he became liable to military service on his own account, nor that he was duly received as such; nor that the petitioner would have been entitled to exemption upon the ground of his being a miller, but for the fact of his having become such after he had become a volunteer and put in a substitute. It was not pretended that he had not complied with all the provisos, or had broken any of the conditions on which the exemption claimed by him was granted by law, or had not conformed to any regulations prescribed by the Secretary of War in regard to substitutes or exemptions. No such regulations were made a part of the case agreed, or proved on the trial, or otherwise brought into the record. We regard the case therefore as standing upon the naked question before stated.

Upon that question the Circuit court 450 was of opinion, *that the petitioner, having become a member of a volunteer company, could not, by afterwards engaging in business as a miller, discharge himself from his voluntary obligation to perform military service; that the substitute furnished by him, only relieved him from such service until such substitute became liable to be called into service on his own account; that at the time the petitioner left his company and engaged in business as a miller, he was not absolutely, but temporarily or conditionally discharged; and that the military authorities, in the exercise of their necessary powers, might detail him from the company to which he originally belonged, and enroll him amongst the conscripts. Is this opinion of the Circuit court erroneous or not?

The law expressly gives, or recognizes, the right to furnish a substitute. It declares, as before shown, "that persons not liable for duty be received as substitutes for those who are, under such regulations as may be prescribed by the Secretary of War."

When a person furnishes a substitute who is duly received as such, the principal becomes thereby exempt from military duty, and the exemption continues as long as the substitution exists. A person not liable for duty at the time he is offered as a substitute, as where he is over the existing maximum age, may be received as such; with this condition however, that if the maximum age should afterwards be so extended by law as to embrace the substitute, and thus make him liable for duty on his own account, the substitution will cease and the principal again become liable, at least unless he be exempt on some other ground. This is the construction which, in practice, has been put upon the law, and it does not seem to be unsound. Whether the substitution be complete or partial in its result, the exemption of the principal during its continuance is alike complete. When

the substitute is received, being then 451 over the existing maximum *age, non constat that he ever will be liable for duty on his own account, and he is therefore received for at least the full term of the principal. The subsequent passage of a law extending the maximum age and making the substitute liable for duty on his own account, cannot, in reason, effect the efficacy of his exemption during its existence. Being exempt from military duty, he is free to engage in other pursuits; and especially those which are beneficial to the public and useful to our defence; and he is entitled to all the privileges annexed by law to such pursuits, to which he would have been entitled if he had never before been liable for military duty.

In this case the principal, after furnishing a substitute according to law and obtaining his discharge from military service, engaged in the useful pursuit of a miller, (having previously been a millwright), and continued to be so engaged down to the time of the trial. While he was so engaged the exemption law was passed, expressly declaring all millers, such as he was, exempt from military service, and an amendatory conscript law was passed making his substitute liable for military service on his own account. Why is he not entitled to the benefit of the exemption law, just as much as he would have been if he had never before been liable for duty? Though once so liable he had discharged himself from that liability, and continued to be so discharged until his claim to the new exemption accrued. He is certainly within the letter of the exemption law, and it is not perceived why he is not within its spirit also. The Circuit court lays stress upon the fact that the principal was a volunteer; and says that having become a member of a volunteer company, he could not, by afterwards engaging in business as a miller, discharge himself from his voluntary obligation to perform military service.

But surely it can make no difference 452 *whether the principal be a volunteer or a mere conscript when he furnishes a substitute. In either case, it seems, the

substitute is accepted and enrolled for three years unless the war be sooner ended. A volunteer, whose remaining term of service may be short, becomes as completely discharged by furnishing a substitute for a full term, as does a mere conscript. The voluntary obligation of the former is not more binding than the legal obligation of the latter, and is certainly not less meritorious. Why then should it deprive the former of the benefit of an exemption to which the latter is entitled? Nor can it make any difference whether a member of a volunteer company, who furnishes a substitute and afterwards becomes liable to perform military service by reason of his substitute being called into service on his own account, be subject to be returned to his place in such company or to be enrolled as a conscript. In either case, it is presumed, his term of service under the conscript law would run from the date of his original enlistment. The enrolling officers are directed in such cases, by general instructions from the War department, to let the substitute remain in the company to which he was attached, and to enrol the principal as a conscript. This is reasonable enough, but surely the principal should have the same benefit of the exemption law that any other conscript would have.

We are therefore of opinion in this case that the judgment of the Circuit court is erroneous and ought to be reversed, and the petitioner discharged from the custody of the enrolling officer.

But while we have taken cognizance of this case on account of its peculiar circumstances, we deem it proper to remark that a person who is in custody of an enrolling officer under the conscript law, and claims to be exempt from military service, either by reason of having a substitute, or upon any of the grounds of exemption
453 *set forth in the exemption law, is not entitled to the benefit of the writ of habeas corpus until he has failed to obtain the relief to which he is entitled by pursuing the regulations on the subject prescribed by act of Congress or the War department. There is a manifest distinction in this respect between the case of a person who is under 18 or over 45 years of age, and that of one who is within those ages. The authority of the President under the conscript law to call out and place in the military service, is expressly limited to persons within those ages. An enrolling officer who takes and holds as a conscript, a person not within those ages, acts at his peril, without any warrant or authority of law, and is a mere wrong-doer. Accordingly it was held in the cases of *Stilwell v. Cloud*, and *Smith v. Cloud*, recently decided by this court, that a citizen above the age of 45 years at the date of the call of the President for conscripts under the act of Congress amending the original conscript law, who is enrolled and detained in custody as a conscript by an enrolling officer under color of the act of Congress and call of the President aforesaid, is not bound, in order

to obtain a release and discharge from such custody, to apply to any of the constituted authorities of the Confederate States, but may, without any such previous application, properly petition any Circuit court or any judge thereof in vacation for a writ of habeas corpus, and upon proving his case to the satisfaction of such court or judge, will be entitled to a judgment discharging him from such custody. But the same principle does not apply to a person whose age is within the limits prescribed by the conscript law. All white men who are residents of the Confederate States, between the ages of 18 and 45 years, are, under the acts of Congress, *prima facie* liable for military duty, and the burden of showing exemption from such liability devolves on those who claim it. In regard to
454 the exemption "arising from bodily or mental incapacity or imbecility, the exemption law expressly refers to "rules to be prescribed by the Secretary of War;" and by an act of Congress entitled "an act to establish places of rendezvous for the examination of enrolled men," approved October 11, 1862, provision is made for the appointment of a board of surgeons for each Congressional district, any one or more of whom is required to attend a place of rendezvous to be established in each county &c., for the examination of enrolled persons; and the decisions of said surgeons, under regulations to be established by the Secretary of War, as to the physical or mental capacity of any such person for military duty in the field, are declared to be final. In regard to substitutes also, the 9th section of the conscript law expressly refers to "such regulations as may be prescribed by the Secretary of War." And in regard to exemptions generally, we know in point of fact, as indeed from necessity must be the case, that regulations have been adopted by the War department, though we cannot know, judicially, what they are, as they have not been made a part of the record and thus brought before us. A person between the ages of 18 and 45 held as a conscript by the proper enrolling officer is not, necessarily, detained without lawful authority, even though in point of fact he may be exempt from military duty. He must assert and prove his claim to the officer in the mode, if any, prescribed by the lawful regulations of the department; and if he fails to obtain in a reasonable time in that way the discharge to which he may be entitled, then, and not till then, he may complain of being unlawfully detained and have the benefit of the writ of habeas corpus. On the trial of the writ before the Circuit court or judge, the regulations of the war department which may be pertinent to the subject or relied on by either party, ought, by such party,
455 to be made a part of the *record, or they cannot be noticed by the appellate court. The course thus indicated ought to be pursued, not only in justice to the Confederate authorities, which ought not to be unnecessarily involved in the cost of litigation, and obstructed in the discharge of their

important functions connected with the public defence, but also to prevent the courts of the country from being burdened with controversies which might by pursuing that course be avoided or more speedily and cheaply settled. Under these considerations we have found some difficulty in taking cognizance of this case, but have decided to do so, as the parties seemed to be at issue only upon a point of law the decision of which properly belongs to the courts.

Judgment reversed.

456

*Brown v. Hume.

January Term, 1864, Richmond.

1. Judgment by Confession—Statute—What It Authorizes.—The act Code ch. 171, § 41, only authorizes a confession of judgment in the clerk's office in vacation.†

2. Same—"In Vacation"—Case at Bar.*—A judgment confessed in the clerk's office on the morning of the first day of the term of the court, before the hour for the opening of the court, is a judgment confessed in vacation, and valid.†

This was a bill of injunction in the County court of Culpeper, afterwards removed by consent to the Circuit court of that county, filed by James R. Hume against James F. Brown and others. Both Hume and Brown were creditors by judgment and execution of Julius M. Hunt, whose property, taken in execution and sold, was not sufficient to satisfy the executions in the sheriff's hands; and the only question in controversy was the validity of Brown's judgment. Upon this point the bill alleged: that Brown's judgment, which was the oldest, was obtained by confession of Hunt on the 16th of March, 1858, being the second day of the March term of the quarterly court of the county of Culpeper, in the clerk's office of said court, before the clerk's deputy, and whilst the court was in session, for the sum of \$594 13.

The defendant in his answer, says: That Hunt was indebted to him by bond in the sum of \$594 13. That on the 15th of March, 1858, he instituted suit upon this *bond against Hunt in the clerk's office of the County court of Culpeper, before the hour at which the said court was accustomed to sit. That Hunt feeling under some obligation to secure to the respondent the payment of the said sum of money, determined to give him the lien of a judgment; and for this purpose went into the clerk's office before the sitting of the court, and confessed the judgment before the sworn deputy, for the said sum of \$594 13. That this confession was not on the 16th of March, 1858, the second day of the March

term as stated in complainant's bill, as will appear by reference to a copy of the writ and endorsement filed with the answer marked X.

The writ of which a copy was filed with the answer is dated the 15th of March, 1858, and the endorsement is, "Judgment confessed in office, March 15, 1858." And there was no other evidence in the cause.

When the cause came on to be heard the court being of opinion that the confession of the judgment in the clerk's office on court day, although it may have been confessed before the actual sitting of the court, was illegal and void, perpetuated the injunction, with costs; and directed that the sheriff in disposing of the money in his hands arising from the sale of Hunt's property, should disregard the execution of Brown altogether, and dispose of the said money among the other executions, including Hume's, in his hands, according to their priorities. From this decree Brown obtained an appeal to this court.

Green, for the appellant.

The Attorney General, for the appellee.

DANIEL, J. The language employed in the first sentence of the forty-first section of the one hundred and seventy-first chapter of the Code, literally interpreted, 458 *is broad enough to embrace a judgment confessed in the clerk's office of a court after the court shall have commenced its session.

It declares that "in any suit a defendant may confess a judgment or decree, in the clerk's office for so much principal and interest as the plaintiff may be willing to accept a judgment or decree for." The section, however, in its second clause, provides that "the same shall be entered of record by the clerk in the order or minute book, and be as final and as valid as if entered in court on the day of such confession, except, merely that the court shall have such control over it as is given by the last section of this chapter," and by the said last section (the 51st) it is declared that "the court shall have control over all proceedings in the office during the preceding vacation. It may reinstate any cause discontinued during such vacation, set aside any of the said proceedings or correct any mistake therein, and make such order concerning the same as may be just."

Notwithstanding the generality of the terms used in the first clause of the forty-first section, the fair implication arising from reading the whole of that section and of the fifty-first section together, is, that the judgment is to be confessed in vacation, and that it is to be subject to the same control that is given to the court over all other proceedings in the office had in vacation. Indeed, a consideration of the very nature of the subject, and a reference to our former practice and legislation, would seem wholly to forbid any other conclusion. In receiving the confession of judgment the clerk, pro hac vice, performs the functions of the court—functions, which, in the absence of

*See discussion of principal case in 2 Va. L. Reg. 327.

See also, monographic note on "Judgments by Confession."

†See the statutes quoted by JUDGE DANIEL in his opinion.

legislative enactments, could have been performed only by the judges or justices in session in their respective courts. Prior to the passage of the act to be found in 2 R. C. 1819, App. 6, chap. 1, whilst the courts could receive a confession of judgment
459 in any stage of *a cause, there was no power in the clerk to take such confession in his office. The result was that a defendant detained in custody for want of bail, though unable to give it, and insolvent, and willing to confess a judgment for the entire demand of the plaintiff, was kept in jail till the session of the court in which the action was brought. In order to relieve insolvent debtors from the long and useless imprisonment which often intervened between the times of their arrest and the sittings of the courts the act just mentioned was passed. I Rob. Pr. 136, 137. It provides that any person in custody in any civil action, on any original or mesne process, and desirous to avail himself of the privileges thereby given to insolvent debtors, may confess a judgment in the clerk's office, at any time during vacation, for the whole amount of the plaintiff's demand in his writ or declaration set forth and costs, or such part thereof as the plaintiff may be willing to accept a judgment for. Such judgment, so confessed, shall be entered of record by the clerk, shall be final, shall have the same validity as if entered in open court; and the defendant may thereupon discharge himself from confinement in the same manner as if the judgment had been rendered in court.

Had the words "at any time during vacation" been omitted the courts could never have construed the statute as intending to allow of confessions of judgment in the clerk's office during the actual sitting of the court. No good end could have been accomplished, no mischief avoided by such a construction. As has been stated, the evil to be remedied was that persons were often kept in jail in the vacations or intervals between the sittings of the courts by reason of the want of some tribunal empowered to take their confessions of judgment. During the session of the court there could be no need or occasion for the vicegerency of any such tribunal.

460 *These views, aided by considerations of the incompatibility involved in allowing the clerk in his office, to discharge, in the place and stead of the court, during the session of the court, duties appropriately belonging to the latter, and by the further consideration of the inconvenience and confusion likely to arise from such a practice, would, I am satisfied, have led the courts, in the absence of the words in question from the statute, to a construction restricting confessions of judgment in the office to the vacation. In the acts of 1839-40 (p. 46) and 1842-3 (p. 50) and in the 41st section of chapter 173 of the Code, the legislature have omitted the use of these words. They have said nothing about the vacation. The omission, I am satisfied for the reasons stated, has proceeded from no

change of policy in regard to the particular in question.

This view of the provisions of the Code on the subject does not however, as it seems to me, necessitate the conclusion that the judgment in controversy is void.

The appellee Hume charges in his bill, that the judgment was obtained by the appellant by the confession of Hunt, on the 16th day of March, 1858, the second day of the March quarterly term of the County court of Culpeper, in the clerk's office of the said court before the clerk's deputy, and while the said court was in session.

The appellant in his answer denies the allegation of the bill, and says that, Hunt being indebted to him by bond (in the sum of \$594 13) on the 15th day of March, 1858, he instituted suit upon said bond against said Hunt in the clerk's office of the County court of Culpeper, before the hour at which the court was accustomed to sit; that said Hunt feeling under some obligation to secure to the appellant the payment of the debt, determined to give him the lien of a judgment; and for this purpose went

461 into the clerk's office before *the sitting of the court and confessed a judgment before the sworn deputy—the clerk being then otherwise engaged in said office—for said debt. This confession (he proceeds) was not on the 16th of March, 1858, the second day of the March term, as stated in complainant's bill, as will appear by reference to a copy of the writ and endorsement filed marked X. The writ is dated the 15th of March, and the copy of the judgment is simply "judgment confessed in office March 15, 1858."

There are no other proofs in the cause. It will be seen that there is no proof, nor any direct admission in the answer, that the court did in fact hold a session on the 15th day of March at all. This may, however, I think be fairly inferred from the answer; which at the same time, however, positively avers that the confession took place before the sitting of the court. And as the appellee charges the confession to have been made on the 16th day of March—the second day of the court—and the appellant avers and proves that it was made on the 15th of March, we are justified, without any reference to the calendar, in concluding from the pleadings, that the confession was made on the first day of the term before the court commenced its session.

No objection was made to the judgment in the argument here, because of its having been confessed before the deputy clerk instead of the clerk, and the fact cannot, I apprehend, operate any prejudice to the judgment, it being provided by the 8th section of chapter 163, of the Code, that the deputy "may discharge any of the duties of the clerk."

The confession being in all other respects regular, the simple question for decision is: whether the fact, that the 15th of March was the day fixed by law for the commencement of the term of the court, of itself, or aided by the further fact that the

462 court sat on that day, *renders void a confession of judgment made in the clerk's office, on the morning of that day, before the court was opened.

For some purposes the term of a court and the time appointed by law for the holding of the court have the same legal import and meaning. Thus the law may require process to be returned, pleadings to be filed, notices to be given, or other steps to be taken, a certain number of days before a given term of the court. A party of whom such a requirement is made, has no right to wait till the time for holding the court arrives, and then if for any cause the court is not held, avail himself of the omission to hold it as an excuse for not having performed an act which the law required to be done a certain number of days before the court could have been opened. In such cases the day on which the act is to be done is fixed by reference to the named term of the court with as much certainty as if it had been designated by its place in the calendar.

In other instances the word "term" is considered as meaning not the stated time when a court should be held, but the actual session of the court. Thus, in the 28th section of the 169th chapter of the revised Code of 1819, it is provided, that when any prisoner committed for treason or felony shall apply to the court the first day of the term by petition or motion, and shall desire to be brought to his trial before the end of the term, and shall not be indicted in that term, unless it appear by affidavit that the witnesses against him cannot be produced in time, the court shall set him at liberty upon his giving bail to appear at a day, to be appointed, of the succeeding term. That every person charged with such crime who shall not be indicted before, or at the second term after he shall have been committed, unless the attendance of witnesses against him appears to have been prevented

by himself, shall be discharged from
463 his *imprisonment, if he be detained for that cause only; and if he be not tried at or before the third term after his examination before the justices, he shall be forever discharged of the crime, unless such failure proceed from any continuance granted on the motion of the prisoner, or from the inability of the jury to agree on their verdict. In the case of Santee, 2 Va. cases 363, the prisoner was remanded for trial by the examining court in July, 1822; at the October term of the Superior court that court did not sit; at the May term succeeding the cause was continued for the Commonwealth; and at the third term in October, 1823, the court failed to sit; and the question to be decided by the general court was whether under the act aforesaid the prisoner was entitled to be forever discharged of the crime; and this question turned on the meaning of the word term as used in the act. The minority of the judges, speaking, through Judge Parker, held that in common parlance the term of a court meant the period assigned by law for the holding of the court; and that this was the sense

annexed to it by the legislature. That the word was employed in this sense in reference to all three of the terms of the court mentioned in the act. That though, to entitle a prisoner to bail if not indicted the first term, it was necessary there should be a court long enough to enable the prisoner to make an application to be bailed, that being a preliminary step, it did not follow that court and term were used by the legislature in the passage relating to the first term, as synonymous. And that in respect to the second and third terms, no application by the prisoner to the court at either of said terms, was required in order to entitle him to the rights and privileges growing out of the failure of the Commonwealth to indict him at the second, and to try him at the third term after his examination; and that it was clear beyond all doubt that the word term in the passage relating

464 *to the second and third terms was intended to mean the stated time for holding the court; and that three terms having passed without a trial, the prisoner was entitled to his discharge. On the other hand Judge Dade, in delivering the opinion of the majority of the judges, said, "If the word term had a fixed and definite meaning in all cases whatsoever, this court would probably never have had to decide this question. But upon reference to the books we can derive no satisfactory conclusion from them. An author indeed (Jacobs' Law Dictionary title Term) defines the terms as 'those spaces of time wherein courts of justice are open for all that complain of wrongs and injuries and seek their rights by course of law and action in order to their redress; and during which the courts in Westminster Hall sit and give judgments &c.' And this definition favors the construction which would make them synonymous with courts. But it cannot be denied that in common parlance in some of the statutes and amongst the law writers the word has been often indiscriminately used to express the actual session of the court, and the stated time when it should sit. This gives room for construction, and imposes the necessity of enquiring into the reason of this law; of considering the word in the context and comparing the relative provisions of the section, so as to ascertain the sense in which the word was used by the legislature in this particular law; and upon the result of this enquiry the decision of this question turns." Proceeding to examine and comment on the several clauses of the section, he came to the conclusion, that in each of the passages in which the word was used it was intended to denote not the time appointed for the holding of the court, but the actual sitting of the court; and that as there was no court either at the first or third term, there had been no failure to try the prisoner at the third
465 term in *the true meaning of the statute; and that the prisoner had shown no right to his discharge; and the court accordingly refused to discharge the prisoner.

In speaking of the operation and force of

judgments in reference to the times at which they were rendered, it is often said by judges and text-writers, that at the common law the whole term is regarded as but one day, and that all the judgments therein relate to the first day thereof, and overreach all intermediate conveyances of the debtors' lands. Yet there are several well recognized exceptions to this rule. And Judge Green, in delivering the opinion of the court in *Coutts v. Walker*, 2 Leigh 268, expressed the opinion, that the exceptions might well apply to all cases in which it appeared that the plaintiff's case could not be matured for judgment on the first day of the term. And in the case of *Skipwith v. Cunningham*, 8 Leigh 271, it was held that the term of a court was not to be considered as necessarily commencing on the day appointed by law for its commencement; and a deed admitted to record on the day appointed for commencing a term, but before the day on which the court actually commenced its session, was adjudged to be unaffected by the lien of a judgment rendered during the term. Judge Tucker in delivering the opinion of the court said—"But admitting that the judgment relates back to the first day of the term, I cannot persuade myself that we ought to consider the term as commencing on the day appointed by law for its commencement, although in point of fact the court was not held until the third day afterwards. There is no analogy between such a case and the session days of the terms in the English courts; and the extension of the fiction of relation to embrace a period when the court was to no intent whatever in session, would be unreasonable and without precedent. I should certainly be averse to any such extension, having in fact 466 very great doubt of the wisdom of the fiction at best; and as there is no precedent to bind me I shall not be the first to make one. I shall consider the judgment as relating back to the first day of the term and the first moment of that day; but I look upon the day on which the court commenced its session as being the first day of the term."

Consistently with this, and as was to have been naturally expected from the correlativeness of the words, we find that there is a like want of uniformity in the meaning attached to the word Vacation, and that it is employed indiscriminately in several different senses. Jacobs in his *Law Dictionary*, (title Vacation), defines it as being "all the time between the end of one term and the beginning of another; and," he adds, "it begins the last day of every term as soon as the court rises." Burrill (title Vacation) speaks of it as the "intermission of judicial proceedings—the recess of courts—the time during which courts are not held." And he also quotes the definition of Jacobs.

Thus, where we look to its own appropriate definition, or seek to deduce its meaning from the use made of its correlative by the law writers, it would seem that there is not attached to the word vacation, a well ascertained, fixed, single, unvarying,

technical meaning which is to control the interpretation of a statute in which the word has been employed; but that, on the contrary, there are several well received meanings of the word, from which it is our duty to select that, which, looking to the whole scope and true purpose of the law, will most probably carry out the intention of the legislature.

In view of the evil sought to be cured by the act of 1819, to wit, the useless and unnecessary imprisonment of debtors, we can see no reason for supposing that the legislature in framing the law of 1819 intended to leave an interval in which a party 467 detained for want of bail *could not confess judgment either in the clerk's office or in court. And as the language of the statute readily admits of an interpretation extending the period during which the clerk may take confession in his office, to the commencement of the actual sitting of the court, no reason is perceived why we should not adopt that interpretation. It is true that since the abrogation of our system of laws relating to bail, the argument against the intention of the legislature to allow of such an interval in the present law, is without one of the grounds on which it formerly rested. Nor, however, (it may with equal propriety be said), is there the same necessity now for allowing judgments to be confessed in the clerk's office at all. Yet they are allowed, doubtless from considerations of public convenience, and as there is clearly in the new law continuing the indulgence, nothing to narrow or abridge the limits of the period within which the confession of judgment may be made in the office, there is obviously no rule of construction which would require us to contract the boundaries of such period.

The argument of incongruity in allowing judgment to be entered, both in the clerk's office and in the court on the first day of the term, may be urged with equal force against allowing the like state of things to occur on the last day of the term; yet according to the authority already cited (Jacobs) the vacation begins the last day of the term as soon as the court rises. In this view of the law a judgment confessed in the clerk's office on the last day of a term after the court has closed its session, would be as valid as if entered in court on the same day; and this being so, what reason have we for declaring that a judgment entered in the office on the first day of the term before the court has commenced its session, shall be void?

According to our practice there is no 468 legal incompatibility *or absurdity in the same judge's sitting and rendering judgments in two courts on the same day. In such cases it has not been supposed by our judges that, in order to give full efficacy to the orders and judgments of either of the two courts, it was necessary to vacate the orders and judgments of the other. The circuit court law of 1819, (see Revised Code of 1819) required that each of said courts should sit until the business thereof was dispatched, unless the judge

holding the same should be compelled to leave the court in order to arrive in time at the next succeeding court of his circuit, or at the general court. And the general court law, 1 Revised Code 219, required said court to be holden at the capitol in the city of Richmond twice in every year, namely, on the 15th of June and 15th of November. In *Mendum's case*, 6 Rand. 704, judgment passing sentence of death on the prisoner, was rendered by the Superior court of Chesterfield on the 15th day of November, the day for holding the general court. The jurisdiction of the Superior court of Chesterfield was sustained and its judgment affirmed by the general court. That court held that if the judge of the Superior court of Chesterfield, after closing that court on the 15th of November, did arrive or could arrive at the capitol at any time on the same day, he would have been, in the meaning of the act, in time to hold a general court on that day; and that as it did not appear that, when the judgment was rendered in the Superior court of Chesterfield, there was not time for the judge to arrive at the general court during the 15th, it would be presumed that there was; Chesterfield court house being distant from the capitol only a three hours' ride; and that there was no ground shown for vacating the judgment of the Superior court. Judge Bouldin, in delivering the opinion of the court, said that some of the judges of the court were in the habit of finishing

469 the business of one *Superior court in the morning of the first day of the next succeeding Superior court, and sometimes of doing a good day's business in the latter court on the same day. A like habit prevails under our present system. Members of this court have not unfrequently sat in the district courts of appeals with judges of the Circuit courts on the same days on which the latter had closed the session of one of their Circuit courts.

It is not believed that any inconvenience or confusion has resulted from this practice. It does not violate, or run counter to, any conceivable policy of the law, whilst its obvious effect is to promote the dispatch of the business of the courts. The argument by analogy in favor of upholding the judgment in controversy seems to me to apply with great force, and to stand without any sufficient answer. And upon the whole I am for reversing the decree of the Circuit court, and for rendering a decree declaring the judgment aforesaid to be valid, dissolving the injunction, and remanding the cause for further proceedings.

The other judges concurred in the opinion of Daniel, J.

Judgment reversed.

470

**Burroughs v. Peyton.*

Abrahams v. Same.

January Term, 1864, Richmond.

1. *Confederate Congress—Power to Raise Armies.*—Congress has the constitutional power to raise armies, either by contract or by coercion.

2. *Confederate Military Service—Substitute—Call under Subsequent Law—Effect on Principal.*—A person who has put in a substitute who has been regularly received and continues in the service, not liable himself to conscription, is not thereby entitled to be discharged from service, under a call made upon him by virtue of a subsequent law of Congress.

3. *Confederate Congress—Power to Contract for Exemptions from Military Service.*—Congress has no power to make a contract with the citizen, whereby that body shall be forbid to call him into the military service of the country.

4. *Same—Act Authorizing Substitutes—Contract.**—The act of Congress authorizing persons in the military service to put in substitutes does not constitute a contract between the government and such persons.

5. *Same—Same—Effect on Subsequent Calls.*—But if it is to be regarded as a contract, it does not apply to exempt the person who has put in a substitute from any call which may thereafter be made upon him for military service.

6. *Same—Power to Coerce State Officials into Service.*—Congress has no power to coerce officers of the State government into the military service of the Confederate States.

On the 12th and 17th of February 1864, J. R. F. Burroughs and L. P. Abrahams applied to this court by petition, setting out that they were held in custody by Major T. J. Peyton commanding at Camp Lee near the city of Richmond, as conscripts. That they had theretofore put in substitutes under the act then in force, and had been regularly discharged from the service, and that their substitutes were still in 471 the service, and were *not liable to conscription under any act of Congress; the substitute of Burroughs being an unnaturalized foreigner, and the substitute of Abrahams being fifty-seven years old.

The writs were issued, and Major Peyton produced the parties, and made return that he held them under and by virtue of the act of Congress entitled "an act to further provide for the public defence," approved April 16th 1862, and the several acts amendatory thereof and in addition thereto, now in force, they being liable under the same military duty in the armies of the Confederate States; and that they were detained for no other cause.

In Burroughs' case it appeared, that on the 19th of March 1862, James R. Branch, Capt. Co. K. 16th Regiment Va. Volunteers, gave to Burroughs a certificate that said Burroughs a member of Branch's company, before being mustered into the service, having furnished an able-bodied man well clothed, in the person of Frederick W. Rholeder, a non-resident of the State of Virginia, who had been accepted by said Branch for the war, as his substitute, has been this day discharged from said company. And on the same day Burroughs received from the Governor of Virginia a

*See principal case cited in *Martin v. Snowden*, 1 Gratt. 114; *Antoni v. Wright*, 22 Gratt. 367; *Clarke v. Tyler*, 30 Gratt. 134.

certificate exempting him from all military service, except ordinary militia duty, on the ground that he had furnished a substitute for the war, who had been received for the war in Capt. Branch's Co. K. 16th Regiment Va. Volunteers. It was not proved that the substitute was still in the Confederate service; but the fact seemed to be admitted by the counsel for the government.

In Abrahams' case it appeared that on the 17th of November 1863, he was regularly discharged from the service of the Confederate States on the ground that he had furnished a substitute who had been accepted, so long as the substitute was exempted under the law and

472 *orders regulating the same. In this case too there was no question as to the continuing service of the substitute.

The cases were heard together, and were elaborately argued by Gilmer, Branch, H. Marshall and Crump, for the petitioners, and August and Randolph, for the government.

ROBERTSON, J., delivered the opinion of the court:

The returns having been made without reference to the recent act of Congress suspending the privilege of the writ of habeas corpus in certain cases, and the respondent not asking leave to amend them and rely upon that act; but on the contrary stating that he asserts no right under it to hold the petitioners in custody; the court does not consider it necessary to decide any question which might arise under said act, and will proceed to consider these cases irrespective of it.

Although this court has, more than once, acted upon questions arising under the acts of Congress approved on the 16th day of April 1862, and on the 27th day of September 1862, commonly called the conscription acts, it has never until now been called on to decide upon their constitutional validity, that having been heretofore either expressly or tacitly conceded. But the question, whether Congress had the power, under the constitution, to pass said acts, is now raised: and, as it is of the highest public importance, it is proper that it should receive the most careful and deliberate examination. In deciding it, considerations of expediency and policy cannot be permitted to control our judgment. We must expound the constitution according to what appears to be its true meaning; and if it be clear that no power to pass the acts in question has been conferred by it, we are bound to declare them void and of no effect, however disastrous may be the consequences of our decision.

473 *It is said that Congress cannot, under the grant of the power to raise armies, place, by force, and at their own discretion, the citizens of a state in the ranks of the army of the Confederate States. That a power so to do, would be despotic in its nature, and far greater and more dangerous than any possessed by the government; subjecting as it does the personal

freedom of every citizen to arbitrary discretion: and moreover that it would be inconsistent with the rights of the state; putting their very existence at the mercy of the Confederate government. That a mere general grant of the power to raise armies, without specifying the mode in which they are to be raised, cannot be held to confer an authority so repugnant to the spirit of free institutions, the principles on which our constitution rests, and the rights secured by it.

The power of coercing the citizen to render military service, is indeed a transcendent power, in the hands of any government; but so far from being inconsistent with liberty, it is essential to its preservation. A nation cannot foresee the dangers to which it may be exposed: it must therefore grant to its government a power equal to every possible emergency; and this can only be done by giving to it the control of its whole military strength. The danger that the power may be abused, cannot render it proper to withhold it; for it is necessary to the national life. The hazard of abuse should be guarded against by so framing the government as to render it unlikely that it will ever use the power oppressively.

The real question for our consideration, then, is not whether the power exists, but where it exists. Has it been conferred on the Confederate government, or is it retained by the states? In its effects upon the individual personally, the act of compelling him to render the service is the same whether it is performed by the state, or by the Confederate government.

474 question *as to which of them should exercise the authority relates merely to the proper distribution of political power between the two governments. And the idea that first suggests itself is that it ought to be placed in the hands of the one which is charged with the duty of providing for the defence of the country; for a government "from whose agency the attainment of any end is expected, ought to possess the means by which it is to be attained."

The clauses of the Confederate constitution relating to the military power, and its exercise, have been adopted without change from the constitution of the United States, the amendments to the latter being inserted in the body of the former. Whatever therefore throws light upon the meaning of the constitution of the United States, on this point, throws equal light upon the meaning of ours.

It is well known that the union of the colonies was formed for the purpose of combined resistance to the oppression of the mother country. Delegates from the several colonies, constituted a Congress which assumed the conduct of the war, in the name and on behalf of all the colonies, which soon became the United States of America. But the Congress could exercise the power of compelling citizens to serve in the army only through the intervention of the states, by means of requisitions upon them for their respective quotas of men; and, being

unable to enforce compliance with these requisitions, it was found impossible to raise an army sufficient for the vigorous prosecution of the war. This difficulty, which had been so painfully felt throughout the contest, and which, indeed, put to serious hazard the success of the cause, was one of the chief reasons urged in favor of the change of the form of government effected by the adoption of the constitution of the United States. It was insisted that the government having the power of determining on peace and war, and
 475 *charged with the duty of providing for the common defence, should be invested with power commensurate with that end, and that this could only be done by abandoning the system of requisitions upon the States, and authorizing the Federal government to act directly upon individuals. These views prevailed, the constitution being framed in accordance with them.

It will be observed that a broad distinction is made in the constitution, between the "militia," and the "armies," referred to in it: the powers conferred upon Congress, and denied to the states, in reference to the one, being widely different from the powers conferred and denied in reference to the other. And, indeed, the two words could not properly have been used to convey the same idea. An army is a body of men whose business is war: the militia a body of men composed of citizens occupied ordinarily in the pursuits of civil life, but organized for discipline and drill, and called into the field for temporary military service when the exigencies of the country require it.

The experience acquired during the revolutionary war had demonstrated, what indeed all previous experience had taught, that however valuable a militia may be, it is unable to contend permanently and successfully with veteran troops; and that it would be to the last degree unsafe to trust to it exclusively for the defence of the country. It was well known that a regular army would be absolutely indispensable in a protracted contest with a powerful nation. Accordingly, in spite of the jealousy, inherited from their English ancestors, against standing armies, the framers of the constitution gave to Congress the power "to raise and support armies." There is certainly nothing in the terms of the grant to restrict Congress to voluntary enlistments as a means of raising armies. Nor does any sufficient reason appear why

such restriction should have been imposed. The experience *of the revolution had shown that it was necessary to resort to compulsion to fill the ranks of the army. This compulsion had not, it is true, been applied by the Federal government; but that was because it had no power to resort to it, being confined to requisitions upon the states. The states had the power: and, in compliance with the requisitions made upon them by Congress, continually exercised it, not for the purpose of bringing out the militia merely, but for the purpose also of filling the ranks of the regular army

when voluntary enlistments fell short of the number to be furnished for it. See Marshall's *Life of Washington*, vol. 4. p. 241.

Instances of such legislation are to be found on the statute book of the State. In May 1777, an act was passed "For the more speedily completing the quota of troops to be raised in this commonwealth for the continental army, and for other purposes:" in which it was provided that if, before the 10th day of August 1777, a sufficient number of men should not have enlisted to make up the quota required, the deficiency should be made up by draughts from the militia; and that each man, so draughted, should "be to all intents and purposes, considered as a regular soldier;" and should serve as such, for three years, if the war should so long continue. See 9 Hen. Stat. at large, p. 275. See also the same volume of Hen. p. 337, and vol. 10 Id. pages 82, 214, 259, 333; and vol. 11 Id. p. 14, for instances of similar legislation. Other instances might doubtless be pointed out; but these are amply sufficient to put it beyond controversy that compulsory draughting was an ordinary means used for filling the ranks of the regular continental army. This, of course, was well known to the framers of the constitution of the United States. If it had been their design to restrict Congress to voluntary enlistments as the means of raising armies, is it at all probable that

they would have failed so to declare
 477 *in express terms? In granting the power "to raise armies," without any words of limitation or restriction as to the mode to be employed, they must be understood as intending that the power should be exercised in any and all of the modes which had been previously employed by the States. Full power to make war was vested in the Federal government. Of course it could not have been intended, if an offensive war, necessary for the assertion of the rights or vindication of the honor of the country, should be undertaken, to withhold from the government the means of prosecuting it with success, by denying to it the use of any troops, except such as might be obtained by voluntary enlistment. Yet this was done, if the power to use compulsion to fill the ranks of the army was not conferred on Congress; for the militia can be called out only for the purpose of executing the laws, suppressing insurrections, or repelling invasions.

But it is said that it does not appear that any objection was made, at the time of the adoption of the constitution of the United States, to the clause granting the power to raise armies, on the ground that it gave to Congress the power of conscription; and that it is incredible that a power so vast and dangerous would have passed without objection, if it had been then supposed to be possible that it would ever be claimed by any one that such power was conferred. It will hereafter be shown that the failure to make the objection may be accounted for on other grounds than the one suggested;

but however this may be, it is entitled to not the slightest weight in determining the construction of the constitution of the Confederate States. When that constitution was adopted, it was well known that the power in question had been asserted to exist, under the constitution of the United

States, by many statesmen whose
478 opinions *had always been received with the utmost respect; especially in the southern states of the late union.

In October 1814, Mr. Monroe, who was then Secretary of War under the administration of Mr. Madison, addressed a letter to Mr. Troup of Georgia, as chairman of the military committee of the house of representatives, in which he proposed four different plans for organizing the forces of the United States. The first of these plans, and the one for which he expressed his preference, proposed that the army should be raised by draught from the free male population of the United States, between 18 and 45 years of age; and he entered into a full examination of the question as to the constitutional right of Congress to compel citizens to serve in the army; coming to the conclusion that there was no doubt of the existence of such right. Mr. Troup, as chairman of the committee on military affairs, reported a bill in conformity with the first plan recommended by Mr. Monroe; but it was never acted upon; a bill upon a different plan having been passed by the senate and sent to the house, where it was amended in certain particulars, in reference to which no agreement was had between the house and senate, when the treaty of peace with Great Britain rendered the passage of any bill unnecessary, and the whole subject was dropped. But the proposition of Mr. Monroe to raise men by conscription (as it was then designated) led to much discussion, in which the right was earnestly asserted by some, and as earnestly denied by others; those asserting it belonging generally to the states rights party. See *Annals of Congress* (13 Cong. 1814-15, vol. 3).

This is not referred to as settling conclusively the true construction of the constitution in this particular; but it shows that the framers of the constitution of the Confederate States did not agree in opinion with those who think that the power
479 in question is fraught with *danger to the liberties of the citizen or the rights of the states, or they would have taken care to use language which would leave no doubt that they did not intend to confer it, instead of retaining that which had been construed, by many of the wisest statesmen under the government of the United States, to give it.

But it is impossible that it could have been supposed, at the time of the adoption of the constitution of the United States, that it would never be claimed by any one that it conferred this power; for such was the construction of the constitution in the papers of the *Federalist*, written with the view of inducing the people of the states to adopt it; and recommending it to them be-

cause it invested the Federal government "with full power to levy troops; to build and equip fleets; and to raise the revenues which will be required for the support of an army and navy, in the customary and ordinary modes practised by other governments." *Federalist*, No. 23. See also, *Id.* from No. 23 to No. 28, inclusive.

The failure to make special objection, at the time, because of the grant to Congress of the power of conscription is not surprising. There was no serious reason to apprehend that a government designing to overthrow the liberties of the people, would raise an army for the purpose, by a conscription of the very people whose rights were to be assailed; and it was obvious that if it should have the folly to do so, the army, when raised, would be the most efficient instrument that could be devised, for the defeat of the object in view. The danger really apprehended, from the grant of the power to raise and support armies, was that the Federal government would be enabled to raise and keep in its pay an army of mercenary troops with no interests in common with the people; which might be
480 used for the overthrow of their liberties and the destruction of the *rights of the states. It was to this danger that the objections pointed. It was guarded against by adding to the grant of the power to raise and support armies, a proviso that "no appropriation to that use should be for a longer period than two years;" thus requiring the consent of every new Congress to the continuance of an appropriation for the support of the army. It was not deemed safe to go further than this in limiting the power of Congress on the subject. A proposition to limit the number of the army to be raised was rejected, because it was impossible to foresee what number the exigencies of the country might require. The objection to permitting a standing army to be kept up in time of peace was disregarded, because, when it was conceded that armies were necessary to protect the country from foreign aggression, it was manifest that it would be unwise to withhold the power to raise them until after hostilities had actually commenced. When it was resolved that the Federal government should be entrusted with the common defence, it followed, as a corollary, that it ought to be

"invested with all the powers requisite to the complete execution of the trust." It was wisely determined therefore "that there should be no limitation of that authority which is to provide for the defence and protection of the community, in any matter essential to its efficacy; that is, in any matter essential to the formation, direction, or support of the national forces." *Fed.* No. 23. As has been already stated, experience had shown that the exercise of the power of compulsion was necessary to raise an army of sufficient size for the necessities of the country in time of war. It had been habitually applied by the states in the war from which the country had just emerged. What then could be more natural or proper

than to entrust this power to the Federal government along with the other war powers confided to it? Why should it be ex-
 481 cepted from the *grant? Such excep-
 tion would be opposed to the principle on which the grant was founded; and might, at a time of critical danger to the country, render the grant itself nugatory. The power to raise armies by conscription is less dangerous to the liberties of the people, than is the power of raising them by voluntary enlistment. An improper exercise of the power of conscription could not fail to excite at once the indignant opposition of the people; while an army might be improperly increased by voluntary enlistment without attracting much popular attention; and one thus raised would, as has been shown, be much more dangerous to the rights of the States, and the liberties of the people, than the one raised by conscription.

It is said, however, that the absence of a provision requiring the power of conscription to be exercised equally and uniformly, shows that it was never designed to be conferred upon Congress; for, without some such limitation, Congress may act most unjustly and oppressively, distributing the burden of raising an army unequally between the different states; and that any state is liable to have its whole armsbearing population withdrawn from it, and carried off, to any part of the world, in the ranks of the army.

To this it may be answered that this power, like all others, is unquestionably liable to abuse; though it does not seem probable that the attempt would ever be made to abuse it in the manner suggested. The protection against its abuse in this, or any other manner, is to be found in the responsibility of Congress to the people, ensured by their short tenure of office; and in the reserved right of each state to resume the powers delegated to the Confederate government, whenever, in her judgment, they are perverted to the injury or oppression of her people.

Again, it is objected that if the
 482 authority to raise *armies gives to Congress the right to compel citizens to serve as soldiers, it embraces the whole war power, so far as relates to the raising of men; and not only renders the provisions in reference to the militia supererogatory, but enables Congress to destroy the militia itself, by absorbing into the army all the men who compose it. And it is argued that it must therefore be inferred that the right of conscription does not exist; as it cannot be supposed that it was intended to confer power upon Congress to destroy the militia of the states.

It is true that the constitution does recognize the militia, and provide for using it, as well as regular armies, in the military service of the country. A well regulated militia has (as is stated in one of the amendments) always been regarded as necessary to the security of a free state. It was therefore proper that provision should be made in the constitution for its organi-

zation, and for the authority to be exercised over it by the state governments and Congress respectively. It was not probable that in the exercise of the power to raise armies, Congress would, under ordinary circumstances, materially diminish the number of the militia. But it cannot be true that, with the view of preserving the militia entire, it was intended to deny to Congress the right to take individuals belonging to it for the regular army. This construction would prevent Congress from obtaining from its ranks not only conscripts but volunteers also; and as the militia embraces the whole armsbearing population, it would render it necessary that the army should contain none but foreigners hired for the purpose, and having no interest in common with the people of the country. No one can imagine that such was the intention of the framers of the constitution.

The true interpretation of the constitution in reference to this matter would seem to be, that the power to use the whole military force of the country was conferred
 483 *upon Congress, and it was left to their discretion to fix, as the varying necessities of the country might require, the relative proportion of regular troops and militia *to be employed in the service. If it should appear at any time to be proper to increase the army, it might be done by taking men from the militia either as volunteers or as conscripts—the action in either case being upon the individual citizen, and not upon the militia as an organized body. As it was impossible to foresee how large an army the exigencies of the country might demand, the number of militiamen to be thus transferred to its ranks was wisely left to the discretion of Congress. It may be difficult to say to what extent Congress have the right, in the exercise of this discretion, to affect the militia, as an organized body. It is sufficient for the purposes of this decision to see, as we do, that neither of the acts of Congress, the validity of which has been called in question, does destroy or impair the organization of the militia; construing them, as it is proper that they should be construed, in connection with the exemption acts which are in pari materia. It will be time enough, when a case is brought before us in which the organization of the militia is destroyed or impaired by Congress, to enquire what limits are fixed to their action in this respect.

It is further objected that if Congress have the right of compelling citizens to serve in their armies, the state governments are at their mercy, and exist at their will: that they may conscribe all of the officers of the state, executive, legislative and judicial; and thus put a stop to the action of its government. This objection is without foundation. Congress can have no such power over state officers. The state governments are an essential part of our political system; upon the separate and independent sovereignty of the states the foundation of our confederacy rests.

484 All powers not delegated to the *Confederate States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people thereof; and the Confederate States guarantee to each state a republican form of government.

It is absurd to suppose that the government of the Confederate States can rightfully destroy the governments of the states which created it; and all the powers conferred on it must be understood to have been given with the limitation that, in executing them, nothing shall be done to interfere with the independent exercise of its sovereign powers by each state. Congress can have no right therefore to deprive a state of the services of any officer necessary to the action of its government. And the state itself is the sole judge as to the officers that are necessary for that purpose.

But it is said that this is not enough to satisfy the rights and duties of the state as a sovereign. That each state has the right to command the services of all her citizens, and on the other hand is bound to afford them protection. That this right and duty are both interfered with by the exercise of the power of conscription by Congress; for by it the citizen may be dragged from his home and forced into the army, for service perhaps in a foreign land, against the wish of the state to which he belongs.

If, however, the power in question has been conferred upon Congress by the constitution, it is a mistake to say that it can be exercised without the consent of the states. For each state by ratifying the constitution gave her consent. We are brought again to the enquiry, is the power granted to Congress by the constitution? For the reasons already indicated we think it clear that it is. And it was wisely granted; for the rights of the states and liberties of the citizens can be much more effectually asserted and defended than they could possibly be if the power had been withheld.

485 *The objection that the states have been deprived of the power of appointing the officers is founded on the mistake of regarding the forces called out as "the militia." They are not militia, but an army; created under the power given to "raise armies." Not, it is true, a standing army to be kept up in time of peace, but a provisional army, brought into the field for service during the existing war. No power is reserved to the states, by the constitution, to appoint officers of the army, whether it be regular or provisional.

Lastly, it is objected to the acts under consideration that Congress do not themselves exercise the power of raising an army, but delegate it to the President.

We do not think that they are susceptible of any such interpretation. They delegate no authority to the President to raise an army; but merely authorize him to call out and place in the field the army raised under and by the laws. There can be no valid objection to the discretion given him to

call out from time to time, as the necessities of the country might demand, those made liable to service by the laws. It was, on the contrary, eminently proper that, as commander in chief, he should be invested with such discretion.

For the foregoing reasons we are of opinion that the objections which have been taken to the constitutional power of Congress to pass the acts in question are not well founded, and that said acts should be sustained and enforced.

The next question for our consideration is, whether Congress possessed the constitutional power to pass the act approved on the 5th day of January 1864, entitled, "An act to put an end to the exemption of those who have heretofore furnished substitutes." It is insisted that the government, in permitting substitution, entered into a contract with each individual in whose stead a sub-

stitute was accepted, that he should 486 not *(except in certain contingencies specified in the regulations made by the Secretary of War), be required to render military service, during the period of time for which the substitute was put in; and that the law in question is unconstitutional and void because it violates this contract. The constitution of the Confederate States provides that no state shall pass any law impairing the obligation of contracts; but does not impose any restriction upon the power of Congress in this respect. It is insisted, however, that the omission to prohibit expressly the passage of such laws by Congress, resulted simply from the belief that such prohibition was unnecessary; and does not authorize the inference that Congress have the power to pass them. That if any legislature can violate its contracts, it is because of its unlimited powers, and its being beyond the pale of being questioned in any of its tribunals. That the Confederate government exists only by virtue of powers conferred on it; and, as no power has been granted it to break any engagement it may enter into, it has no right to break a contract which it has a constitutional right to make.

On the other hand it is said, that though it be true that the Confederate government has no right to exercise any power which has not been granted, yet that if, in the exercise of a granted power, a law should be passed impairing the obligation of a contract, such law will be valid and cannot be set aside by the courts. In support of this position they compare the clause of the constitution declaring that no state shall "pass any bill of attainder, or ex post facto law, or law impairing the obligation of contracts," with the clause which declares that "no bill of attainder, ex post facto law, or law denying or impairing the right of property in negro slaves, shall be passed" by Congress; and they argue that it cannot be supposed that the words

487 "or law impairing *the obligation of contracts" would have been omitted from the latter clause, if it had been intended that the power of Congress over

contracts should be as restricted as that of the states.

In the view we take of the matter before us, it is unnecessary to decide the question as to the extent of the power of Congress in this respect, and we express no opinion upon it. If the privilege of substitution had been granted upon a valuable consideration paid directly to the government, Congress would have a right to put an end to the exemption granted by reason of it, whenever in their judgment the situation of the country became such as to render it proper that the party should be again required to serve in the army. The arrangement of substitution cannot be made to extend further than to discharge the person putting in the substitute from the liability to which he is then subject under the existing law. No contract entered into by Congress can be enforced or sustained, unless it appear that the power to make such contract has been conferred by the constitution. No power has been granted them to agree that any person, liable to render military duty, shall be exempted, for any fixed time, from such liability, under any and every call for troops which the necessities of the country may require to be made. The obligation of the citizen to render military service is a paramount social and political duty. It is a matter in which the whole body politic is interested. "The citizens have a right collectively and individually to the service of each other to avert any danger which may be menaced. The manner in which the service is to be apportioned among them and rendered by them, is a matter for legislation." The government, as the agent and trustee of the people, is charged with the whole military strength of the nation, in order that it may be employed so as to ensure the safety of all.

The power which it has to enforce the
488 *performance of the obligation to render military service is given that it may be used, not abdicated. No right has been conferred on the government to divest itself, by contract or otherwise, of the power of employing, whenever and as the exigencies of the country may demand, the whole military strength that has been placed at its disposal. As the nature and extent of those exigencies cannot be foreseen, and it is impossible to say in advance that the services of every citizen capable of bearing arms may not become indispensable for the defence of the country, the government has no right to enter into any contract precluding itself from requiring those services if they should be needed. If there be such right, the spectacle might be presented of a nation subjugated and destroyed at a time when it has within its limits citizens amply sufficient to defend it successfully against all the assaults of its enemies; but whose services cannot be commanded because, forsooth, the government has contracted with them that they shall not be required to serve in the army.

It may possibly be said that our protection against this danger is to be found in

the reserved concurrent power of the states to employ their military strength for the defence of the country. This might perhaps lessen our danger, but it does not meet the argument. The proposition is that the government of no nation can abdicate, or bind itself not to exercise, any part of the power entrusted to it for the defence of the community. And it cannot be supposed that it was intended, under our system of government, to confer the right upon congress to strip themselves of their power, and trust to the irregular, uncertain and tardy action of the several states to bring out the military force of the country.

It may be said also that the case supposed is an extreme one; and that it is not at all probable that any government would ever enter into contracts depriving
489 *itself, to such an extent, of the right to exercise the powers with which it is invested. It is true that the case supposed is an extreme one, not likely to arise even if the right in question were possessed by governments. But it tests the principle. In determining the powers of governments we ought not only to look to what will probably be done, but we should look also to what may possibly be done under them.

No government can have the right to endanger the life of the nation it represents, by contracting that it will not exercise the powers confided to it. For a proposition so obviously true it can hardly be necessary to cite authority; but the authorities are ample to show that in less important matters than that of military defence, "a legislative body cannot part with its powers, by any proceeding, so as not to be able to continue the exercise of them," and if any attempt be made to do so the act is null and void. "It can and should exercise them, again and again, as often as the public interests require." "It cannot abridge its own legislature power, by making permanent and irrevocable contracts in reference to matters of public interest." *East Hartford v. Hartford Bridge Company*, 10 How. U. S. R. 511; *Goszler v. The Corporation of Georgetown*, 6 Wheat. R. 593. In the case of *The Ohio Life Insurance and Trust Company v. Debolt*, 16 How. U. S. R. 416, in which the question was as to the validity of a state law, Chief Justice Taney says, "The powers of sovereignty confided to the legislative body of a state are undoubtedly a trust committed to them, to be executed to the best of their judgment for the public good; and no one legislature can by their own act disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body, unless they are authorized to do so by the constitution under which they are elected."

490 *We think therefore that if it appeared that congress had attempted to make a binding and irrevocable contract to exempt from liability to all subsequent calls for military service those who put in substitutes, during the time for which they were put in, such contract would be

void because of the want of power in congress to make it. But there has been no attempt to make any such contract. Exemption from future liability on the part of a citizen to render military service at the call of the country, is not a subject matter of contract, within the meaning of the clause of the constitution prohibiting the passage of any law impairing the obligation of contracts. By the term "contracts" in that clause it is not meant to include rights and interests growing out of measures of public policy. Acts in reference to such measures are to be regarded as rather in the nature of legislation than of compact, and although rights or interests may have been acquired under them, those rights and interests cannot be considered as violated by subsequent legislative changes which may destroy them. Whatever in the nature of a contract could be considered to exist, there must be implied in it a condition that the power is reserved to the legislature to change the law thereafter as the public interest may from time to time appear to require. In delivering the opinion of the whole court in the case of *Butler v. Pennsylvania*, 10 How. U. S. R. 416, Mr. Justice Daniel says, "The contracts designed to be protected by the tenth section of the first article of the Federal constitution are contracts by which perfect rights, certain, definite, fixed private rights of property are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government, for the benefit of all, and from the necessity of the case, and according to universal understanding to be varied or discontinued as the public good may require." Accord-
 491 cordingly it was *held in that case that an appointment to a public office which by the existing law of the state was to be held for one year with a fixed per diem compensation, does not amount to a contract by the state thus to employ and pay the officer during the year. So that a law repealing the one under which the officer went in, and directing that the office should be vacated before the expiration of the year, and that the officer, in the meantime, should receive a smaller per diem compensation than he was entitled to under the law, by virtue of which he was appointed, was held to be valid; and the officer who continued to discharge the duties of the office, from the day fixed by the latter statute for the reduction of his compensation, until the day when the office was vacated, was held to be entitled to the reduced compensation only, and not to that fixed by the statute under which he received his appointment. See also *East Hartford v. Hartford Bridge*, 10 How. U. S. R. 511; and the opinion of Mr. Justice Campbell in the case of *State Bank of Ohio v. Knoop*, 16 How. U. S. R. 369, 405. So, divorces granted by the legislature of a state do not (according to the great preponderance of authority, and as we think in accordance with sound principle) impair the obligation of contracts, within the meaning of the con-

stitutional inhibition; because marriage, although usually denominated a contract, and certainly one in some senses, is also a status or civil relation, and therefore subject to legislative control. *Bishop on Mar. and Div.* § 771 to § 775. Where a seizure was made by a revenue officer, under a promise, contained in a law of the United States, that on conviction he should share the forfeiture; and a condemnation was regularly had adjudging the forfeiture to have been incurred, it was held that a discharge of the forfeiture by the Secretary of the Treasury, without making compensation to the revenue officer, who had in-
 492 curred trouble and expense *in making the seizure and procuring the condemnation, was no violation of vested rights, or impairment of the obligation of a contract. *United States v. Morris*, 10 Wheat. R. 246. See also the cases of *The State Bank of Ohio v. Knoop*, 16 How. U. S. R. 369; *The Ohio Life Insurance and Trust Company v. Debolt*, Id. 416; *Alexander v. The Duke of Wellington*, 2 Russ. & Myl. 35, 6 Cond. Eng. Ch. R. 383; *The Elsebe-Maas*, 5 Chr. Rob. Adm. R. 155. For the marked distinction between an engagement to render military service and a contract, the cases of *The United States v. Cottingham*, 1 Rob. R. 615, and *The United States v. Blakeney*, 3 Gratt. 405, decided by our own court may be referred to. To borrow the language of Mr. Justice Campbell in the case of *The State Bank of Ohio v. Knoop*, and apply it to the cases before us: "A plain distinction exists between statutes which create hopes and expectations, and those which form contracts." Congress allowed exemptions from military service to those who furnished substitutes, "on existing considerations of policy, without annexing restraints on their will, or abdicating their prerogative, and consequently are free to modify, alter or repeal them." Whatever therefore may have been the expectation, at the time, in reference to the extent of the exemption obtained by putting in a substitute, there was clearly no contract the obligation of which has been impaired, and no vested right which has been violated by the passage of the law putting "an end to the exemption from military service of those who have heretofore furnished substitutes."

The truth seems to be that substitution was permitted as an act of grace and favor on the part of the government, and not as a matter of contract. The government received nothing except the service of one man in the place of another to whose service it was entitled. The consideration paid by the principal for the service
 493 *of the substitute was a matter of private arrangement between them, with which the government had nothing to do. It is true that under a regulation made by the Secretary of War, the substitute was not received for less than three years or the war, although the party putting him in may not have had so long to serve. And it is said that, in this way, the government

received more than a mere equivalent for the service of the principal. The advantage gained by the government is rather seeming than substantial. For the government has the undoubted right, on the expiration of the time for which the principal is liable, to make a new call upon him, and compel him to serve so long as the necessities of the country may require. The only advantage then it can be said to have gained is that it has relieved itself from the inconvenience of having to make a new call as soon as it might otherwise have been required to make it; and this advantage cannot be regarded as a material one. Indeed it was found that substitution on these terms was so disadvantageous to the service, that before the passage of the act now under consideration, one was passed prohibiting entirely all future substitution. It was originally permitted as a privilege to individuals, and not from any benefit the government expected to derive from it; and it did not cease to be a privilege because of the terms imposed as a condition of granting it. It is said, however, that where the substitute is in service, at the time that the principal is again called in, the government gets the service of two men; when but for the substitution it would have had the service of one of them only. This is an incident of the substitution which may result favorably to the government in the case supposed; but it is not perceived that either the principal or the substitute has a right to complain. The substitute is required to serve no longer than he has, for a consideration satisfactory to himself, *agreed to serve; and the principal has received all he has a right to claim under the exemption granted him. But even if the permission granted by Congress to individuals to put in substitutes could be held to amount to a "contract" by which Congress was irrevocably bound, what would be the true interpretation of such contract? The well established rule of construction is that all grants of privileges and exemptions from general burdens are to be construed liberally in favor of the public and strictly as against the grantee. Whatever is not plainly expressed and unequivocally granted is to be taken to have been withheld. *Charles River Bridge v. Warren Bridge*, 11 Pet. R. 420; *The Richmond R. R. Co. v. The Louisa R. R. Co.*, 13 How. U. S. R. 71; *State Bank of Ohio v. Knoop*, 16 How. U. S. R. 369; *The Ohio Life Insurance and Trust Co. v. Debolt*, Id. 416. It would be especially improper to infer, in the absence of the most distinct indication of intention, that Congress designed in any grant to go further than the constitution allows them to go. But it is not necessary to apply a strict rule of construction. No fair interpretation of the law can make it a grant of exemption from liability to service under laws which might thereafter be passed as the necessities of the country might from time to time require. The 9th section of the act of 16th April 1862 provides, "That persons not

liable for duty may be received as substitutes for those who are, under such regulations as may be prescribed by the Secretary of War." This is the whole provision on the subject. There is not one word to show that it was intended to extend the exemption from liability, by reason of having furnished substitutes, to any liability other than that created by the act. On the contrary the language is, "persons not liable for duty may be received as substitutes for those who are." What duty and liability are referred to? The duty and liability, *of course, imposed by the law of which this section forms a part, and no other. When the liability was extended to other persons by the amendatory act of 27th September 1862, the privilege of substitution was also extended to those then made liable, by the provision that nothing therein contained should be understood as repealing or modifying any part of the act of 16th April 1862, except so far as was therein expressly stated. Nor is there any thing in the regulations made by the Secretary of War under the authority conferred on him by these acts, from which it can be inferred that the exemption could be made to extend to any liability other than that created by the acts themselves. If it had been supposed that those furnishing substitutes were to be relieved from liability to future calls, during the period of time for which the substitute was furnished, an exemption paper so stating in express terms would have been given. Instead of such a paper we find that nothing more was ever given than a simple discharge from the army. Again, whatever might be the power of Congress, no one can pretend that the Secretary of War had any right, without express authority of law, to make a contract for exemption which would relieve the party from liability under any call for service that might be made by Congress, during the time for which the Secretary's exemption lasted. Now the law permitting substitution merely gave the sanction of Congress to a practice which had previously prevailed under orders of the Secretary. It made no change in that practice, and there is nothing to show that it was designed to extend the exemption by reason of substitution, beyond the limits within which it was confined under it.

The nature of the transaction, the terms of the act, and the regulations and practice under it, all show that according to the true intent and meaning of the parties the person furnishing a substitute was to be relieved *from the liability then resting on him, under existing laws, to render military service, and from that only. There is nothing to show that it was designed to exempt him from any service which the future wants of the country might make it proper for Congress to require of him. He may, it is true, have entertained the belief that the necessities of the country would not be such as to require another call to be made upon him; and so have hoped and expected that by putting in the substi-

tute he would in fact be relieved from the performance of military service during the time for which he was put in. The disappointment of these hopes and expectations can give him no right to complain. If he has sustained loss, it is *damnum absque injuria*. The government has been guilty of no such breach of faith; for if the transaction be called a contract, he has had the benefit of all that he contracted for; namely, exemption from service until the situation of the country became such as to make it necessary that he should again be called upon to take part in its defence. The act putting an end to the exemption from military service of those who have furnished substitutes, commences with the recital, "Whereas in the present circumstances of the country it requires the aid of all who are able to bear arms;" thus showing, on its face, that but for the pressing necessity of the country the exemption would not have been taken away. It would be beyond the jurisdiction of this court to enquire whether Congress was right or wrong in supposing such necessity to exist. Of its existence, Congress, to whose discretion it is confided to provide means adequate to the defence of the country, have the exclusive right to judge.

But it is objected that the law is unconstitutional and void, because it makes no provision for compensating those whose exemptions are taken away. It is said that the privilege of exemption is a valuable right; and if "the public necessity requires that the citizen should be deprived of it, it can be taken only upon making to him a just compensation."

We have seen that the transaction is one relating to a matter of public concern as to which Congress could not, if they would, make any valid contract which would entitle the party to compensation; and further that they have not attempted to make any such contract. It has also been shown that even if the transaction could be regarded as a contract, the government has fully complied with its engagement, and has deprived the party of no right; for the condition has happened, upon the happening of which, by the contract itself according to its true interpretation, the exemption was to cease. If there should be any case presenting an equitable ground for relief or indemnity, it is a matter of which the courts can take no cognizance.

The only remaining question is, whether the petitioner Burroughs, who claims to have put in his substitute under the law of this State, passed on the 10th day of February 1862, stands on a different footing, as to this matter, from those who have put in substitutes under the act of Congress.

It has been very much disputed, in the argument of the case, whether he did really put in a substitute under the State law, in such a way as to entitle himself to a discharge from service according to its provisions. We consider it unnecessary to enter upon an examination of this question; because, supposing him to have acted in strict conformity with the requirements of that

law, and to have become entitled to a discharge from service, in accordance with its provisions, we do not think that he occupies a better position than those do who put in substitutes and obtained their discharge under the law of Congress. The law of the State, like the law of Congress, exempted only from the then existing

498 *liability to render military service, and did not (as it could not properly) undertake to exempt from future liability, if the necessities of the country should make a further call necessary. The act of Congress of 16th April 1862, operated upon all white men who were residents of the Confederate States, between the specified ages, and not legally exempted, whether they were in or out of the army. Those in the army, however they had been put there—whether under requisitions upon the states, or as volunteers turned over by state authority, or in any other manner—became liable to service under the act of Congress, which superseded all previous laws, and all calls that had been made for troops. Those who had put in substitutes under State authority had a right to enjoy the benefit of the substitution in like manner as if it had been effected under the orders of the Secretary of War, or the act of Congress; and this right has always been recognized and allowed by the Confederate government. But they have no claim to stand on any higher ground than those who put in substitutes under Confederate authority.

We are of the opinion therefore that each of the petitioners is liable to render military service, and must be remanded to the custody of the respondent.

The motion to discharge the petitioners overruled, and they remanded to the custody of the officer.

499 *Rider v. The Commonwealth.

July Term, 1860, Lewisburg.

1. **Criminal Law—Petit Larceny—Indictment—Charging a Previous Petit Larceny—Effect.**—An indictment for petit larceny, which proceeds to charge that the person indicted had been previously indicted, tried and sentenced for another petit larceny, is an indictment for a felony, and a county or corporation court has no jurisdiction to try the prisoner.
2. **Same—Same—Same.**—If upon such an indictment the prisoner is tried and found guilty, the verdict should be arrested, and all the proceedings subsequent to the indictment should be quashed.
3. **Same—Same—Same—Statute.**—The indictment when brought into court should have been treated as a presentment, and steps taken in conformity with the Code, ch. 207, § 15, p. 771.

At the March term 1860, of the Hustings court of Lynchburg, Spotswood Rider was indicted for feloniously stealing, in October 1859, one axe of the value of fifty cents. And the indictment further stated that the said Rider had been indicted, and on the 9th of March in that year, by the verdict and judgment of the Hustings court of

Lynchburg, convicted, for having on the 2d of February previous stolen a bridle of the value of two dollars, for which he had been sentenced to three months' imprisonment in the jail of Lynchburg.

The prisoner plead not guilty to the charge of stealing the axe, but admitted in open court that he had been indicted, tried, convicted and sentenced, for stealing the bridle. Upon the trial the jury found the prisoner guilty, and assessed his imprisonment in the city jail to *seven days; and they further found that he had been duly indicted, tried, convicted and sentenced for the petit larceny set out and stated in the second count of the indictment; and that he admitted the same in open court, and before the jury. The prisoner thereupon moved in arrest of judgment, which was overruled, and the court sentenced the prisoner to one year's imprisonment in the penitentiary. The prisoner thereupon took the case up to the Circuit court of Lynchburg, by writ of error, where the judgment was affirmed. And he then obtained a writ of error to this court.

The case was argued by G. W. Latham, for the prisoner, and by the Attorney General, for the Commonwealth.

ALLEN, P. At a quarterly term of the Hustings court held for the city of Lynchburg on the 5th of March 1860, the prisoner was indicted for feloniously stealing an axe of the value of fifty cents; and it was alleged in the indictment that the accused had previously been indicted in the same court of a different offence of petit larceny, and sentenced to punishment. The accused being in custody plead not guilty to so much of said indictment as charged the felonious stealing of the axe; and admitted the truth of so much of the indictment as charged that he had been previously indicted, convicted and sentenced for a different offence of petit larceny. The jury empanelled to try the issue, found him guilty, and fixed the time of his imprisonment in the city jail to seven days; but further found that he had been indicted, tried, convicted and sentenced in due form of law for the petit larceny charged in the indictment.

On this finding of the jury, the Attorney for the Commonwealth moved the court to sentence the accused to one year's imprisonment in the penitentiary according

501 *to the provisions of the Code, ch. 199, § 27, p. 752. To this the accused objected; and moved in arrest of judgment for several causes assigned. But the court overruled his objection and motion in arrest of judgment, and sentenced him to be confined in the penitentiary for one year. To which opinion and judgment of the court he excepted; and his exception was signed, sealed and made part of the record. A writ of error having been allowed, the judgment of the Hustings court was affirmed by the Circuit court for the corporation of Lynchburg; to which judgment of affirmance a writ of error has been allowed by his court.

Upon these proceedings the first question is that raised by the motion in arrest of

judgment, and assigned as error in the petition: Had the Hustings court jurisdiction to try the cause, as the offence with which the accused was charged is punishable with confinement in the penitentiary?

The county and corporation courts of the commonwealth deriving their existence from the acts of the legislature, can exercise such jurisdiction only as has been conferred by statute. The Code, p. 616, ch. 157, § 3, provides that the county or corporation courts shall have jurisdiction to hear and determine all cases, &c., "except criminal causes against free negroes charged with felonious homicide, or any felony, the punishment whereof may be death, and against white persons, charged with any offence, the punishment whereof may be death, or imprisonment in the penitentiary."

This provision of the Code, except that portion in reference to free negroes, conforms to the policy of the legislature from the first organization of county courts. By the act of 1748, 5 Hen. Stat. 489, § 5, entitled "An act for establishing county courts, and for regulating and settling the proceedings therein," cognizance of such

502 criminal causes where judgment or conviction shall be *for loss of life or member, was excepted from the jurisdiction conferred. A similar provision is found in the act passed the 3rd December, 1792, ch. 67, § 5. In the interval between the revision of 1792 and 1819, the penitentiary system was introduced. The act of 1819, 1 Rev. Code, p. 246, ch. 71, § 7, regulating the jurisdiction of the county and corporation courts, excepts from the jurisdiction conferred, such criminal cases where the judgment, upon conviction, shall be for the loss of life or member, or imprisonment in the public jail and penitentiary house, as shall not be expressly declared cognizable in the said courts by act of assembly."

This long settled policy of the legislature excepting from the jurisdiction of these inferior courts such criminal causes punishable on conviction with loss of life or member, or imprisonment in the penitentiary, has never been departed from in relation to white persons. There is no statute expressly declaring, in the language of the Rev. Code of 1819, such causes cognizable in said courts. On the contrary such jurisdiction is not only withheld by the negative provisions of the statute already quoted, but by the express terms of the law, Code, p. 773, ch. 208, § 1, it is affirmatively declared, "that a trial of any white person for felony, and of a free negro for felonious homicide, or any felony punishable with death, shall be in the Circuit court." It is moreover provided, Code, p. 764, ch. 205, § 1 and 7, that before a white person charged with a felony or a free negro charged, &c., is tried before a Circuit court he shall be examined as therein provided for, unless by his assent entered of record in such court, such examination be dispensed with. By the 7th section it is enacted, that if it appear on the examination of such person,

that a felony has been committed, and that there is probable cause to charge the accused therewith, the examining court shall remand him for trial in the Circuit court having cognizance *of the case.

These provisions of the Code render it clear that if the offence charged was a felony the Hustings court had no jurisdiction to try the cause.

The Code, p. 750, ch. 199, § 1, defines felony and misdemeanor: "Offences are either felonies or misdemeanors. Such offences as are punishable when committed by free persons with death or confinement in the penitentiary, are felonies; all other offences are misdemeanors."

At common law simple larceny, whether grand or petit larceny, was felony: Offences, Blackstone says, which are considerably distinguished in their punishment, but not otherwise. 4 Black. Com. 229. And it is said by Hawkins, that whenever an offence would amount to grand larceny if the thing stolen were above the value of twelve pence, it is petit larceny if it be of that value or under. And it seems that all petit larceny is felony, and consequently, requires the word felonice, in an indictment for it. Hawkins' Pleas of the Cr. 146. § 34, 36.

By the act found in 1 Rev. Code of 1819, p. 617, § 7, it was provided, that if any person shall feloniously take, steal and carry away any goods or chattels, under the value of four dollars, he should on conviction, be punished with stripes or by confinement in the jail and penitentiary for a term not less than six or more than eighteen months. And if any person having been punished by stripes for such offence, shall be convicted of a like offence a second time, he shall be sentenced to undergo a confinement in the penitentiary for a term not less than five or more than ten years. The Code has in some respects changed the law in regard to the two kinds of larceny. By the Revised Code of 1819, it continued a felony though it might on conviction be punishable with stripes or confinement in the penitentiary at the discretion of the jury. The

Code, p. 729, *ch. 192, § 14 enacts, that if a person commits simple larceny of goods and chattels of less value than twenty dollars, he shall be deemed guilty of petit larceny, and confined in jail not exceeding one year, and at the discretion of the court may be punished with stripes." The offence not being punishable with death or confinement in the penitentiary, is a misdemeanor according to the Code, ch. 199, § 1, defining felonies and misdemeanors. But as the Revised Code of 1819 imposed a heavier punishment upon conviction of a like offence the second time, the Code likewise, p. 752, ch. 199, § 27, provides that, "when any person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted and admitted, or by the jury found, that he has been before sentenced in the United States for the like offence, he shall be sentenced to be confined in the penitentiary for one year.

The argument of the Attorney General that the law ascribes the punishment to the offence, and declares the offence to be felony where that punishment is death or confinement in the penitentiary, and does not refer to the person, is answered by the terms of the 27th section, which describes the offence as a like offence. In either case the act is similar, and the Code makes the commission of the first act a misdemeanor. But if the lighter punishment fails to reform, and the party is guilty of a like offence a second time, such second offence is punishable with confinement in the penitentiary, and is a felony. Being so punishable, the county and corporation courts cannot take cognizance of the cause. The indictment having alleged that in addition to the offence for which he was then charged, he had been before sentenced for the like offence, the charge so preferred amounted to felony, which could be tried in the Circuit court only, and that after being examined by a called court, unless such examination had been dispensed with. If the

505 *offence, though punishable as aforesaid, could be regarded as a misdemeanor, it would follow that under the provisions of the Code, ch. 199, § 25, 26, after repeated convictions and sentences a white person might be sentenced by the county court to be confined in the penitentiary for life. If the legislature intended to confer such jurisdiction on the county and corporation courts it would have done so expressly, and not left it to implication.

It was suggested in argument that the provision contained in the Code, ch. 199, § 7, could not be reconciled with the construction that would make this offence felony to be tried in the circuit court only. The section referred to, punishes the principal in the second degree, as if he were the principal in the first degree. He is punishable for his own offence as the principal in the first degree, but is not sentenced according to the sentence which may be imposed upon the principal offender. Being the first offence in his case, he may be punishable as for a misdemeanor, whilst the principal offender may be sentenced to a different punishment. And so it would be in cases under the 25th and 26th sections of chapter 199, imposing additional punishment after previous convictions and sentences.

I think the Hustings court had no jurisdiction to proceed with the case. That the indictment charged the accused with a felony, and when returned by the grand jury it should have been treated as a presentment, and steps taken in conformity with the Code, p. 771, ch. 207, § 15.

It therefore seems to me that the judgment of the Circuit court affirming the judgment of the Hustings court was erroneous, and should be reversed. And this court proceeding to render such judgment as the Circuit court should have done, it further seems to me that the judgment of the Hustings court overruling the

506 motion *of the plaintiff in error in arrest of judgment was erroneous, and

should be reversed and annulled. That all proceedings on the verdict should be stayed or arrested; that the verdict and all proceedings subsequent to the finding of the indictment be set aside; and the cause be remanded to said Hustings court for the accused to be dealt with according to law.

The other judges concurred in the opinion of Allen, P.

Judgment reversed, all proceedings subsequent to the indictment set aside, and cause remanded to the Hustings court.

507 *Bradshaw v. The Commonwealth.

July Term, 1860, Lewisburg.

[86 Am. Dec. 722.]

1. **Criminal Law—Loss of Indictment—Effect.**—In a prosecution for a felony or misdemeanor, if the indictment is lost at any time before the trial, though after arraignment and plea, the party cannot be tried.

2. **Same—Same—Statute—Applicable Only to Civil Cases.**—The act, Code ch. 180, p. 679, authorizing a lost record or paper to be substituted by an authenticated copy or proof of its contents, applies only to civil cases, and does not extend to records or papers in criminal proceedings.

At the June term 1857, of the Circuit court for the corporation of Lynchburg, the grand jury found an indictment against Robert Bradshaw for keeping and exhibiting a certain gaming table called a faro bank, "a true bill." And at the same term Bradshaw appeared, and pleaded "not guilty" to the indictment; and on his motion the case was continued until the next term.

Between this time and the June term 1860, the indictment was lost or abstracted; so that when the case was called for trial at the latter term, it could not be produced; and on the motion of the attorney for the commonwealth he was permitted to file the affidavit of the clerk stating the loss, and giving what he believed to be substantially a copy of the lost indictment. To the filing of this affidavit the defendant excepted.

On the trial of the case the attorney for the commonwealth having tendered to the court the affidavit of the clerk, offered him as a witness to prove the contents of the indictment, mentioned in the affidavit, in order that *the case might be proceeded in, heard and determined upon the proof of the contents thereof. To the introduction of this evidence the defendant objected; but the court overruled the objection and admitted the evidence: And the defendant again excepted. The trial then proceeded, and the jury found the defendant guilty, and assessed his fine at one hundred dollars. And the court rendered a judgment upon the verdict against the defendant for the fine of one hundred

*That, where an indictment is lost, it cannot be supplied by a copy is laid down as the minority rule in 10 Enc. Pl. & Pr. 418.

dollars; and adjudged him to be imprisoned in the jail of the city for two months. To this judgment Bradshaw applied to this court for a writ of error; which was awarded.

J. O. L. Goggin and Kean, for the appellant, insisted:

1st. That the court had not authority at common law to proceed in the trial of a party in a criminal case, without the indictment which had been found by the grand jury. They referred to the case of *Ganaway v. The State*, 22 Alab. R. 772, in which it was held that when an indictment is lost or destroyed, it cannot be substituted on satisfactory proof of a copy. In Texas the case is provided for by statute, and the court held in the case of *The State v. Elliot*, 14 Texas R. 423, that the mode provided by the statute must be pursued. They referred also to *Doty v. The State*, 7 Blackf. R. 427; and insisted that though the syllabus of the cause of *The People v. Burdock*, 3 Caine's R. 104, seemed to allow a copy to be filed, yet the case showed that, the motion was made in an ended cause years after it was ended; and that the record was wanted not for the trial of the party, but to be used in some other proceeding.

2d. They insisted further, that the statute, Code of 1849, ch. 180, § 1, p. 679, authorizing the proceeding upon an authenticated copy of a lost paper, or the proof of its contents, did not apply to proceedings in a criminal *trial: and they relied upon the language of the act, and its collocation in the Code, as showing that it had reference exclusively to proceedings in civil suits.

The Attorney General, for the commonwealth, took a distinction between felonies which could only be prosecuted by indictment, and misdemeanors, which might be by indictment, presentment or information. Code ch. 207, § 1, p. 768. This distinction he insisted would authorize a different practice in these different classes of offences. In felony the prosecution must be on the oath of the grand jury; in misdemeanor it may be upon an information by an officer of the court: and this information may be amended at any time before trial. 1 Chitty's Crim. Law 802. And he insisted that if there might be this change in the information there was no substantial reason why in like cases it may not be in the indictment.

He considered the rights of the defendant before, during and pending the trial, and insisted that they had all been secured to him. That up to and after his arraignment and pleading the indictment was in court, so that he knew the cause of his accusation; and though he was by the common law entitled to a copy of the indictment, he had waived it by pleading, 5 U. S. Dig. p. 154, § 244, R. M. Charlton's R. 142. After pleading he could not move to quash or demur to the indictment: And in respect to the offence for which this defendant was prosecuted the statute forbids all objections for defects or want of form. Code p.

770, § 11, 12, 772, § 23, 24. Upon the trial the right of the defendant was that the charge which had been made against him should be proved. True the indictment was the best evidence of the charge; but upon proof of its loss might it not be supplied? A lost record may be supplied by proof.

4 Phillips Evi. Note 723, p. 1067; Newcomb v. Drummond, *4 Leigh 57; Douglas' widow and adm'r v. Yallop, 2 Burr. R. 722; Rex v. Turner & als., 1 Strange's R. 139; Evans v. Thomas, 2 Id. 833; 1 Chitty's Crim. Law 722 marg. In New York Graham v. Woodhull, 1 Caine's R. 496; The People v. Murdock, 3 Id. 104. In Massachusetts Inh. Stockbridge v. Inh. West Stockbridge, 12 Mass. R. 400; Fay v. Wenzell, 8 Cush. R. 315. In Alabama Dozier v. Joyce, 8 Porter's R. 303; Williams v. Powell, 9 Ind. 493; Wilkerson v. Branham, 5 Alab. 608; 8 Id. 298; 11 Id. 629; 19 Id. 710; 25 Id. 551; 2 Hayw. R. 243; Pleasants v. The State, 15 Ark. R. 624. Then if the evidence was admissible, the question is as to the quantum and not the quality of the proof; and in this case there is no doubt the evidence is almost if not entirely in the language of the lost indictment.

The only importance of the indictment after the trial, is that the defendant might be able to plead autre foi acquit or convict; or move in arrest of judgment. But he was tried upon the evidence as to the indictment, and this is a part of the record. Beal v. Larigstaf, 2 Wils. R. 371; Perkins v. Perkins, 21 Georgia R. 13; Cawood's case, 2 Va. Cas. And upon a motion to arrest the judgment, the evidence shows what the indictment was.

DANIEL, J. The question, upon the decision of which depends the judgment to be given in this case, is a nice and difficult one. It is *res integra* here; and the counsel on either side and the court after diligent search, have failed to find any authority in the British Reports or text books which would seem to rule it. The only case cited at the bar in which the question has been fully discussed and distinctly adjudged is the case of *Ganaway v. The State*, 22 Alab. R. 772, relied on by the counsel of the plaintiff in error—in their printed argument. In that case after several continuances 511 of a *prosecution for an assault and battery for which *Ganaway* had been indicted, the indictment was lost or destroyed, and the inferior court upon the motion of the solicitor, after notice to the accused, allowed a paper, which was offered as, and proved to be, a correct copy of the original indictment, to be substituted in its stead, and proceeded with the trial upon the substituted copy. Upon an appeal to the Supreme court the case was there ably argued, and the majority of the court came to the conclusion that the judgment of the Circuit court should be reversed. The grounds of their decision are very forcibly stated in the opinion of Judge Phelan. After conceding the right of the court to

supply or substitute any part of the record which has been lost or destroyed in a civil case, he proceeds to remark that "In criminal proceedings we are, in many cases, bound by settled principles of law and practice, to consider not that which abstractly exists, but a certain visible external form as essential to the legal existence and sufficiency of the thing itself. For instance, what authority in law (he asks) will protect an officer in arresting my person on a criminal charge or require of me to submit to the arrest? Will a copy of a warrant do? Not at all. It must be the original, lawful warrant itself which I have a right to call for and inspect. This rule, we are inclined to think, has been commonly applied to indictments. The prisoner has been supposed to have a right to have an inspection of the indictment found, and to be arraigned on that only.

But conceding that a declaration and an indictment are alike in many respects, in some other respects there is a very marked difference between them. A declaration is a statement of his cause of action by the party himself or his counsel not under oath. An indictment is a statement of the facts which constitute the alleged offence against the public, on the part of the 512 *accused made under oath by a grand jury, and which to be good in law must have certain formalities; and by the constitution of this State certain words are essential. The one is good even though it be not signed by counsel. The other is nothing if it does not bear the name of the foreman of the grand jury and the words "a true bill." These are indispensable marks of an indictment. The one may be changed at pleasure by leave of the court. The other cannot be changed or altered in the slightest degree by any power after it has been returned into court and the grand jury is discharged. The statutes of jeofails which in general terms authorize corrections and amendments in process and pleadings have never been held to apply to indictments.

"It may be granted, the court has and ought to have power to supply copies or duplicates of all parts of the record or proceedings which emanated from it or under its authority in the first instance; because the power which could make the original, ought to be at all times able to supply a copy, if that be lost or destroyed. But this power does not embrace an indictment. The court has no power to make an indictment or to direct one to be made; that power resides exclusively with the grand jury. Admitting then that a court may supply or substitute whatever part of the proceedings it has power to issue or create in the first instance, yet the principle will not embrace an indictment, because the court has no power to make that or direct it to be made. In the matter of indictments, the grand jury are the sole judges under their oath of the propriety of their own action." The judge also stated in the course of his opinion that with the exception of a single circuit,

the rule of practice forbidding the substitution of an indictment prevailed throughout the State.

513 *In the dissenting opinion delivered by Judge Gibbons, the only case cited by him as an instance in which it had been held allowable to try a person indicted, upon a copy of the indictment, was the case of *John, a slave, v. The State*, 2 Alab. R. 290. In that case, it is true it was held that where several persons are indicted and the venue is changed by less than the whole number, those who change the venue are to be tried on a copy of the indictment. I have been unable however, to discover anything in that case which countenances the proposition that an accused who has not obtained a change of venue may be tried against his consent upon any substitute for the original indictment. On the contrary, I think, the case looks the other way. There the venue had been changed at the instance of one of several persons indicted for a felony, and an order had been made sending not only a transcript of the record but also the original indictment to the court to which the venue was changed. Subsequently another order was made requiring the clerk of the last mentioned court to return the original indictment; which was executed, and the party who had not obtained a change of venue was tried on the original indictment so returned, and convicted. And on his appeal it was insisted, in his behalf, that the prosecution had been discontinued and jurisdiction of the court over the case lost in consequence of the execution of the order directing the original indictment to be sent to the court to which the venue, as to one of the parties, had been changed.

Goldthwaite, J., in delivering the opinion of the court sustaining the judgment of the court below, so far as it turned on the question arising upon the orders of the court below, above mentioned, remarked—"The presiding judge at the time of permitting the change of venue as to Anderson, was probably misled by the generality of the rule of this court with respect to
514 changes of venue. *The rule was not intended to apply to criminal cases where more persons than one are indicted, when one only shall apply for a change of venue. In such a case if the accused makes out a sufficient cause, he is entitled by statute to a change of venue; but the original papers of right appertain to the court, which retains jurisdiction over such of the accused as do not desire, or cannot procure a change of venue. A transcript of the record which must necessarily include a transcript of the indictment, as well as of all other original papers, is 'all which can regularly be transmitted to the court to which the venue is changed. The accused who under such circumstances, asks for a change of venue may be tried on such a transcript, and his consent, if that is to be considered as essential, will be inferred from his application. If the practice was otherwise, the monstrous absurdity might result, that the prosecution against the others

accused might be terminated or indefinitely delayed by the measure of grace accorded the one who sought elsewhere a trial which he might not obtain in an impartial manner in the county where the indictment was preferred." He then proceeded to show that the irregularity which had occurred, of sending the original papers to the court to which the venue had been changed, had worked no injury to the plaintiff in error; that the order for the re-transmission of the indictment to the court in which the prosecution originated was right; and that there had been no discontinuance of the case.

There is nothing in the decision of the court nor in its opinion bearing adversely to the case of the plaintiff in error here. He has had no agency in creating the necessity or exigency by which it is sought to justify his trial on a substituted indictment. He is in no degree chargeable with the absence of the original. He has not procured nor sought a change of venue.

515 He has *given no consent express or implied to be tried on anything short of the original, identical indictment found.

The case of *the People v. Burdock, &c.*, 3 Caines R. 104, cited by the Attorney General, does not necessarily involve the decision that a person accused may, against his consent, be tried on a copy of a lost indictment. The reporter, it is true, in his syllabus states the case as deciding the general proposition that, if a record of an indictment be lost the court will grant leave to file one nunc pro tunc. But on examination of the case it will be seen that it does not go to any such length. The report of the case is very brief and I give it entire: "An indictment found against the defendants for a forcible entry and detainer in April term 1798, had, on being removed into this court been quashed and restitution ordered, but the record of it could not on search in the clerk's office, be found. Riker applied for leave to file a record nunc pro tunc, on an affidavit by the attorney employed in the prosecution, disclosing the above facts, and that on examination of his register he found not only that a record had been duly filed, but that he actually obtained an exemplification of it which had been lost. Granted accordingly." When it is seen that in that case the motion was made in 1805 in respect to an indictment found in 1798—which had been long since quashed—it is obvious that the decision then made, is no precedent for the case under consideration. It is manifest that there the substituted indictment was to be used for some purpose other than the trial of the person indicted.

The only case, which I have been able to find, in addition to those cited at the bar, bearing immediately on the question in hand, is that of *The State v. Harrison*, 10 Yerger's R. 542. The decision and reasoning of the Supreme court of Tennessee in that case, are strongly in favor of the plaintiff in error in this. In that case
516 after *the prisoner had been regu-

larly indicted, tried and found guilty of a felony, by the verdict of a jury, he moved in arrest of judgment, on the ground that there was no bill of indictment on record against him. It appeared that the indictment had been lost or mislaid during the trial and upon diligent search could not be found; and the solicitor thereupon moved the court to make a copy of the indictment together with certain affidavits, proving very fully that it was a correct copy, a part of the cause, which was done. The entry made upon the record was as follows: "State v. Harrison. The attorney general appeared in open court and moved the court that the following copy of the indictment in this case and the affidavits annexed be made a part of the record in said cause. Whereupon the court upon examination and inspection of the same, order the same to be spread upon the minutes and made a part of the record in his cause;" and a copy of the indictment and affidavits annexed was also inserted in the entry. In a bill of exceptions the judge recited that the copy of the indictment was filed upon record by him not merely from the affidavits "but because the court was fully satisfied, that said copy of said indictment so ordered and made a part of the record, was an exact literal copy of the original indictment, not only from the affidavits appended to said copy, but from the recollection and memory of the court itself." The Supreme court held that no judgment could be rendered against the prisoner upon a copy of the indictment thus spread on the records of the court below; and that the case was one proper for arrest of judgment.

In delivering the opinion of the court, Turley, J., after considering the general power of a court to alter and supply from its own memory alone, any order judgment or decree pronounced by it at the same term, qualifies the concession with the remark that the principle doubtless applies

517 with more force to things which have emanated *from the court itself, for the reason that the judge may well recollect what he has himself directed to be done and find it impossible to remember what has been done by others. And he then proceeds to say, "If the indictment could be supplied from the memory of the judge the record must show explicitly and certainly that it was so done. The recital in the bill of exceptions does not amount to this. To establish the principle that a judge might supply a lost bill of indictment upon the affidavit of others independent of his own recollection would, as we think, be exceedingly dangerous to the lives and liberty of the citizens; and we cannot do so. We think we go far enough in saying this may be done upon the memory of the judge."

The provisions of chapter 180 of the Code, allowing papers, "in any cause," lost or destroyed to be substituted by an authenticated copy of what is lost or destroyed or proof of the contents thereof, have obviously no application to the case. Though

the language of those provisions is broad enough to cover the loss of papers in criminal prosecutions, yet, from the general frame and tenor of this chapter, and from its position in the Code, as one of a series of chapters under the title of (51) "Proceedings in civil suits," considered in connexion with the declaration of the design set forth in the preamble of the Code, to arrange the general statutes of the commonwealth "in appropriate titles, chapters and sections," it is manifest that the remedy proposed by the provisions in question, applies to the loss or destruction of papers in civil causes only.

Upon the whole it seems to me that the plaintiff in error is entitled to a judgment of this court in his favor. There is no legislative provision regulating the practice in his case; there is no authoritative decisions in England or Virginia ruling the point raised by him, against him; whilst the

518 weight of the few adjudications on the question by the courts in this country, of which we have any reports, is clearly in his favor. In this state of the law I do not think we are authorized by affirming the judgment to introduce a practice which would tend to impair the efficiency of one of those guards which the law has provided for the protection and security of the citizen. Whenever, on a trial, the original indictment is substituted by parol proof of its contents, the accused is necessarily exposed to the hazard of being tried for, and convicted of, a charge differing, in greater or less degree, from that preferred by the grand jury. To expose to such a hazard an accused who is nowise responsible for the loss or destruction of the original indictment, seems to me to be hardly in accordance with the spirit that regulates the proceedings in criminal trials; and I am for reversing the judgment.

The other judges concurred in the opinion of Daniel, J.

Judgment reversed.

519 *Booth & al. v. The Commonwealth.

April Term, 1861, Richmond.

1. *Grand Juries—Exemption from Service.**—Persons over sixty years of age are not disqualified from serving on grand juries; though they are exempted from the service if they choose to claim the exemption.†

2. *Repeal of a Statute Which Repeals Common Law—Effect.*‡—If an act repealing a provision of the common law is itself repealed, the common law provision is revived. The act, Code, ch. 16, § 19, p. 102, applies to statutes, and not to the common law.†

*See generally, monographic note on "Juries" appended to Chahoon v. Com., 20 Gratt. 723.

†See the statute quoted by JUDGE MONCURE in his opinion.

‡Common Law—Changed by Statute—Effect of Repealing Statute.—See foot-note to Insurance Co. v. Barley, 16 Gratt. 363.

In the Circuit court of the county of Franklin at its May term 1861, Edwin C. Booth and James Smith were presented for gaming. They appeared at the October term of the court and pleaded in abatement that Christopher Taylor, one of the grand jury which made the presentment, was over the age of sixty years, and by reason thereof not qualified to serve on the said grand jury. To this plea the Attorney for the Commonwealth demurred, and the court sustained the demurrer; and directed the defendants to answer further. This they failed or refused to do; and the court adjudged that each of them should forfeit and pay to the commonwealth thirty dollars and costs. From this judgment the defendants obtained a writ of error.

Wingfield and Early, for the appellants.
The Attorney General, for the Commonwealth.

MONCURE, J., delivered the opinion of the court.

The plaintiffs in error were presented for unlawful *gaming. They pleaded in abatement that a member of the grand jury which made the presentment was over the age of sixty years, and by reason thereof not qualified to serve on the grand jury. There was a demurrer to the plea and joinder in demurrer. The Circuit court sustained the demurrer, and ordered the said plaintiffs to answer further to the presentment; which failing and refusing to do, judgment was rendered against them according to law. And on their petition this court awarded a writ of error to the judgment.

This case involves the construction of the first section of the act passed April 9, 1853, entitled "an act concerning the compensation and empanelling of jurors, their qualifications and manner of selection in certain cases," which declares "that all free white male persons who are twenty-one years of age, and not over sixty, shall be liable to serve as jurors, except as hereinafter provided." Sess. Acts, p. 43, ch. 27, § 1. The exceptions here referred to are certain officers and professional persons, who, by the second section of the act, are "exempted from serving on juries."

Does the first section apply to grand jurors as well as petit jurors? And if so, does it create a disqualification, or a mere exemption from serving on juries? These are the questions, upon the decision of which, or one of which, the case depends. If the section does not apply to grand jurors; or does not disqualify a person over sixty years of age to serve as a juror; in either case there is no error in the judgment of the Circuit court. If the converse of both propositions be true, then there is such error. It is well settled that the disqualification of one of the grand jury finding an indictment may be pleaded in abatement to the indictment. 3 Rob. Pr., old ed., p. 82, and cases cited; 1 Chit. C. L. 307.

The first is a doubtful question, to say

the least of it. The first section of 521 chapter 162 of the Code, entitled "of juries generally," as reported by the revisors in their report, p. 813, was in these words: "No person shall be qualified to serve upon a jury, grand or petit, in any proceeding civil or criminal, unless he is qualified to vote in the election of members of the general assembly, is over 25 and under 60 years of age, and owns property real or personal of the value of \$300."

The fourth section of chapter 206 of the Code, entitled "of grand juries," as reported by the Revisors Id. p. 1008, was in these words: "For every grand jury there shall be summoned twenty-four citizens of this state who are freeholders of the county or corporation in which the court is to be held, and when they are grand jurors for a county court not inhabitants of a town having a corporation court, and who are in other respects qualified jurors, and not constables, ordinary keepers, surveyors of roads, nor owners nor occupiers of water grist mills."

The former of these two sections expressly embraces grand as well as petit juries, and the words, "who are in other respects qualified jurors," in the latter, clearly refer in part at least, to the qualifications prescribed by the former. Indeed, the note appended to the said words by the revisors, points directly to the former section.

The former section was materially amended by the legislature, so as to make it read, "No person shall be qualified to serve upon a petit jury, in any proceeding, civil or criminal, unless he is 21 years of age, and owns property, real or personal, of the value of \$100." Code, p. 628, ch. 162, § 1. The latter section was adopted without amendment, except an immaterial transposition of words. Id. p. 767, ch. 206, § 4. The words "and in other respects qualified jurors," were retained in the section. But they had not the same meaning in the Code as in the report of the Revisors. In the latter, as before 522 *stated, they plainly referred, in part at least, to the qualification of grand as well as petit jurors expressly created by ch. 162, § 1. But in the Code they could have no such reference; as by the legislative amendment of the last mentioned section, the qualification thereby created was expressly confined to petit jurors, and to make the words in question still refer to that section as amended, would altogether destroy the effect of the amendment.

There was then no doubt about the meaning, and no room for construction, of the report of the revisors, nor of the Code on this subject. Then came the act of April 9, 1853, the first section of which is before recited, and is of doubtful meaning. It does not mention "a jury, grand or petit," as the report of the revisors does; nor "a petit jury," as the Code does; but "jurors" only, without any adjective. And the question is, whether this word embraces both grand and petit as the former does, or petit only as the latter does.

The act is very long, containing forty

sections, and certainly relates, in different parts of it, to grand as well as petit jurors. The most of it relates to petit jurors only. But three sections relate expressly to grand jurors, viz: The fourth, which amends and re-enacts the second section of chapter 206 of the Code, p. 766, for the purpose of requiring a grand jury to be at only two, instead of four, of the quarterly terms of the county, and some of the corporation courts; the fifth, authorizing any court in which a grand jury is to be empaneled, to limit the number of persons to serve thereon, provided it be not less than sixteen; and the ninth, which, after prescribing how jurors required for the trial of cases, except felony, shall be selected and returned to serve, concludes with directing that "grand jurors shall be summoned as now provided by law." In all the other sections in which juries or jurors are mentioned, they are mentioned without the adjective

523 "grand" or "petit." Indeed the word "petit" no where occurs in the act. Where the noun alone is used, it generally refers to petit juries, or jurors only; as the context plainly shows. In one or two instances, and especially the first section before recited, the meaning of the word is somewhat equivocal. Why, on the one side it may be asked, did the legislature drop the adjective petit used in the Code, if they intended to confine their meaning to petit jurors? And why, it may be asked on the other, did they not use both adjectives, grand and petit, as the revisors did, if their meaning comprehended both? Or why did they not use the word petit any where in the act, though they plainly intended, generally, to confine their meaning to petit jurors? The twenty-fourth section is in these words: "No exception shall be allowed against any juror after he is sworn upon the jury on account of his age or other legal disability, unless by leave of the court." It will not be contended that this section extends to grand jurors. But why does it not, at least as much as the first section; for it is, if possible, more comprehensive in its terms. It may be said that the twenty-fourth section is copied, almost literally, from former laws, and has been judicially construed to be confined to petit jurors. 1 R. C. 1819, p. 266, § 12, and note (h); Cherry's case, 2 Va. Cas. 20, and note; Long's case, Id. 318; and Therby's case, 7 Leigh 747. On the other hand it may be said that the connection in which the provision is used in former laws confines its meaning in them, necessarily, to petit jurors; whereas there is nothing in the act of 1853 to limit the meaning of the word "juror" in the twenty-fourth section any more than the word "jurors" in the first section. If the twenty-fourth section relates to grand as well as petit jurors, the exception in this case came too late, and there is an end of the case. I admit, how-

524 ever, that it does not. But that "it does not, is at least an argument to show, that neither does the first section relate to grand as well as petit jurors. An-

other argument tending the same way is, that while the act of 1853 repeals six of the sections of chapter 162 of the Code, entitled "of juries generally," it repeals no section of chapter 206, entitled "of grand juries," and amends only one for the purpose before stated. Thus leaving the latter chapter, with a slight amendment, still standing as the law of the land, and indicating an intention to make no material change of the law in regard to grand juries; at least none not plainly expressed in the act.

I am therefore inclined to think that the first section of the act of 1853 does not apply to grand jurors. Indeed the counsel for the plaintiffs in error admit that it does not; that it was intended to fix and define the qualification of petit jurors, and is substituted to the place of sec. 1 of ch. 162 of the Code, and occupies the same relation which it did to sec. 4 of ch. 206; but they contend that the words, "in other respects qualified jurors," in the last mentioned section, refer to the qualification of petit jurors prescribed by the first section of the act of 1853. If I have shown, as I think I have, that the words in question did not refer to sec. 1 of ch. 162 of the Code, it follows, on the admission aforesaid, that they do not refer to section 1, of the act of 1853.

But suppose the first section of the act of 1853 does apply to grand as well as petit jurors, does it create disqualification; or a mere exemption from serving on juries?

The first section of chapter 162 of the Code, clearly creates a disqualification. It declares expressly that "no person shall be qualified," &c., "unless he is 21 years of age," &c. But the first section of the act of 1853 uses very different language. It declares "that all free white male persons, who are 21 years of age and not
525 "over 60, shall be liable to serve as jurors," &c.; which necessarily implies that none under 21 or over 60 shall be so liable. The word "qualified" is neither expressed nor implied in the act. The word both expressed and implied is "liable," which has a very different meaning from "qualified." Its meaning is "bound" or "obliged." And the section should be construed as if it had been written: "No person under 21 or over 60 years of age shall be obliged to serve as a juror; but all free white male persons who are 21 years of age and not over 60, shall be obliged, when duly required, to serve as jurors, except as hereinafter provided." This would not be a disqualification, but a mere exemption of persons of the former class from serving on a jury.

But it may be asked, if this be so, why were not persons of that class included among the exempts embraced in the second section. They might well, perhaps, have been. But they are at least as well embraced in the first section, or implied thereby. The second section seems to be confined to persons who are exempted on account of their office or profession. A person exempt from serving on juries is not liable to serve; and a person not liable to

serve is exempt from serving. The terms seem to be convertible. If the legislature had intended to exempt only persons under 21 or over 60 years of age, they could not have done so more plainly or appropriately than by the first section. But intending, besides this general exemption, to make certain special ones, they enumerated them in the second section. The words "liable to serve" embrace all persons mentioned in the first and not exempted in the second section; and are so used in some of the other sections of the act, as the seventh and twenty-second.

Again, it may be asked, is a person under 21 years of age a qualified juror? And if not, how can a person over 60 be a qualified

juror, since the two ages are mentioned *in the same section and in immediate connection; thus showing that if the legislature intended to disqualify the former, they intended also to disqualify the latter. The answer is that the first section of the act of 1853 does not disqualify any person, and therefore not a person under 21 years of age. It merely declares who are liable to serve, and thus plainly implies who are not liable. If a person so implied not to be liable, is in fact disqualified, it must be under some other law. Certainly under the Code, p. 628, ch. 162, § 1, a person less than 21 years of age was disqualified to serve only on a petit jury and not on a grand jury. And this seems also to have been the case under the Code of 1819, 1 R. C. p. 266, § 12. Still he may have been disqualified at common law, as will be further noticed presently. If so, there is nothing in the statute which repeals or changes the common law in this respect; certainly nothing in the first section of the act of 1853. That a person over 60 years of age may be disqualified by statute to serve on a jury, is undoubtedly true. But then the statute to have that effect ought to be very plain; and if the words used be as consistent with a mere exemption as with a disqualification, they will be construed in the former, rather than in the latter sense. We have instances of this in the construction which has been put upon certain English statutes of a like nature. See 1 Chit. C. L. 309; 5 Bac. Ab. Juries. We must construe a statute according to its subject matter. The same words may create a disqualification, or exemption merely, according to the subject matter. If a statute directed the sheriff not to summon persons over 60 years old to serve on juries, it would be construed to create a mere exemption, in the absence of anything in the context to show that a disqualification was intended. If it directed him not to summon persons convicted of infamous offences, it would be construed to create a disqualification.

527 *The subject matter would indicate an intention, in the former case to relieve certain persons from the duty of serving on juries, and in the latter to prevent them from serving. It is upon this principle that constables, ordinary keepers, surveyors of roads, and owners and occu-

piers of water grist mills, have been held to be disqualified by the statute directing them not to be summoned on grand juries. They are peculiarly liable to presentment, and therefore considered to be improper persons to be on the grand jury. In Moran's case, 9 Leigh 651, it was held that the disqualification of owners and occupiers of water grist mills, though general in its terms, is limited to the jurisdiction within which their mills are situated. Judge Summers, in delivering the opinion of the court in that case, makes the following observation which is appropriate to this case: "The privilege of a freeholder residing in the county to serve on grand juries, is inherent by the common law, and sanctioned by our act of assembly, except so far as the latter may have taken it away on principles of public policy; therefore, in construing the latter, we deem it proper to adopt the interpretation which will least abridge the general privilege, and confine the exception to the necessity and reason of the enactment."

Again it may be said, that the 4th sec. of ch. 206 of the Code, p. 767, which still remains in force, requires that "for every grand jury there shall be summoned twenty-four citizens of this state, who are freeholders of the county or corporation in which the court is to be held, and in other respects qualified jurors, and not constables," &c., and that the words "in other respects qualified jurors," must refer to the first section of the act of 1853, as there is no other act now in force which creates any other qualification than those contained in the 4th section itself of ch. 206 of the Code. I have already had occasion to notice why these words were inserted in the

528 *Code, and they lost much if not most of their meaning by the amendment in the legislature of chapter 162, § 1 of the Code, as reported by the revisors, while no corresponding change was made in chapter 206, § 4. Still the words are not without meaning as the law now stands. There are common law qualifications of grand jurors to which the words may refer. They were required to be *probi, aut liberi, et legales homines*. 5 Bac. Ab. Juries A, p. 311, E 347. And therefore, we are told, it is a good exception at common law to one returned on a grand jury, that he is an alien, or villein, or that he is outlawed for a crime, or that he was not returned by the proper officer, or that he was returned at the instance of the prosecutor. Id. 311. Again, in reference to the qualification of jurors, that they should be *liberi et legales homines*, the same author says: "Hence it has been always clearly holden that aliens, minors or villeins cannot be jurors." Also infamy is a good cause of challenge to a juror; as that he is outlawed, or that he hath been adjudged to any corporal punishment whereby he becomes infamous, or that he hath been convicted of treason, or felony, or perjury, &c. Id. 347. Indeed, the Code, p. 734, § 3, expressly makes conviction of perjury a disqualification; and this is one

case at least to which the words in question may refer. That some of these common law disqualifications may be merged in statutory provisions in regard to them, cannot affect others not so merged.

As to the argument that if the first section of the act of 1853, does not prescribe a qualification, then there is no law to disqualify minors, free negroes, Indians and women, from serving on juries; it is a sufficient answer to say, that such persons are not *liberi et legales homines*, and are therefore not qualified jurors at common law. The same objection, in kind if not in degree, might have been taken to the law as contained in the Codes
529 *of 1819 and 1849, for in neither was there any provision requiring jurors to be "free white male persons;" and yet no one ever supposed that under either, a free negro, Indian or woman could be a juror. Free negroes are also disqualified by statute to serve on grand juries, because they cannot be citizens. That a common law qualification may have once been prescribed by a statute also, which has been repealed, does not destroy the common law qualification. Such a statute would be only in affirmance of the common law. But if it were repugnant thereto, the repeal of it would of course restore the common law. The provision in the Code, ch. 16, § 19, p. 102, that "when a law, which may have repealed another, shall itself be repealed, the previous law shall not be revived without express words to that effect, unless the law repealing it be passed during the same session," applies only to statute law.

I am therefore of opinion that the first section of the act does not create a disqualification. There is no other statute which disqualifies a person over 60 years old from serving on a jury, and certainly he is not disqualified by the common law. It follows that I am for affirming the judgment.

ALLEN, P., and LEE and ROBERTSON, Js., concurred in the opinion.

DANIEL, J., dissented.

Judgment affirmed.

530 *Wash v. The Commonwealth.

October Term, 1861, Richmond.

1. **Statutes—Issue of *Venire Facias*—Directory.***—The act, Code, ch. 208, § 5, p. 836, and the act, Code, ch. 105, § 14, p. 828, directing the issue of a *venire facias* are merely directory to the officer, and a prisoner cannot object to the writ because the acts have not been complied with.

2. ***Venire Facias*—Unwarranted Qualification—Effect.**†—The act, Code, ch. 162, § 1, was repealed by the

***Statutes—*Venire Facias*—Directory.**—The principal case was cited and approved in *Hall v. The Commonwealth*, 89 Va. 173, 15 S. E. Rep. 517.

See also, the principal case cited in *Spurgeon v. Com.*, 86 Va. 656, 10 S. E. Rep. 979.

†***Venire Facias*—Failure to Comply with Statute—Effect.**—In *Whitehead v. Com.* 19 Gratt. 651, the writ failed to comply with the statute requiring the jurors to be summoned "remote from the place

act of April 9, 1853, Sess. acts, p. 47, and jurors in cases of felony are not now required to own estate real or personal, of the value of one hundred dollars. And if the writ of *venire facias* requires the officers to summon jurors with this qualification it will be quashed on motion of the prisoner.

3. **Same—Error on Face of Writ—Objection in Appellate Court.**—If there is an error on the face of the writ of *venire facias*, and the prisoner moves to quash it, though he does not specify the error, it may be taken advantage of in the appellate court.

4. **Criminal Law—Uttering Counterfeit Coin;—Scienter—Presumption.**§—In a prosecution for uttering counterfeit coin, the guilty knowledge of the prisoner that the coin was counterfeit is a fact to be proved, and there can be no presumption of law, from the existence of other facts, of this guilty knowledge; though there may be a presumption of fact.

5. **Same—Guilty Intention—Presumption—Quere.**—**Quere:** If there be a presumption of law of a guilty intention in any prosecution for a criminal offence; except in the case of a prosecution for murder.

where the offence is charged to have been committed."

The court said: "In the *Commonwealth v. Wash*, 16 Gratt. 530, it was held that a writ of *venire facias*, which directed the officer to summon freeholders, who owned 'property to the value of one hundred dollars at least,' ought to have been quashed on motion, as it contained a qualification which the law did not require. It was there held, that it was not material to the question whether this mandate of the writ was regarded by the officer or not. Nor was the accused required to show that he had been injured by the error of the officer issuing the writ. It is true, that in that case the error was, that it contained more than the law allows, and in this case it contains less. But the principle of the case seems to be, that the writ itself must be one according to the law; that is, that the requirements of the writ are essential, and cannot be dispensed with, though the officer might in fact have summoned only the proper persons.

"It follows, therefore, that the court erred in denying the motion to quash the writ of *venire facias*; that the judgment must be reversed, and a new trial awarded to the accused."

§See generally, monographic *note* on "Forgery and Counterfeiting" appended to *Coleman v. Com.*, 25 Gratt. 865.

§**Criminal Law—Possession of Stolen Goods—Presumption of Fact.**—In *State v. Heaton*, 23 W. Va. 792, the court said: "In *Smith v. State*, 58 Ind. 341, it is held: 'The presumption arising from the possession of stolen goods is one wholly of fact and not of law.' In this the court of appeals of Virginia concurs. (*Wash's Case*, 16 Gratt. 530; *Price v. Com.*, 21 Gratt. 846.)" See also, on this point, the principal case cited in *Walker v. Com.*, 28 Gratt. 976. See *foot-note* to *Price v. Com.*, 21 Gratt. 846; *foot-note* to *Walker v. Com.*, 28 Gratt. 999.

In *Trogdon v. Com.*, 31 Gratt. 873, the court said: "The opinion of this court in *Wash's Case*, 16 Gratt. 531, has a strong bearing upon this question. There the distinction is plainly drawn between guilty knowledge or intent as a presumption of law, and guilty knowledge or intent as a presumption of fact—a mere inference to be drawn by the jury. In the latter case, whilst the jury may find the accused

On the 18th of February 1861, Harvey Wash was indicted by the grand jury of the Hustings court of the city of Richmond, held by the judge thereof, for feloniously uttering and attempting to employ as true, to Richard Emmerson, one piece of false, forged and base coin, forged to the likeness of a quarter eagle, a gold coin current by law and usage in this State, he knowing *the same to be false and forged, with intent to defraud, &c. Upon the motion of the prisoner the trial was postponed to the March term of the court: And at the March term he was tried and convicted by the jury, and they ascertained the term of his imprisonment in the penitentiary at two years; and the court sentenced him according to the verdict.

The prisoner filed six bills of exceptions to rulings of the court made in the progress of the trial; of which however, only the first, fifth and sixth were noticed by this court. The first was to the refusal of the court to quash the venire facias. The venire facias bears date the 27th of February 1861, and directs the sergeant to cause to come before the judge of the Hustings court "on the 1st day of the next March term of the court to be held by the said judge, (being the 18th day of March 1861), twenty-four good and lawful men freeholders of the corporation,"—"each one of whom is twenty-one years of age and owns property real or personal, of the value of one hundred dollars at least." Upon the calling of the cause and after the same was pronounced to be ready for trial, the prisoner moved the court to quash the venire facias, because it had not been issued more than twenty days before the then term of the court, and for other errors alleged to be apparent on the face of the paper, but not mentioned by the counsel or the accused. Which motion the court overruled; and the prisoner excepted.

The fifth exception is to an instruction given by the court on the motion of the attorney for the commonwealth. This exception sets out the evidence given on the trial. This evidence, if believed, shows that the prisoner in payment of his bill, on the 3d of January 1861, passed to Emmerson a two dollars and a half piece which was received by him as gold, and that Emmerson paid him back one dollar in change; and that the piece *was counterfeit.

It also shows that the prisoner on that and the day previous, passed similar pieces purporting to be of the same amount, to

four other persons either in payment for debts or purchases: all of which were counterfeit. It further shows that when he was arrested on the 3d he had in his purse \$55 of one dollar pieces, and near or quite \$200 in two dollars and a half pieces, and he had in his traveling bag \$247 of the like pieces; all of which were counterfeit. The prisoner when asked by the officer who arrested him, how he came by the money replied first that he could not say to save his life; and again that he had been trading in southern money at a discount, and might have got some on the borders of North Carolina; and he afterwards said he won some from a hog drover.

The prisoner, who had before lived in the county of Hanover, removed to Appomattox about a year previous to the trial, and resided about six miles from Pamplin's depot on the Danville railroad. And he introduced two witnesses, who stated that between the 10th and 15th of December 1860, they saw the prisoner and a man called Jones, a stranger to them, in a shanty at Pamplin's depot with a considerable quantity of gold and bank notes; that they saw the prisoner hand Jones a roll of notes, and the prisoner had some gold loose in his hand, and there were rolls of paper as if gold were wrapped in them. And one of these witnesses stated that Jones said he owed a large debt in North Carolina, and to save the per cent. he was merely exchanging gold for North Carolina money. It was in proof that the prisoner married in Appomattox county some thirty years since, and his wife's family is of high standing. And a number of highly respectable witnesses testified that they had known the prisoner for years, (some for ten and some for thirty years,) that they were his neighbors, knew him well, and that he was a man of the highest character.

533 *The instruction given by the court is as follows:—"The court instructs the jury that if they believe from the evidence that the piece of coin charged in the indictment to have been uttered by the prisoner was forged, and that it was uttered by the prisoner to Richard Emmerson as genuine, and that at the time he uttered the same he had in his possession a large number of similar forged coin, and that he did within a short space of time before or afterwards utter similar pieces of forged coin to other persons, and that he gave false and contradictory accounts of the manner in which the said forged coin came into his possession, then the law presumes the prisoner knew that the piece of coin uttered to the said Richard Emmerson was forged, and unless that presumption is rebutted by the evidence they should find the prisoner guilty."

The sixth bill of exceptions states that the jury retired to consider of their verdict on Monday the 1st of April, and after several hours absence they returned into court and announced that they were unable to agree. They were committed to the ser-

guilty upon a given state of facts, they are not bound to do so. They are to weigh all the circumstances, and draw from them such conclusion as they may think warranted by the evidence. In this class of cases it has been held that even the admission of the accused that the act was done with a fraudulent or malicious intent cannot preclude the Commonwealth from proving it by any proper evidence. *Commonwealth v. McCarthy*, 119 Mass. R. 364; *Priest v. Inhab. Groton*, 103 Mass. R. 530." See generally, monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 723.

geant, and the next morning they came into court and stated that they had been unable to agree. They then retired to the jury room to consult, and about 4 p. m. they came into court and said to the judge, "that they wished to know if they must take the instruction of the court as law. And the court then informed them, that, in his opinion, they were bound to take the instruction of the court as law; but they must consider and decide upon the evidence in the case. That if there was any error in the instruction it would be corrected in the court of appeals."

Upon the application of the prisoner this court awarded a writ of error to the judgment.

Crump and Nance & Williams, for the prisoner.

The Attorney General, for the commonwealth.

534 *ALLEN, P., delivered the opinion of the court:

The plaintiff in error was indicted in the Hustings court of the city of Richmond on the 18th day of February 1861; and the trial at the instance of the accused, was postponed until the March term of said court. At that term when the cause was called for trial, and after the same was pronounced to be ready for trial, the accused moved the court to quash the venire facias, because it had not been issued more than twenty days before the said term of the court, and for other errors alleged to be apparent on the face of the writ, but not mentioned by the counsel or the accused. The motion was overruled; and the prisoner excepted.

The Code of 1860, ch. 208, § 5, p. 836, provides that if a person accused of felony be not tried at the term of a superior court, to which he is remanded for trial, the clerk thereof shall, at least twenty days before any subsequent term that the case remains pending, issue a venire facias for his trial, returnable, &c. The same Code, ch. 105, § 14, p. 828, directs the clerk of a county or corporation court which determines that a person ought to be tried in a Circuit court, as soon as may be to issue a venire facias directed to the officer of the court in which the trial is to be.

It seems to me that both of these provisions are directory to the officer, and not intended for the benefit of the accused, except so far as a compliance with the provisions of the statute may tend to ensure a speedy trial. In one case as twenty days may not intervene between the examining and circuit courts, the clerk of the examining court is to issue the writ as soon as may be, so as to enable the officer to summon a proper venire before the term of the circuit court. In the other case where the trial is postponed at the first term of the circuit court, the law makes it the duty of the clerk of that court, at least twenty days before a subsequent term, to issue a

535 *venire facias; the object being to remind the clerk of the necessity of issuing the writ in time for the proper offi-

cer to execute it. All that the accused can require is, that it shall have been issued and executed, so that the trial may be had at the proper term, and the writ be executed in such time, that he may if he request it, be furnished with the list of jurors summoned for his trial. That list he is entitled to; but not before the first day of the term; that being the return day of the court, unless the court has directed it to be returnable on some other day.

It is further objected to the venire facias that it annexes a condition to the persons to be summoned not warranted by law, whereby a class of qualified jurors is excluded, and so the range of selection narrowed. The writ requires the officer to summon twenty-four good and lawful men, freeholders of his corporation, each one of whom is twenty-one years of age, and owns property, real or personal, of the value of one hundred dollars at least. By the Rev. Code of 1819, p. 601, § 9, the officer was required to summon twelve good and lawful men, freeholders of his county or corporation.

The act of February 24, 1846, sess. acts p. 62, superadded the qualification of being possessed of visible estate real or personal, of the value of five hundred dollars. The act of 1847-8, sess. acts p. 148, § 5, reduced this property qualification to three hundred dollars. The Code, ch. 162, § 1, provided that no person should be qualified to serve upon a petit jury in any proceeding, civil or criminal, unless he was twenty-one years of age, and owned property, real or personal, of the value of one hundred dollars. This section being the 1st section of chapter 162, together with several other sections of the same chapter of the Code, was repealed by the 39th section of the act of April 9, 1853, sess. acts p. 47. The first section of the act of 1853, p. 43, provides that all

536 *free white male persons who are twenty-one years of age, and not over sixty shall be liable to serve as jurors except as herein provided. By the 2nd section of the act certain officers of government, &c., were exempted. By the 28th section of the same act, p. 46, it is enacted that nothing contained in the preceding sections shall apply to the empaneling of juries in cases of felonies, but the jurors shall be called, chosen, sworn and empaneled for the trial of every case of felony according to chapter 208, of the Code of Va., concerning juries in such cases. The provisions of this act have been incorporated in the Code of 1860, pp. 687, 691, ch. 162, §§ 1, 27, and p. 835, ch. 208, § 4. The 1st section, as we have seen, dispenses with the property qualification entirely; and the 39th section repeals the first section of ch. 162, of the Code requiring such qualifications; and the 28th section declares that nothing contained in the sections preceding shall apply to the empaneling of juries in cases of felonies, but the jurors shall be called, chosen, sworn and empaneled according to chapter 208 of the Code. The Code, chap. 208, § 4, p.

774, provides that in a case of felony the writ of venire facias shall command the officer to summon twenty-four freeholders residing remote, &c., "and qualified in other respects to serve as jurors." If the act of 1853 had contained no other provisions bearing on this question it might have been argued with great force, that although the first section dispensed with the property qualification in terms sufficiently broad to cover criminal as well as civil cases, yet that as the 28th section declared that the preceding sections should not apply to the empaneling of juries in cases of felonies, that the property qualification was intended to be retained in such cases, and that the 4th section of chapter 208, of the Code, referred to as furnishing the rule, must be construed as if the law in this respect remained unchanged

537 by the act of 1853, dispensing "with the property qualification generally.

That the phrase in that section "qualified in other respects to serve as jurors," comprehended all things essential to the qualifications of jurors by the common law where unaltered or by statutes then in force. But the act of 1853 did not stop with the enactments referred to. By a subsequent section it expressly repealed the statute requiring a property qualification. There is therefore no law in force requiring a property qualification upon which that clause can operate. It may be satisfied however by referring it to the various common law provisions touching the qualifications of jurors, and such statutory provisions as remain in force; as for instance the disqualification to serve as a juror resulting from a conviction for perjury, &c. I think therefore that the only property qualification intended to be retained, is that designated in the 4th section of chapter 208, which enacts that the venire facias shall command the officer to summon twenty-four freeholders. If freeholders, and qualified in other respects according to the common law where applicable and statutes still in force, the freeholder is a proper juror, though his property, real and personal, may not be of the value of one hundred dollars. The defect in the writ appearing on the face of it, a motion to quash was the proper mode of taking advantage of it. McWhirt's case, 3 Gratt. 594. In that case a writ of venire facias was quashed by the order of the court without the consent of the prisoner, because the prisoner, who had been indicted jointly with others, had elected to be tried separately, and the writ had directed a venire to be summoned for the trial of all jointly indicted.

Nor do I regard it material to the question whether this mandate of the writ was regarded by the officer or not. The presumption is that he confined himself to the mandate of the writ, and summoned

538 only such as "he was thereby required to summon. Nor in such case can the accused be required to show he has been injured by the error of the officer issuing

the writ. The summoning officer has been required to exclude from the jury persons who by law the prisoner was entitled to have as his triers, and if the writ may thus limit the range of selection, the trial of offences would be confined to such persons as the clerk thought proper to designate. No such power has been entrusted to any functionary, and not being authorized by law, the court erred in overruling the motion to quash.

Nor does the omission to point out the error in the court below preclude him from raising the objection here. He moved to quash for one defect which was specified, and other errors alleged to be apparent on the face of the paper. The motion raised every objection to the writ for matter apparent on the face of it. It is the duty of the commonwealth through her officers, to conduct her prosecution according to law; and no obligation rests on the accused to point out errors for the benefit of the commonwealth. I think the court erred in overruling the motion to quash the venire facias, and for this error the judgment should be reversed.

The petitioner in his assignment of errors, and by his counsel in argument here, contends that there was error in the instruction given by the court at the instance of the attorney for the commonwealth, upon the whole evidence as set forth in the fifth bill of exceptions. The instruction is somewhat ambiguous, leaving it doubtful whether the court intended to say that the guilty knowledge was a legal presumption which the jury were bound to deduce from the fact set forth, unless rebutted by the evidence, or as furnishing a strong presumption of the fact of guilty knowledge which if unexplained or rebutted might warrant a verdict of guilty. I think

the terms used implied that the court

539 intended to instruct "the jury that the facts set forth if not rebutted, raised a legal presumption of the further fact of guilty knowledge, which bound the jury to find the prisoner guilty. And this it is fair to infer, was the belief of the jury; for it appears by the sixth bill of exceptions, that after the case had been committed to the jury, they came into court the next day and enquired, if they must take the instruction of the court as law, and were informed they were, in the opinion of the court, so bound; but they must consider and decide upon the evidence in the case. Thus limiting the jury to the enquiry whether the evidence proved the facts set forth in the instruction; and if they were satisfied that those facts were established, that they raised of themselves the legal presumption of guilty knowledge, and the jury should find the prisoner guilty.

The question how far a jury is bound to presume guilt or a guilty intent from any state of facts, is involved in very great doubt by the authorities. The various decisions on the subject are reviewed and commented on by Bishop on criminal law, §§ 248, 249 and 513; 2 Starkey's Ev. part

2,928, note p; 3 Arch. Crim. Prac. 550; and Best on presumptions, ch. 1, 2, 3. By one elementary writer it is said that where the policy of the law and ends of justice require that a presumption should be made, the jury should be told they ought to make the presumption, unless some evidence be given to the contrary; it should not be put to them as a matter of discretion. Larceny for example, it is said, is inferred from the recent possession of stolen property. Best on presumption, ch. 3, § 40. Starkey, *ubi supra*, says that though the fact of a connection between the recent possession of stolen property by the accused, with the fact that he stole it, are usually combined, experience shows that this connection, although unusual, is not necessary. No artificial weight can be attached to it, and juries do not convict *unless fully satisfied of the actual guilt of the prisoner. Artificial presumptions can therefore never be safely established as a means of proof in criminal cases. The author reprobates in proper terms what he calls the abominable and sanguinary statute, of 21, Jas. 1, ch. 27, which made the concealment of the bastard child by the mother, evidence that she murdered it.

It is a maxim laid down by all writers on criminal law, that every person must be presumed to intend that which is the immediate and natural consequence of his deliberate acts. And therefore, it is said, that the uttering a forged document is conclusive evidence of an intention to defraud the person who would naturally be affected by it. And the weight of authority would seem to be in favor of that proposition. But the correctness of the rule seems to be controverted by the reasoning of Starkey, *ubi supra*; and Bishop on Crim. Law, § 248, says it is probably impossible to lay down any exact rule in the present state of the authorities. In homicide it is conceded to be a presumption of law that where the fact of slaying has been proved, malice must be intended; and that all circumstances of justification or extenuation are to be made out by the prisoner unless they appear from the evidence adduced against him. Foster's C. L. 255, 290. Perhaps in most other criminal prosecutions, the jury instead of being bound down by artificial rules, should be instructed that in the absence of all rebutting evidence they might fairly make such presumption.

The question of guilty knowledge involved in the present case is of a different character from that of presumed intention from a given state of facts. The guilty knowledge is itself a fact constituting an essential ingredient of the offence charged. The actual existence of the fact must be proved either directly or by such other facts and circumstances, as when fairly investigated *by the proper tribunal for the ascertainment of facts, can leave no reasonable doubt that the fact does exist.

The court cannot assume in supposed adherence to any artificial rule of law, that other facts being proved to exist, there is

in all cases a legal and necessary connection between such facts and the other fact to be presumed. The determination rests exclusively with the jury; and they must decide truly according to their own convictions upon a consideration of all the evidence before them. From a state of facts being proved to exist to their satisfaction, such as those detailed in the bill of exceptions, most men disposed to act fairly would deduce the fact of guilty knowledge as being satisfactorily established; and so that the offence charged was proved beyond all reasonable doubt. But evidence of general good character might tend to rebut the presumption. And under peculiar circumstances the general presumption of innocence until guilt was proved might have the like effect. The weight of such evidence and presumption in any case is to be determined by the jury alone. The proof of such facts as those set out in the instruction, in the absence of every thing to contradict or explain them, might in general be sufficient to warrant a conviction; yet as was remarked by the judge in his opinion in Spencer's case, 2 Leigh 751, 756, it would not bind the jury with conclusive force. It is nothing more than a high degree of presumptive proof; and that in some cases of presumptive proof the inferences would be very strong and irresistible, in others weak and wholly inconclusive. And in all cases the jury are to weigh the circumstances and draw from them what inferences they may warrant.

The instruction as given did not leave the jury such liberty; it constrained them, paying a proper respect to the opinion of the court, to draw the inference of guilt as a legal presumption, from the facts as set forth, if *they believed them, unless that presumption was rebutted. Deciding in effect that if such facts were found by a special verdict, supposing a special verdict proper in a criminal case, the court would presume from them the additional fact of guilty knowledge necessary to make out the crime, though such fact was not expressly found. I think the instruction was erroneous, and if asked for in the same terms should not be given.

Judgment reversed.

543 *Samanni v. The Commonwealth.

October Term, 1863, Richmond.

1. Statute—Riots—Case at Bar.—S occupies a house, the front room on the first floor as a store, the back room as a dining room, the upper rooms as sleeping apartments for her family; but the only mode of ascent to the upper rooms is outside the house. A riotous destruction of the front door and window of the store room, is an offence under the act Code, ch. 194, § 6.
2. Same—Same—Same.—A partial pulling down or destruction of a dwelling house is an offence under the act Code, ch. 194, § 6: In this differing from the English statute.

This was an indictment against Thomas

Samanni in the Hustings court of the city of Richmond, held by the judge thereof, for that he did with other white persons, to the number of three or more, unlawfully and riotously assemble themselves together to disturb the peace of the commonwealth. And being so unlawfully and riotously assembled together, the dwelling house of one Mina Schweitzer, situate in the city, did then and there feloniously destroy in part, to the great terror, &c.

On the trial it was proved that there was a riot in Richmond at the time stated in the indictment, and that the prisoner and a number of others, mostly women, made an attack upon the store of Mrs. Schweitzer who had shut the door. That there were several blows upon the door with a hatchet, some of them by Samanni and others by a woman, by which a panel of the door was broken, and then the bar which fastened the door was removed by some person who put his or her hand through the broken panel; and the door was thus opened.

544 *and the crowd entered and took away a large amount of goods. A window near the door was also broken.

It also appeared that Mrs. Schweitzer occupied the whole house, using the upper part for sleeping rooms for herself and her children, and the front part of the lower floor as a store for the sale of goods, and the rear part of the same floor as a dining room. The dining room and store are separated by a partition with a door in it. There is no internal communication between the store and the lodging rooms above; but to get from the store to these rooms it is necessary to go out of doors into an alley, and then ascend a pair of steps.

After the evidence had been introduced the Attorney for the Commonwealth moved the court to instruct the jury as follows:

"If the jury believe from the evidence, that the upper part of the house of Mina Schweitzer was used by her as a sleeping apartment for herself and family, and the lower part thereof was used by her as a store and a dining room for herself and family, then the said house is a dwelling house within the meaning of the 6th section of the 195th chapter of the Code of Virginia."

The prisoner moved the court to give the following instruction:

"If the jury shall believe from the testimony, that Mrs. Schweitzer occupied the lower part of the said house as a store for the purchase and sale of goods, and the upper part thereof as a dwelling house wherein she slept; but there was no internal communication between the upper and lower part of said house, except by going out of the house into and through an alley, then the storehouse is not a part of the dwelling house."

The court gave the first instruction, and refused to give the second; and the prisoner excepted.

The jury found the prisoner guilty, and ascertained the term of his imprisonment in the penitentiary at two *years.

545

And he then moved for a new trial, on the ground that the verdict was contrary to the law and the evidence. But the court overruled the motion; and the prisoner again excepted; and applied to a judge of this court for a writ of error, which was awarded.

Crane and Ratcliffe, for the prisoner.

The Attorney General for the commonwealth.

ROBERTSON, J., delivered the opinion of the court.

We are of opinion that the house alleged in this case, to have been partially destroyed, is a dwelling house within the meaning of the statute under which the prosecution was had; and that the court committed no error in giving the instruction asked for by the Attorney for the Commonwealth, and in refusing that asked for by the prisoner.

But it is insisted that a new trial ought to have been granted because the destruction was not such as is contemplated by the statute; and numerous English decisions have been referred to for the purpose of showing that where the destruction is partial only, it must, to bring the case within the statute, be made to appear that there was an intention to destroy totally. The language of the English statute is as follows, viz: "If any persons riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down or destroy," &c. And it has been held, under it, that to convict of beginning to destroy a house, an intention to destroy the house, and not a portion of it merely, must be shown: in other words that a destruction of the whole house must have been begun.

It is obvious that these decisions rest upon the peculiar wording of the English statute. If the same language were used in ours, it might well be said that, having 546 *been adopted subsequently to these decisions, it ought to be construed in conformity with them: that in copying the English statute our legislature intended to take it with the meaning affixed to it by the English courts.

But the language of our statute is very different. It is, "If any rioter, being free, pull down, or destroy, in whole, or in part, any dwelling house, or assist therein, he shall be confined in the penitentiary not less than one, nor more than five years; and, though no such house be so injured, every rioter," &c.

It seems to have been intended by this statute to put the partial destruction of a dwelling house on the same footing with its total destruction, as to the guilt and punishment of the rioters engaged in it; and the terms used appear to have been adopted with the express view of excluding the possibility of any such construction as that placed upon the English statute.

The only question remaining is, whether, in this case, any part of the house was

pulled down or destroyed? A window was broken into; and the front door was broken open, by splitting a panel and removing the bar with which it was fastened. The door was thus rendered useless, and destroyed as a door. This was a destruction of a part of the house, sufficient to bring the perpetrators within the purview of the statute passed to prevent rioters from injuring dwellings.

It can make no difference that the purpose of the rioters may have been to rob, rather than to destroy. If in the accomplishment of that purpose they destroyed any part of the house, their offence, under this statute, was as complete as if their original design had been to pull down or destroy the house.

The motion for a new trial was properly overruled; and the judgment must be affirmed.

Judgment affirmed.

547 *Forde v. The Commonwealth.

April Term, 1864, Richmond.

1. **Criminal Law—Justice Acting as Coroner Also on Examining Court.**—A justice of the peace who has acted as coroner in taking the inquest upon the dead body of the man, whom the prisoner is charged to have murdered, is not thereby legally disqualified from sitting as a member of the examining court.

2. **Evidence—Witnesses—Contradiction of.**—The rule that upon cross-examination of a witness he shall not be asked a collateral question in order to contradict and thus discredit him, does not apply to the statements made by the witness on his examination in chief; but these statements may be contradicted though they were collateral to the issue.

3. **Same—Case at Bar.**—On the trial of a prisoner for murder, a witness on his examination in chief makes a statement as to the action of a third person, and upon his cross-examination he is

***Evidence—Witnesses—Contradiction of.**—In *Morgan v. Franklin Ins. Co.*, 6 W. Va. 498, it is said: "Following the current of authority, it seems to be the established rule, that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony. And if a question is put to a witness which is collateral or irrelevant to the issue, his answer is conclusive, and cannot be contradicted by the party who asked the question. *Forde's Case*, 16 Gratt. 547.

"It is competent to impeach the credit of a witness by proof that he has made statements inconsistent with the testimony he has given on the trial. (*Idem.*)

"In order to lay a foundation for impeaching his testimony by contradicting it, it is not irrelevant to inquire of the witness, on cross-examination, whether he has not on some former occasion given a different account, or made a different statement, of a matter of fact to which he has testified on the trial. (*Idem.*)" The principal case is also cited in *Robinson v. Pitzer*, 3 W. Va. 354; *State v. Goodwin*, 32 W. Va. 181, 9 S. E. Rep. 87.

asked whether he did not make a different statement (stating it) before the examining court: to which he says he does not remember. The statement made by the witness before the examining court, may be proved in order to discredit him. And this may be done either by proving by another witness that the statement was made by the witness, or by proving by one witness that only one witness spoke of the act of that third person, and by another person that the witness proposed to be contradicted was that witness.

At the February term 1864, of the Hustings court of the city of Richmond, Robert S. Forde was tried for the murder of Robert E. Dixon. On the trial various questions were made, and exceptions taken by the prisoner to the rulings of the court; and the jury having found him guilty of murder in the second degree, and ascertained the term of his confinement in the penitentiary at eighteen years, and the court having pronounced judgment upon him in pursuance of the verdict; he obtained a writ of error to the judgment from this court.

There were but two questions considered by this court: and upon these questions, the facts are fully stated by Judge Allen in his opinion.

Crump, for the prisoner.

The Attorney General, for the Commonwealth.

ALLEN, P. The record in this case nowhere states the facts proved, or all the evidence offered upon the trial. Each bill of exceptions sets out only so much of the testimony as was necessary to show the relevancy of the question raised and decided by the court; and the correctness of the rulings of the court upon the isolated questions is the only matter for consideration here. From the bill of exceptions first in order, numbered second in the transcript of the record, it appears, that after the accused had been permitted to withdraw the plea of not guilty, theretofore pleaded, he moved to quash the indictment upon the ground that he had not been sufficiently and legally examined by a properly constituted examining court, in this: that R. D. Sanxay one of said court, had acted as coroner by virtue of his authority as a justice of the peace in and for the city of Richmond, and so had disqualified himself from sitting as one of the justices upon the said supposed examining court. And in aid of his motion, he offered in evidence the record of said examining court, from which it seems that on the second day of the court, and the court having fully heard the evidence, the prisoner moved the court that further proceedings in the case should be discontinued, because R. D. Sanxay, one of the sitting justices in the case, acted as a coroner in the case; which motion was overruled. The prisoner thereupon offered his affidavit alleging that after his arrest, and during his confinement in the old market in the city of Richmond, a person represented to be R. D. Sanxay, an alderman of said city,

entered the room in which the affiant was confined, in a great hurry and in a very excited manner, and made the remark also in an excited manner, that the deceased R. E. Dixon, had been shot with a copper ball, and that it showed how determined the prisoner was to take the life of the deceased; and made other remarks of a similar character, indicating a very decided opinion of the guilt of the affiant. Also, that affiant had been informed and believed that R. D. Sanxay is the acting coroner of said city, who presided at the inquest on the body of the deceased, and signed the verdict rendered by the jury in the case. And that he was informed and believed that the said R. D. Sanxay was one of the court then sitting on the bench to try the case then pending. And also in support of his motion, he offered the record of the finding of the coroner's jury. The inquest appears to be certified and signed by Richard D. Sanxay, J. P., acting as coroner. Upon this testimony the court of Hustings of said city overruled the motion to quash the indictment, and the accused excepted.

After the motion to quash the indictment was so overruled, the accused as it appears by the bill of exceptions numbered three in the transcript of the record, tendered two pleas in abatement, the first alleging that said R. D. Sanxay, one of the five justices who sat upon the examining court, had formed and expressed a fixed opinion of his guilt, &c. The second that he had not been legally examined because the said R. D. Sanxay, one of the five justices, had acted as coroner, &c. Which pleas the court upon motion of the commonwealth rejected; to which decision the accused
550 *excepted. The same questions were raised by each exception and they may be considered together.

The constitution and functions of the examining court are regulated and prescribed by the Code of 1860, ch. 205. It is in effect nothing more than a more formal examination and inquiry into the facts than could be made by a single justice sitting generally alone, without time to examine carefully, or the aid of counsel to assist his deliberations. Under such circumstances he may err (supposing the facts to be undisputed) upon the question whether in law they make out a felony; or he may be mistaken as to the facts. As an additional safeguard for the liberty and protection of the accused, the examining court is interposed. It must be satisfied that there is a corpus delicti, that a felony has been committed, a proposition in regard to which they can have the benefit of consultation and argument. If satisfied on that point, and that there is probable cause to charge the accused therewith, he is to be remanded for trial. If entitled to bail they may bail him. But if it appear to the court, that there is not probable cause for charging the accused with the offence he shall be discharged. And an effect is given to such order of discharge which a discharge by a magistrate

does not possess; the accused shall not thereafter be questioned for the same offence. But when they remand, they pronounce no definitive sentence upon the question of the guilt of the accused. Their judgment on the questions of law or fact is not evidence on the trial, and can have no influence upon the result. There would seem to be therefore no more reason for entertaining a motion to quash an indictment by a challenge for favor as to a justice of the examining court, than there would be to a committing justice where there is no examining court. The examining court is peculiar to Virginia. And no case has been produced where such a motion
551 has been made or sustained, on *account of favor in the committing magistrate. When the examining court has acted, its functions cease; the court is dissolved. No bill of exceptions can be taken to its decisions, for there is no mode provided for receiving them. The cause could not be sent back to the same court: a new court must be convened. If the challenge could be listened to, where is it to be made and when? If to the same court, who is to try it? Not the remaining justices in a court of five, for every act performed by such court must be the act of a court of five justices. The justice challenged must be the judge of his own competency in the case supposed. This would lead to scenes discreditable to the administration of justice. If some other tribunal is to determine the question upon evidence aliunde, the principle would apply to all inferior courts, and judgments which import verity when pronounced by a duly organized court having jurisdiction over the subject matter, would be set aside by matter not appearing in the record.

As to the constitution of the court itself, the 4th sec. of ch. 205, provides that the justice who committed or recognized the accused for examination shall not, without the consent of the accused entered of record, be one of the examining court. This is the only exception allowed or provided for by law; and the expression of one excludes all others in a court consisting of duly qualified and acting justices. The coroner does not fall within the letter of the statute and the court could not embrace him except by assuming legislative power. If it were important it might perhaps be shown that he does not fall within the principle of the exception. The committing justice has examined the evidence. He has solemnly adjudged upon the sufficiency of the evidence to charge the accused with the offence. The examining court is to enquire into the same question; and it was therefore provided, that the committing magistrate
552 who *has passed judicially on the very question, should not compose one of the examining court, unless the accused consents. The duties of the coroner are judicial. He conducts the inquisition; but the finding is the act of the jury, they are to enquire into the material circumstances of the death of the deceased, and

if they find he came to his death by unlawful violence, who were guilty thereof. The coroner is to return the inquisition to the county court, and recognize such witness as he thinks proper to appear and testify at such court, when it sits for the examination of the accused. And if the person charged by the inquest be not in custody, he may for his apprehension issue process in the same manner as a justice; such warrant to be returned before a justice who examines and commits or not as in other cases. The coroner does not pass judicially upon the question whether the evidence sufficiently charges the accused with the offence. He is committed judicially to no such opinion, and may in fact have made up no definite opinion or have come to a different conclusion from that at which the jury have arrived. I think upon all the grounds insisted upon here, the court below did right in overruling the motion to quash the indictment, and in rejecting the two pleas in abatement tendered by the accused.

The fourth bill of exceptions, after setting out the testimony of a witness who made the post mortem examination of the body of the deceased, and of several other witnesses who detailed the occurrences as remembered by them respectively, which took place at the time and place of the homicide, gives the narrative of J. E. Goodwin, a witness of the Commonwealth, of what had occurred on that occasion. In his evidence the witness said amongst other things, "That the first he saw of the accused was whilst witness was waiting for the deceased, in his conversation with the 553 officer, and he saw the *accused and Mr. Quarles (whom he knew by sight), just before they came through the gate from the Capitol Square nearly opposite to Manassas Hall. The gate was revolved on the centre, and Quarles came out on the left side of the gate, and the accused came out on the right side; Quarles came out first, and witness does not recollect which way he went or what became of him, as he kept his eyes on the accused. Just before the accused came through the gate he drew a pistol from what appeared to the witness to be a new belt, and kept the pistol under his coat or cloak as if to keep it out of view." After describing the position of his cloak or coat, and stating some other circumstances that he observed, he states, "That the accused came down to the flagging and called out, 'Dixon, are you ready?' or, 'are you ready Dixon?' and then fired at him." After a very special detail of the circumstances about the firing of the pistols and other incidents of the encounter, he further says, "Quarles may have passed in front of witness without his noticing him; does not remember that he said in his testimony before the examining court that Quarles passed down on the west side of 10th street from him. Witness has been very sick recently, and does not remember half of his own business; that is he does not remember half the minutiae of his own business; does not recollect what he said on his examination before the examining court."

In the bill of exceptions the narrative of this witness is continuous, without discrimination in chief, and on his cross examination. It appears sufficiently, however, from the whole deposition as recorded, that the first statements quoted were made on his examination in chief, the last on his cross examination. And this is fully shown towards the close of the bill of exceptions and after the testimony of the witness T.

H. Quarles is set forth. It is then 554 stated that on the cross examination *of the witness Goodwin, and with a view of contradicting him, the counsel of the accused asked him whether he had not said in his testimony before the examining court, that "Mr. Quarles after coming out of the gate with the accused went down 10th street on the opposite side from that on which he Goodwin was standing," and his reply was, that "he did not remember making any such statement." Quarles was examined as a witness for the commonwealth, and stated in his testimony that after passing through the gate, "He went on to the flagging, crossed Bank street on it, and passed down on the east side of 10th street." On his cross examination he was asked by the counsel of the accused, whether the witness Goodwin did not in his testimony before the examining court make the statement above mentioned with reference to his Quarles' movements after leaving the gate? He replied that he was present at the examining court, and heard all the testimony, and that only one witness had mentioned him, but who that witness was he could not say; he had just seen Goodwin and could not say whether he was the witness or not.

The counsel for the accused then proposed to introduce evidence for the purpose of proving that only one witness at the examining court mentioned Quarles' movements, and that witness was the witness Goodwin; which evidence they proposed to follow up by asking Quarles if the witness who spoke of him at the examining court did not, in his examination, say that he, Quarles, after coming out of the Capitol gate with the accused, went down 10th street on the side opposite to that on which the said witness stood. To the introduction of which evidence the Attorney for the Commonwealth objected, and the court sustained the objection, and refused to allow such evidence to be given to the jury: to which decision the prisoner excepted..

555 *From this synopsis of the material parts of the bill of exceptions, it is somewhat uncertain what was the precise proposition the court intended to decide. Whether it rejected the testimony because it was not competent, after the foundation had been laid as aforesaid by the question propounded to the witness Goodwin and his answer that he did not remember as aforesaid, to prove by other witnesses what he did say, so as to discredit his evidence given on his examination in chief, by showing either a want of veracity or a defective memory; or whether supposing the proof would be proper if Quarles could have identified him as the witness who mentioned

his movements, it was irregular to connect Quarles' testimony as to what the only witness who mentioned his movements did say on the former examination, with the testimony of other witnesses, to prove that Goodwin was that witness who in his examination at the examining court mentioned Quarles' movements, so as to identify him, upon the ground that such additional testimony was secondary or not the best attainable evidence to prove the disputed fact.

As the witness Quarles had been asked on his cross-examination, whether Goodwin did not, in his examination before the examining court, make the statement aforesaid with reference to Quarles' movements after leaving the gate, and no objection seems to have been made to the inquiry, it is probable the decision of the court was founded on the latter objection. However that may be, if the testimony was improper on either ground it should have been rejected; if legal the accused was deprived of the benefit of it by the decision of the court. The stress of the argument here on the part of the commonwealth has been rested on the first ground, that the evidence was incompetent; that the matter in regard to which it was attempted to contradict the witness was

collateral to the real issue in the 556 cause. *That the movements of the witness Quarles had no connection with the issue the jury were sworn to try, and that whether he passed down on one side or the other of 10th street after leaving the capitol gate, could not according to the testimony set forth, have had any imaginable influence upon the transaction between the parties engaged in the contest.

It is a well settled rule, found in all the text writers upon evidence, that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony. And if a question is put to a witness which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked the question, but it is conclusive against him. 1 Greenl. Evidence, § 449. The rule was recognized, and the reason stated why his answer cannot be contradicted in the case of *Charlton v. Unis*, 4 Gratt. 58; where it is said this would be unjust to the witness and the party introducing him; for though every witness may be supposed to come prepared to sustain the truth of his testimony given on the trial, he cannot be expected to come prepared to prove the truth of every collateral statement he may have made on another occasion.

It was held also in the same case, that it is competent to impeach the credit of a witness by proof that he has made statements inconsistent with the testimony given on the trial. And accordingly we find it laid down in *Greenleaf*, ubi supra, that it is not irrelevant to inquire of the witness whether he has not on some former occasion given a different account of a matter of fact to

which he has already testified, in order to lay a foundation for impeaching his testimony by contradicting it. These expressions in the opinion and authority referred to "the testimony given on the trial," 557 "to which he has *already testified,"

point out the distinction between collateral matter introduced upon the cross-examination, to lay a foundation for impeaching his testimony by contradicting the witness, and matter which he has testified to in his examination in chief, introduced by himself, and stated to the jury as part of his own narrative of the transaction.

In the case referred to from Grattan the plaintiff having read the deposition of a witness, the defendant to discredit him, introduced an affidavit made by the witness a short time before the institution of the suit, stating various matters; and then introduced evidence contradicting one of the statements contained in the affidavit, thereby to discredit the witness by showing a want of memory or of veracity in respect to that statement. This was held to be improper.

Applying those principles to this case, if the witness Goodwin had not referred to the movements of Quarles in his testimony in chief, but if this had been brought out upon cross-examination, and shown to be collateral or irrelevant to the issue, his answer could not have been contradicted by the party who asked the question, but would have been conclusive against him. But that was not the case here. On his examination in chief he said that he saw the accused and Quarles whom he knew by sight, just before they came through the gate from the Capitol Square nearly opposite to Manassas Hall. The gate was revolved on the centre and Quarles came out on the left side of the gate, and the accused came out on the right side. Quarles came out first and witness did not recollect which way he went or what became of him, as he kept his eyes on the accused: and he then proceeds to detail the circumstances which in their nature were calculated to occupy all of his attention. This statement necessarily tended to give weight to his details of

the main transaction; to show that 558 his attention *was so closely fixed upon them, his mind so preoccupied by the scenes of the tragedy enacting before him, that incidental or collateral matter passed unheeded before him. In this point of view the statement becomes incorporated with the main narrative of events, and is an essential part of his testimony. It does not fall within the reason assigned, that the answer of a witness to collateral matter cannot be contradicted by the party asking it, because it would be unjust to expect the witness to come prepared to prove the truth of every collateral statement. As he has embodied it himself in his own narrative of the transactions he must be prepared to sustain it. He cannot complain of any surprise at the effort to discredit him with reference to such a statement, by

showing that he has made contradictory statements on other occasions; nor does his reply that he did not remember having made such statements, when asked if he had not made such contradictory statements to lay a foundation for proving them, change the aspect of the case. If the party were precluded by such reply from showing that he made such contradictory statements the jury would be left in doubt whether they ever were made.

It is not for the court to say what weight such testimony should have upon the jury, whether it tended to weaken his testimony by showing a defect of memory, or to discredit it by showing that he had made a false statement with a view that his testimony upon other matters should make a deeper impression. I think therefore that it was competent for the accused after asking the witness, Goodwin, upon his cross-examination, and with a view of contradicting him, whether he had not said in his testimony before the examining court, that Mr. Quarles, after coming out of the gate with the accused went down 10th street on the opposite side from that on which he, Goodwin, was standing; and if he

559 *denied having made such a statement, or said that he did not remember making it, to introduce evidence to prove that he did make such a statement, to discredit the witness by impeaching his veracity or showing a defective memory. Nor do I think there is anything in the objection as to the mode in which it was attempted to prove such contradictory statement. It is not a question as to the quality of the testimony when compared with some other evidence of a superior degree; as an attempt to prove the contents of a writing without accounting for its nonproduction, &c.; or where from the nature of the transaction it appears there is better evidence of the fact which is withheld or suppressed: thus raising a suspicion of fraud. The objection here related to the measure and quantity of the evidence by which it was attempted to establish the fact; and whether the whole matter could be proved by Quarles alone, or by his testimony as to what a witness said in the examining court connected with the testimony of other witnesses to prove who that witness was, is immaterial. The necessity of resorting to such additional proof may impair the force of the testimony to establish the fact, but the testimony itself is admissible to be judged of by those whose province alone it is to weigh it.

I think, therefore, that the court erred, to the prejudice of the accused, in excluding the testimony he proposed to introduce for the purpose of contradicting and so discrediting the witness, Goodwin, as set forth in the fourth bill of exceptions; and that for such error the judgment must be reversed, and the verdict of the jury set aside; and the cause remanded for a new trial of the accused upon the indictment.

This conclusion renders it unnecessary to express any opinion upon the propriety of

the decisions of the court below upon the motion for continuance on account 560 *of the absence of John T. Clark, as disclosed in the first bill of exceptions; or upon the application for a new trial upon the ground of after discovered testimony as set forth in the fifth bill of exceptions. The same questions may not arise upon the new trial rendered necessary by the judgment of the court upon the previous bills of exceptions; nor could they in fact arise presenting precisely the same circumstances.

DANIEL and ROBERTSON, Js., concurred in the opinion of the President, except that they did not think it important whether the statement of the witness Goodwin came out on his examination in chief or on cross-examination.

MONCURE, J., concurred in the opinion, except that he thought that the statement was relevant testimony.

Judgment reversed.

561

*Elvira, a Slave.

January Term, 1866, Richmond.

1. **Criminal Law—Slaves—Conviction of—Unanimity in Court Essential.**—A slave tried for a felony the punishment of which may be death, can only be convicted by the unanimous opinion of the justices who compose the court. And the fact that the law authorizes the court in its discretion, to direct the slave to be sold and transported beyond the United States, instead of being sentenced to death, does not dispense with the necessity of unanimity in the court in the conviction.
2. **Same—Same—Conviction by Majority of Court—Habeas Corpus.**—A slave condemned by a majority of the court to be sold and transported, relieved by writ of *habeas corpus*.
3. **Same—Same—Same—Quere.**—**QUERE:** If in such case the Court of Appeals has jurisdiction to award a writ of error to the judgment of the judge refusing to discharge the prisoner.

In April 1864, Elvira, a slave, the property of C. Ford, was tried before a court of five justices of the city of Petersburg, for attempting to poison the family of her master; and the court by a majority of the justices present found her guilty, and sentenced her to be sold and transported beyond the Confederate States. The judgment of the court recited that one of the justices composing the court, dissented from the opinion and judgment.

After the sentence had been pronounced, C. Ford, the master of the prisoner, applied to the judge of the Circuit court of Petersburg for a writ of *habeas corpus* to have her discharged, on the ground, that the judgment of conviction having been rendered by less than the whole number of justices composing the court, was

562 *illegal, and in effect an acquittal of the prisoner. The writ was allowed; but upon the hearing of the case, the judge being of opinion that the judgment by a majority of the court was legal, remanded

the prisoner; and thereupon Ford applied to a judge of this court for a writ of error, which was allowed.

The case was argued by J. Garland, for the petitioner.

There was no counsel for the commonwealth.

MONCURE, J. It is unnecessary to express any opinion on the question arising in this case as to the jurisdiction, as well of this court as the court below; this court being equally divided in opinion on that question, and being therefore unable to decide the case on that ground. My opinion on the merits, is as follows:

By 1 R. C. 1819, ch. 111, § 32, the justices of every county or corporation were declared to "be justices of oyer and terminer for trying slaves charged with felony; which trials shall be by five at least without juries. No slave shall be condemned in any such case unless all of the justices, sitting upon his or her trial, shall agree in opinion, that the prisoner is guilty." Tate's Dig. 272, No. 2.

By act of 12th February, 1828, Sess. Acts, p. 29, slaves were made triable for simple larceny of a thing of the value of \$20 or less, by a justice of the peace, and punishable by stripes.

Slaves convicted of offences without the benefit of clergy, were punishable with death; within the benefit of clergy, were punishable by being burnt in the hand, and suffering such other corporal punishment as the court should think fit to inflict; except when they once had the benefit of clergy, in which case they were punishable with death. Tate 275, No. 13; 1 R. C. ch. 111, § 45. Burning in the hand was

563 abolished by act of *February 8th, 1838, Sess. Acts, p. 76. The act of November 27th, 1789, prescribes in what cases the benefit of clergy should and should not be allowed. R. C. ch. 172, § 1 to 9; Tate's Dig. pp. 275-6, Nos. 14 to 22.

By act of March 15th, 1830, Sess. Acts p. 22, § 11, ch. 22, except in case of homicide and where the punishment shall be death, free negroes were to be prosecuted, tried, &c., as slaves. Tate 273, note 2.

Where a slave was tried and convicted of any crime which might affect life, the court was directed to cause the testimony to be entered of record, and a copy of the whole proceedings to be sent to the executive. R. C. ch. 274, § 40; Tate 274, No. 8.

The governor with the advice of council was authorized, when it should be deemed expedient, to contract and agree with any person for the sale and purchase of all those slaves who might be under sentence of death for conspiracy, insurrection, or other crimes. R. C. ch. 274, § 39; Tate 275, No. 11. See also Id. No. 12.

Thus stood the law when the act of 1847-8 was passed, entitled the "Criminal Code."

By that act, ch. 26, § 1, it was declared that the county and corporation courts, consisting of five justices at the least, shall

be courts of oyer and terminer for the trial of slaves charged with felony, and of free negroes charged with any felony except in cases of homicide and where the punishment may be death. § 4: No slave shall be condemned to death, and no free negro to the penitentiary, unless the justices sitting on his trial shall agree in the sentence. § 5: When any slave shall be condemned to death or any free negro to the penitentiary, the court shall cause the testimony given on his trial to be committed to writing and filed of record, and the clerk shall forthwith send a copy of the whole proceeding to the executive. Slaves were triable for

564 *misdemeanors by a justice of the peace, and punishable by stripes. Ch. 26, § 11, p. 163; ch. 12, § 14, p. 126. Offences committed by slaves were felonies or misdemeanors. Those shall be felonies which are punishable with death, or which, if committed by free persons, would be punishable by death or by confinement in the penitentiary. All other offences shall be misdemeanors. Ch. 12, § 15, p. 126. Any slave who shall commit any offence, for the commission whereof a free person at the time of committing the same is punishable with death or by confinement in the penitentiary for a period not less than three years, shall be punished with death. Id. § 1. Any slave who shall commit any offence for the commission whereof a free person at the time of committing the same is punishable by confinement in the penitentiary for a period less than three years shall be punished by stripes. Id. § 2. Any slave having been once sentenced for any offence mentioned in the preceding section, who shall afterwards commit any such offence and be adjudged guilty thereof, shall be punished with death. Id. § 3.

Thus stood the law at the time of the revival of 1849.

The revisors' report corresponded, substantially, with the act of 1847-8, in regard to punishment, mode of trial, and manner of conviction of slaves for felony. P. 990, ch. 200, § 4 and 5; p. 1036, § 2 to 7. But in a note to § 4, p. 990, they made this suggestion: "Instead of having for slaves but two classes of punishment, a third at least should be recognized by law. There should, in this chapter, be a designation of offences too serious to be punished by stripes, yet not sufficient to be punished by death, in which the sentence should be that the slave be sold to be transported beyond the limits of the United States. That might be the sentence of the court in a considerable number of cases. Even then the sentence of death would still be pronounced

565 *in many cases in which the executive should have the power of reprieving for transportation."

By the Code of 1849, ch. 17, § 20, it is declared that, "In the case of a slave under sentence of death, the governor may order a commutation of the punishment by directing that such slave be sold to be transported beyond the limits of the United States," &c.

Ch. 200, § 7. "If a slave plot or conspire to rebel or make insurrection, or commit an offence, for the commission of which a free negro, at the time of committing the same, is punishable with death or by confinement in the penitentiary for not less than three years, he shall be punished with death. *But unless it be an offence for which a free white person, if he had committed it, might have been punished with death, such slave instead of being punished with death, may at the discretion of the court, be punished by sale and transportation beyond the limits of the United States.*

Id. § 8. If a slave commit an offence for which a free negro, if he had committed it, might be punished by confinement in the penitentiary for a period less than three years, such slave shall be punished by stripes; and if, having been once sentenced for such offence, he afterwards commit an offence for which a free negro, if he had committed it, might be punished by such confinement, he shall be punished with death, or, at the discretion of the court, by sale and transportation as aforesaid.

Id. § 9. "If a slave be sentenced to sale and transportation under either of the next two preceding sections, the same proceedings shall be had as in the case of a slave under sentence of death, whose punishment is commuted by the governor to sale and imprisonment.

The words in § 7, of chap. 200, which are italicized in the foregoing citation, seem to have been adopted by the legislature in consequence of the suggestion of

566 *the revisors before mentioned. They do not, in strict pursuance of that suggestion, designate a class of offences to be punished by sale and transportation, but merely give the court a discretion to adopt that punishment instead of death, except as therein mentioned, instead of pronouncing the sentence of death, and leaving it to the executive to commute or not, according to its discretion, under ch. 17, § 20.

Thus the law now stands; and the question is, whether all the justices, sitting on the trial of a slave, charged with an offence, for the commission of which, a free negro, at the time of committing the same, is punishable with death, or by confinement in the penitentiary for not less than three years, must not agree in his conviction, in order to his being punished by sale or transportation, at the discretion of the court, under the words in italics as aforesaid?

Beyond a doubt, unanimity was necessary to the conviction of a slave for such an offence, before the Code of 1849 was adopted; for so the law expressly declared. Is such necessity dispensed with by the words superadded in that Code, "But," "such slave, instead of being punished with death, may, at the discretion of the court, be punished by sale and transportation beyond the limits of the United States?" Were these words intended to produce so radical a change of the law as to authorize a conviction

of a slave for such an offence by a less number than all of the justices composing the court, provided he was punished by sale and transportation instead of death? Certainly, unanimity in the conviction is still necessary to authorize the punishment of death. Why is it not also still necessary to authorize the alternate punishment, which the court, at its discretion, may inflict, instead of death? The question of guilty or not guilty comes up for decision by the court before the question as to the manner of punishment. The prisoner

567 *must first be determined to be guilty, before the court can be called on to say how he is to be punished. When the court is divided upon that question, can the effect of such division be a conviction or acquittal, according as the court shall afterwards determine whether the punishment shall be death or sale and transportation? To the offence, the law has annexed the punishment of death; and in reference to that punishment the case must be decided. Accordingly the law requires the court to be unanimous to convict. But having convicted, the law gives power to the court, at its discretion or election, instead of the punishment of death to inflict the punishment of sale and transportation. The very term "discretion," implies that the punishment of sale and transportation can only be inflicted where death might or would have been inflicted but for the exercise of such discretion. And the terms, "instead of being punished with death," imply the same thing. The same or nearly the same observations apply to the succeeding sections of the Code to the one now under consideration. Code, ch. 200, §§ 7 and 8.

The meaning of the words in the Code, ch. 212, § 5, "No slave shall be condemned to death nor a free negro to the penitentiary, unless all the justices sitting on his trial agree in the sentence," in my view is, that "no slave shall be convicted of an offence punishable with death," &c., "unless all the justices," &c., "shall agree in the judgment of conviction." The old law had said, "No slave shall be condemned in any such case," that is in any case of felony, however punishable, "unless all of the justices sitting upon his or her trial shall agree in opinion that the prisoner is guilty." The legislature of 1847-8 classified felonies committed by slaves, making the higher class punishable with death and the lower with stripes, and requiring unanimity of the justices in order to a conviction, only in the former case. It accomplished

568 *the purpose of this requisition simply by saying, "no slave shall be condemned to death," &c. The purpose was fully accomplished by these words, and could not have been accomplished in fewer words. The punishment of death applied, certainly and unconditionally, to every offence for which a free person, if he had committed it, would have been punishable by confinement in the penitentiary for a period not less than three years. Therefore saying, that "no slave shall be condemned

to death," &c., was, in effect, though in fewer words, saying, that "no slave shall be condemned for an offence punishable with death," &c., and this effect, it seems to me, was not intended to be changed, and is not changed, by the words superadded in the Code of 1849 as aforesaid.

This construction seems to me to be also reasonable. The legislature of 1847-8 intended to dispense with the necessity of unanimity in the conviction of slaves for felony only in inferior cases; that is, cases punishable by stripes. And the legislature of 1848-9, in authorizing the punishment of sale and transportation to be adopted at the discretion of the court instead of the punishment of death in the higher class of felonies, could hardly have intended, by mere implication, to dispense with such necessity in such cases.

But it is said that the words of the law are too plain for construction; that the legislature has only said, "no slave shall be condemned to death," &c.; that unanimity is required in no other case, and upon no other question, than on the mere sentence of death. But this, it seems to me, is too literal a construction, and sacrifices the obvious meaning of the law. According to this construction a slave might be convicted by a bare majority of the court provided the whole court concurred in the sentence of death; which certainly could not have been intended. The words "condemned to death," do not mean the mere sentence of death as the consequence of conviction, but the conviction itself, and, as before said, is only another and shorter, though not so accurate a mode of saying, "condemned for an offence punishable with death." The manner of punishment was expressed to signify the offence itself. The word "condemned" was used in the old law: "No slave shall be condemned in any such case," that is for any felony; and the same word was continued to be used in the act of 1847-8, and the Code of 1849: "No slave shall be condemned to death." Under the act there was no difficulty, and it would seem there should be none under the Code. The words added in the latter were not designed to effect a change in the construction of the preceding words—but only to give to the court, to a certain extent, the power of commutation, which before had exclusively been vested in the executive. If the court refuses to exercise the power thus given to it, the executive may still exercise it as before, and may exercise it in cases to which the power of the court does not extend. But whether the power be exercised by the executive or the court, its exercise, it seems to me, ought to be preceded by a unanimous conviction of the accused. A free negro cannot be condemned to the penitentiary for the shortest period, without the unanimous judgment of his triers. Could it have been intended that a slave might be condemned

to sale and transportation beyond the limits of the United States by a bare majority? The scheme for adjusting the mode of trial of negroes was, to require unanimity in regard to higher offences, but to authorize a conviction by a mere majority in regard to inferior offences punishable by stripes, whether the offender was a slave or a free negro.

In my view of this case, as must plainly be perceived, unanimity is not required to convict a slave of every felony, but only a felony punishable with death, and it
570 *is therefore not necessary to my construction of the law that the words "to death" should be rejected. On the contrary I would retain these words, and merely supply others to effectuate the intention of the legislature, which was sufficiently expressed by the words as originally used in the act of 1847-8, but was obscured by the additional words used in the Code of 1849.

The words of the old law were, "unless all of the justices, &c., shall agree in opinion that the prisoner is guilty." The words of the new law are, "unless all the justices, &c., agree in the sentence," that is "that the prisoner is guilty." Guilty of what? Not of death, but of an offence punishable with death. The two laws used similar language in many respects, and ought to be construed alike, except where a change was plainly intended. A change was plainly intended so far as to limit the requisition of unanimity, which formerly extended to all felonies, to that class of them only which was punishable with death, but was not plainly intended in any other respect. And therefore the word "condemned" in each applies to the offence and not the punishment merely, and the words "agree in the sentence" in one, near the same as the words "agree in opinion that the prisoner is guilty" in the other; both applying also to the offence and not the punishment. The words "unto death," used in the one case and not the other, were used to designate the higher class of felonies to which the law applied, and not to be confined according to their strict, literal and abstract import to the mere sentence of death following the judgment of conviction.

I have now only to apply the foregoing views to the case under consideration. The offence for which the slave Elvira was tried being punishable with death, and all the parties who sat on her trial not having

571 agreed in her conviction, she was therefore, in effect, acquitted. *It

follows that I am for reversing the judgment of the Circuit court and rendering a judgment to discharge her from imprisonment and restore her to the possession of her owner.

The other judges concurred in the opinion of Moncure, J.

Prisoner discharged.

INDEX.

ABATEMENT.

1. See *Equitable Jurisdiction and Relief*, No. 5, and
Jones v. Bradshaw and others, 355
2. A plea in abatement is admissible in an action of ejectment. The act Code, ch. 135, § 13, refers only to pleas in bar of the action.
James River and Kanawha Company v. Robinson, 434
3. *Quære*: If a defendant may not plead in abatement and in bar at the same time, the pleas being filed at the proper times.
Idem, 434
4. A defendant may waive his plea in abatement and plead in bar to the action.
Idem, 434
5. What a waiver of the plea, see *Ejectment* No. 8, and
Idem, 434

ACTIONS.

1. See *Case*, No. 1, 2, and
Parsons v. Harper, 64
2. See *Slander*, No. 1, 2, 3, 4 and
Hogan v. Wilmoth, 80
3. See *Executors & Administrators*, No. 1, and
Lawson's ex'or v. Lawson, 230
4. Persons owning a reversionary interest in a slave may sue for an injury done to him whilst held by the life tenant.
Harvey v. Skipwith & als., 393
5. A husband who has survived his wife and has qualified as her administrator may unite in an action with the other joint owners of the reversion of a slave for an injury done to him.
Idem, 393
6. The fact that the life tenant has received back the slave from the hirer before the action is brought by the reversioners, constitutes no defense to their action.
Idem, 393
7. If a hired slave is put by the hirer to a dangerous employment, in violation of the contract of hiring, and is seriously injured whilst thus employed, the hirer is liable for the damages, notwithstanding the slave may have been negligent or imprudent, or have acted in disobedience of the orders of the hirer in respect to such employment, and notwithstanding such negligence or imprudence or disobedience may have been the proximate cause of the injury.
Idem, 393

ADVERSARY POSSESSION.

1. In an action to recover property, if the defendant has been in adversary possession a sufficient length of time to render the statute of limitations a bar to the action, this possession gives title; and it is not necessary to plead the statute.
Layne v. Norris' adm'r, 236
2. A life tenant of a slave sells her life interest and dies. The purchaser continuing to hold the slave, does not hold under, but

adversely to the remainderman, and the statute commences to run on the death of the life tenant.
Idem, 236

3. A special verdict which finds uninterrupted possession of a slave by the purchaser from a life tenant, of her interest in the slave for more than the time which will create the bar of the statute, without finding anything from which it may be inferred that he held by authority of the remainderman or his representative, finds in effect an adversary possession.
Idem, 236

4. When a special verdict finds personal property in possession of a defendant, the law infers it to be adversary, in the absence of any finding to the contrary.
Idem, 236

AGENTS.

1. K. K. & A. were a firm doing a wholesale business as merchants in Richmond, and in 1846 they employed P to carry on a retail business in Lynchburg, under the style of
574 P, agent for J. S. K., *the name of one of the partners. The publication was made and the sign put up in the above name as prescribed by the statute. In 1850 some of the partners retired, but the firm in Richmond was continued, new partners being admitted, under the name of K., P. & K.; J. S. K. continuing to be a member of the firm; but neither then nor at any time after the Code of 1849 went into effect, was there any new publication as to the agency in Lynchburg. In 1853 the goods of K., P. & K., in the storehouse of P in Lynchburg, were taken under execution by his creditors. *Held*: The law having been complied with in 1846, and the present firm in Richmond being but a continuation of the former, the goods are not liable to creditors of P.

Farmers' Bank of Va. v. Kent, Paine & Kent, 257

APPELLATE COURT.

1. If a party obtains a supersedeas to a judgment by default, before applying to the court in which the judgment was rendered or the judge thereof, to correct the errors of which he complains, his supersedeas will be dismissed as improvidently awarded.

Davis, Sheriff v. The Commonwealth, 134

2. See *Criminal Jurisdiction and Proceedings*, No. 7 and
Wash's case, 530

ASSUMPSIT.

1. See *Executors and Administrators*, No. 1, 2, 3, and
Lawson's ex'or v. Lawson, 230

ATTORNEY.

1. A power of attorney to confess a judgment may be executed before the action is brought.

Insurance Company of the Valley of Virginia v. Bailey's adm'r, 363

2. A judgment may be confessed either in court or in the clerk's office, by an attorney in fact who is not a lawyer. *Idem*, 363

BAILMENTS.

1. See *Executors and Administrators*, No. 1, and
Lawson's ex'or v. Lawson, 230
2. See *Agents*, No. 1, and
Farmers' Bank of Va. v. Kent, Paine & Kent, 257
3. See *Actions*, No. 4, 5, 6, 7, and
Harvey v. Skipwith & als., 393
4. See *Evidence*, No. 5, and
Harvey v. Skipwith, 410

BONDS.

1. See *Official Bonds*, and
Gibson v. Beckham & als., 321
2. See *Evidence*, No. 5 and
Harvey v. Skipwith, 410

CASE.

1. Since the act, Code ch. 148, § 7, p. 589, counts in trespass may be joined to counts in case in an action on the case.

Parsons v. Harper, 64

2. In an action on the case for suing out a *capias* and imprisoning the plaintiff, in an action of slander in which he was the defendant, it is not necessary to aver malice or want of probable cause in suing out the *capias*.

Idem, 64

COLLATERAL INHERITANCE TAX.

1. The § 15, of the act of March 2, 1854, which imposes a tax on collateral inheritance, has been repealed by the act of March 18, 1856, imposing taxes for the support of the government, though there is no provision of the latter act repealing in terms the former.

Fox's adm'rs v. The Commonwealth, 1

COMMON LAW.

1. When a statute changing the common law is repealed, the common law is restored to its former state.

Insurance Company of the Valley of Virginia v. Bailey's adm'r, 363
Booth's case, 519

CONDITIONS.

The setting out a condition precedent in the language of the condition is sufficient.

Smith's adm'r v. Loyd's ex'or, 295

CONFESSION OF JUDGMENTS.

1. See *Proceedings in Clerk's Office*, No. 4, 5, and *Brown v. Hume*, 456

CONGRESS.

1. The acts of Congress in relation to the District of Columbia, must be taken notice of by the state courts without

575 *proof, as all other public acts of Congress are taken notice of.

Bayly's adm'r v. Chubb, 284

2. See *Military*, No. 3, 4, 5, 6, 7, 8, and
Burroughs v. Peyton, 470
Abrahams v. Same, 470

CONSCRIPTS.

1. See *Military*, No. 1, 2, and
Mann v. Parke, 443

2. See *Military*, No. 4, 5, 6, 7, and
Burroughs v. Peyton, 470
Abrahams v. Same, 470

CONSTITUTIONALITY OF LAW.

1. The act of March 17, 1856, Sess. Acts 1855-6, p. 38, entitled "An act providing additional protection for the slave property of citizens of the Commonwealth," is not, in any of its provisions, in violation of the constitution of the United States or the bill of rights and constitution of Va.

Baker v. Wise, Governor, 139

2. The act is not a regulation of commerce, but of police. *Idem*, 139

3. In directing pilots to search vessels about to sail north of the capes of Virginia, the act is not in conflict with the 10th article of the bill of rights of Va.; there being a distinction between the search of vessels of commerce in navigable waters, and dwelling houses or other suspected places.

Idem, 139

4. In confining the search of vessels owned in whole or in part by non-residents of the state, the act does not violate § 2, of article 4, of the constitution of the United States, securing to the citizens of each state "the privileges and immunities of citizens of the several states."

Idem, 139

5. When in the regulation of any subject of internal police, a regard to justice and the due and convenient enforcement of its laws, requires a state to adopt a different mode of proceeding or a modification of the regulation, in respect to persons residing out of the state, in order fairly to meet and provide for the circumstance of their non-residence, the competency of the state so to act is not taken away by this § 2, article 4, of the constitution of the United States. *Idem*, 139

6. In confining the search to vessels about to sail north and owned in whole or in part by non-residents of Va., the act is not in conflict with Clause 6, of § 9, Article 1, of the constitution of the United States; which prohibits the giving of preference by any regulation of commerce or revenue, to the ports of one state over those of another. This provision is a restriction upon the power of Congress, and does not refer to the State governments. *Idem*, 139

7. The 4th article of the amendments to the constitution of the United States refers to the government of the United States, not to the states. *Idem*, 139

8. The allowance to the pilots of a fee of \$5 for the search of the vessel, to be paid by the master, is not in conflict with clause 2, § 10, Article 1, of the constitution of the U. S.

Idem, 139

9. The seizure and forfeiture of the vessel prescribed for a violation of the act is not in conflict with clause 3, § 8, Article 1, of the constitution of the U. S., which gives to Congress the power to regulate commerce with foreign nations, and among the several States and with the Indian tribes.

Idem, 139

10. Congress has the constitutional power

to raise armies either by contract or by coercion.

Burroughs v. Peyton, 470
Abrahams v. Same., 470

11. Congress has no power to make a contract with the citizen, whereby that body shall be forbid to call him into the military service of the country. *Idem.*, 470

12. Congress has no power to coerce officers of the State Government into the military service of the Confederate States.

Idem., 470

CONSTRUCTION OF STATUTES.

1. When it is manifest that a law is intended to embrace and include the whole legislation on the subject to which it refers, provisions of former laws on that subject, not embraced in it, are repealed by implication.

Fox's adm'rs v. The Commonwealth, 1

2. For rules on the construction of statutes, see opinion of *Moncure, J.* *Idem.*, 1

CONTINUANCE OF A CAUSE.

1. What surprise of counsel not sufficient cause of continuance.

See *Practice at common law*, No. 3 and *Hoghead & als. v. Baylor*, 99

COURTS.

1. In case of contested elections before *county courts under the act of April 22, 1852, ch. 71, p. 64, 65, the county court has no authority to give a judgment for costs to either party.

West v. Ferguson & als., 270

2. If in such a case the county court does give a judgment for costs to either party, a writ of prohibition from the circuit court is a proper proceeding to arrest the judgment.

Idem., 270

3. What acts of courts binding, and cannot be questioned incidentally.

See *Official Bonds*, No. 1, 2, 3, 4, and *Gibson v. Beckham & als.*, 321

4. See *Criminal Jurisdiction and Proceedings*, No. 1, and *Rider's case*, 499

CREDITORS AND DEBTORS.

See *Agents*, No. 1 and *Farmers' Bank of Va. v. Kent, Paine & Kent*, 257

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. An indictment for petit larceny, which proceeds to charge that the person indicted had been previously indicted, tried and sentenced for another petit larceny, is an indictment for a felony; and a county or corporation court has no jurisdiction to try the prisoner.

Rider's case, 499

2. If upon such an indictment the prisoner is tried and found guilty, the verdict should be arrested, and all the proceedings subsequent to the indictment should be quashed.

Idem., 499

3. The indictment when brought into court should have been treated as a presentment, and steps taken in conformity with the Code, ch. 207, § 15, p. 771.

Idem., 499

4. In a prosecution for a felony or misde-

meanor if the indictment is lost at any time before the trial, though after arraignment and plea, the party cannot be tried.

Bradshaw's case, 507

5. The act, Code ch. 180, p. 679, authorizing a lost record or paper to be substituted by an authenticated copy or proof of its contents, applies only to civil cases, and does not extend to records or papers in criminal proceedings.

Idem., 507

6. The act, Code ch. 208, § 5, p. 836, and the act Code ch. 205, § 14, p. 828, directing the issue of a *venire facias*, are merely directory to the officer, and a prisoner cannot object to the writ because the acts have not been complied with.

Wash's Case, 530

7. If there is an error on the face of the writ of *venire facias*, and the prisoner moves to quash it, though he does not specify the error, it may be taken advantage of in the appellate court.

Idem., 530

8. In a prosecution for uttering counterfeit coin the guilty knowledge of the prisoner that the coin was counterfeit is a fact to be proved; and there can be no presumption of law from the existence of other facts, of this guilty knowledge; though there may be a presumption of fact.

Idem., 530

9. *QUERE*: If there can be a presumption of law of a guilty intention in any prosecution for a criminal offence; except in the case of a prosecution for murder.

Idem., 530

10. The act, Code ch. 162, § 1, was repealed by the act of April 9, 1853, *Sess. Acts*, p. 47, and jurors in cases of felony are not now required to own real and personal estate of the value of one hundred dollars. And if the writ of *venire facias* requires the officer to summon jurors with this qualification it will be quashed on motion of the prisoner.

Idem., 530

DAMAGES.

1. What damages plaintiff may recover in an action for false imprisonment. See *False Imprisonment*, No. 1, 4, and

Parsons v. Harper, 64

DEMURRERS.

1. For effect of demurrer to plea, see *Oyer*, No. 3, and

Smith's adm'r v. Lloyd's ex'x, 295

2. Declaration on promissory note avers it was made in Boston, and on same day endorsed and delivered to plaintiff. On demurrer court will hold assignment made in Boston where it might legally be made.

The Freeman's Bank v. Ruckman, 126

DISTRICT OF COLUMBIA.

1. The acts of Congress in relation to the District of Columbia must be taken notice of by the State courts without proof, as all other public acts of Congress are taken notice of.

Bayly's adm'r v. Chubb, 284

577

*DOWER.

1. Unless it is impossible to assign a widow her dower in real estate in specie, a court of equity has no power, under its general jurisdiction, against her will to decree

a sale of the real estate, and to provide her a compensation in money.

White v. White & als., 264

2. A widow entitled to dower in the real estate of her deceased husband, is neither a joint-tenant, tenant in common or coparcener with the heirs at law, within the meaning of the statute concerning partition, Code, ch. 124, p. 526, so as to authorize a court of equity to sell the whole estate against her will, and compel her to receive a moneyed compensation out of the proceeds in lieu of dower. *Idem*, 264

3. In decreeing a sale at the suit of the heirs of a decedent's estate, real and personal, except the widow's share of the slaves, the court should protect and secure to her, her interest in the proceeds of the sale of the other personal property. *Idem*, 264

DWELLING HOUSE.

1. G. occupies a house, the front room on the first floor as a store, the back room as a dining room, the upper rooms as sleeping apartments for the family; but the only mode of the ascent to the upper rooms is outside the house. A riotous destruction of the front door and window of the storeroom is an offence under the act, Code, ch. 194, § 6.

Samanni's Case, 543

2. A partial pulling down or destruction of a dwelling house is an offence under the act, Code ch. 194, § 6: In this respect differing from the English statute. *Idem*, 543

EJECTMENT.

1. If the grantee in a patent for land was dead at the time the grant issued, the patent is void; and this may be shown on a trial in ejectment in which one party claims under the patent.

Blankenpickler v. Anderson's heirs, 59

2. In an action of ejectment if there is a claim by the plaintiff for mesne profits and damages for waste, and by the defendant for improvements under §§ 30 and 32 of ch. 135 of the Code, both claims must be passed upon by the same jury.

Goodwyn & als. v. Myers, 336

3. When the statements are filed with the declaration and plea, the jury sworn to try the issue in ejectment may make all the enquiries required at the same time that they try the issue; or the enquiries may, if the court shall so order, be made by the same jury after the verdict on the title is recorded; or by a new jury to be empanelled. *Idem*, 336

4. If defendant claims for improvements on the land, the plaintiff may at any time before a judgment is rendered on the assessment of the value of the improvements, though after the jury which tried the issue or passed upon the defendant's claims for improvements has been discharged, require that the value of his estate in the premises, without the improvements, shall be ascertained: And this inquiry is to be made by another jury. *Idem*, 336

5. The value of the plaintiff's estate in the premises without the improvements, is to be

ascertained as at the time when the assessment of the value of the improvements was made. *Idem*, 336

6. An office judgment in an action of ejectment does not become final without the intervention of the court or a jury; but there ought in every such case, to be an order for an enquiry of damages.

The James River and Kanawha Co.

v. Lee, 424

Same v. Wortham, 424

Same v. Macfarland, 424

7. A plea in abatement is admissible in an action of ejectment. The act, Code ch. 135, § 13, refers only to pleas in bar of the action.

James River and Kanawha Co. v.

Robinson, 434

8. A defendant in ejectment admitting that he was mistaken as to the matter pleaded in abatement, and upon this admission submitting the issue upon the plea to the court, at the same time asked leave to file the plea of "not guilty." This was in effect a waiver of the plea in abatement, and he should have been permitted to file the plea of not guilty. *Idem*, 434

9. See *Abatement*, No. 3, 4,

Idem, 434

ELECTIONS.

1. In case of contested elections before the county court, under the act of April 22, 1852, ch. 71, p. 64, 65, the county court has no authority to give a judgment for costs to either party.

West v. Ferguson & als., 270

578 *2. If in such a case the county court does give a judgment for costs to either party, a writ of prohibition from the circuit court is a proper proceeding to arrest the judgment. *Idem*, 270

EQUITABLE JURISDICTION AND RELIEF.

1. One tenant in common may maintain a suit in equity against the cotenant, who has occupied the whole of the common property, for an account of rents and profits.

Early & wife v. Friend & als., 21

2. An attaching creditor and an assignee both recover judgments against a debtor of an absent defendant, without objection on his part, although he had notice of the assignment before the judgment in the attachment suit. He cannot, after the judgments are obtained, file a bill of interpleader against them to require them to litigate their respective rights to the fund; but is liable to pay both judgments.

Haseltine & Walton v. Brickey &

als., 116

3. See *Dower*, and

White v. White & als., 264

4. In decreeing a sale at the suit of the heirs of a decedent's estate real and personal, except the widow's share of the slaves, the court should protect and secure to her, her interest in the proceeds of the sale of the other personal property.

White v. White & als., 264

5. The act, Code ch. 171, § 19, p. 711, applies only where the objection to the jurisdiction of the court is for mere matter in abatement; as where the case is a proper one for a court of equity, but not for the particular court in which the suit is brought; or where the suit ought to abate by reason of some circumstances attending the situation of the plaintiff or defendant or the like.

Jones v. Bradshaw & others, 355

6. Where a bill alleges proper matter for the jurisdiction of a court of equity (so that a demurrer will not lie) if it appears on the hearing, that the allegations are false, and that such matter does not in fact exist, the result must be the same as if it had not been alleged; and the bill should be dismissed for want of jurisdiction. *Idem*, 355

7. The ground of equitable jurisdiction stated in the bill, being the want of a discovery from the defendant, and it appearing from the evidence that as to some material facts alleged the plaintiffs had full proof, and as to the others they were mere pretenses; the bill will be dismissed for want of jurisdiction. *Idem*, 355

8. If pending an appeal in the court of appeals, the defendant has satisfied the decree, upon a reversal of it the circuit court should make an order of restitution in his favor. *Idem*, 355

EVIDENCE.

1. In an action on the case for suing out a *capias* and imprisoning the plaintiff, in an action of slander in which he was defendant, he may prove as damage sustained by him, the amount of the fee paid by him to counsel for a motion to quash the *capias*.

Parsons v. Harper, 64

2. Where the motives of a party are a material enquiry in a cause, any evidence which tends, in any degree, to throw light upon them, is not to be rejected, though the court may think it is not entitled to much weight with the jury. *Idem*, 64

3. If a record is offered in evidence, a part of which is objected to by the other party, he must specify the part objected to, or the objection may be properly overruled.

Idem, 64

4. In an action on the case for false imprisonment, the whole record of the case in which the imprisonment occurred is competent evidence for the plaintiff. *Idem*, 64

5. The true function of an ordinary hire bond is not to stipulate for the mode in which a slave is to be employed, but to bind the bailee for the payment of the hire; the execution of the bond or note does not extinguish so much of the contract of hiring as may relate to the manner in which the slave is to be employed; and hence oral evidence showing that there were restrictions as to the mode of employing the slave, does not vary or contradict the written instrument, but is consistent with it, and may be properly admitted.

Harvey v. Skipwith, 410

EXAMINING COURT.

1. A justice of the peace who has acted as coroner in taking the inquest upon the dead body of the man whom the prisoner is charged to have murdered, is not thereby legally disqualified from sitting as a member of the examining court.

Forde's Case, 547

579 *2. For functions of an examining court, see *Allen, P.* opinion.

Idem, 547

EXECUTORS AND ADMINISTRATORS.

1. A sick man receives a sum of money in bank notes which he hands to his wife for safe-keeping until he should get well enough to put them in bank; and he dies a few days after. After his death his executor applies to the widow for the bank notes, which she refuses to deliver to him, saying she intends to keep them. He sues her in assumpsit for the money, and the declaration contains only the common counts. **Held:** The action was well brought, and he is entitled to recover.

Lawson's ex'or v. Lawson, 230

2. The cause of action not having occurred until the death of the husband, his executor might sue for the money in his own name or as executor. *Idem*, 230

3. If it was necessary to sue as executor, as the declaration commenced in the name of B as executor of the testator, though it alleged that the defendant was indebted to the plaintiff and promised to pay to the plaintiff, yet in support of the justice of the case, it may be construed as a declaration in the plaintiff's character of executor.

Idem, 230

4. See *Official Bonds*, No. 1, and *Gibson v. Beckham & als.*, 321

FALSE IMPRISONMENT.

1. In an action on the case for suing out and imprisoning the plaintiff, in an action of slander in which he was defendant, he may prove as damage sustained by him, the amount of the fee paid by him to counsel for a motion to quash the *capias*.

Parsons v. Harper, 64

2. In an action on the case for false imprisonment, the whole record of the case in which the imprisonment occurred is competent evidence for the plaintiff. *Idem*, 64

3. In an action on the case for false imprisonment, if the defendant has unlawfully sued out process against the plaintiff, and caused him to be imprisoned upon it, and the process has been afterwards set aside because illegally issued, it constitutes no defence to the party; but the plaintiff is entitled to recover damages for the wrong done him, without regard to the motives of the defendant, or the circumstances attending the doing of the wrongful and unlawful act. *Idem*, 64

4. In such a case, though the act complained of was done without malice, yet being

unlawful and in violation of the plaintiff's right, he is entitled to recover not only for the costs he has incurred, but for the loss of time, interruption to his business, and the suffering, bodily and mental, which the act may have occasioned. *Idem*, 64

FELONIES.

1. An indictment for petit larceny, which proceeds to charge that the person indicted had been previously indicted, tried and sentenced for another petit larceny, is an indictment for felony; and a county or corporation court has no jurisdiction to try the prisoner.

Rider's Case, 499

FOREIGN LAWS.

1. The acts of Congress in relation to the District of Columbia are not foreign laws, but are to be taken notice of by the state courts without being proved.

Bayly's adm'r v. Chubb, 284

HABEAS CORPUS.

See *Slaves*, No. 7, 8, and

Elvira's Case, 561

HUSBAND AND WIFE.

1. See *Executors and Administrators*, No. 1, and

Lawson's ex'or v. Lawson, 230

2. A husband in the lifetime of his wife makes an absolute gift of his wife's remainder in slaves, by deed which is recorded after her death, and survives both the wife and the life tenant. The gift is valid and effectual against him, though before possession is obtained by the donees he dissents from it.

Henry v. Graves, 244

3. A deed of marriage settlement will not divest the marital rights of the husband to a greater extent than the terms of the deed clearly requires.

Mitchell v. Moore & als., 275

4. See *Marriage Settlements*, No. 2, 3, and *Idem*, 275

5. A conveyance of slaves in trust for S for her life, and after her death to *B and the heirs of her body. But should B die without heir or heirs of her body, in that case to C. The conveyance does not give B a separate estate; but upon her marriage and the husband's possession of the slaves, the right of B in the slaves vested in him.

White v. White & als., 264

6. See *Pleadings at Common Law*, No. 13, and

Harvey v. Shipwith & als., 393

7. A husband who has survived his wife and has qualified as her administrator may unite with the other joint owners of the reversion of a slave in an action for an injury done to him; and the description of him in the commencement of the declaration, as administrator of his deceased wife will be considered as mere *descriptio personæ*; the declaration

stating the interest in the property as his, and the injury as done to his property.

Idem, 393

INTEREST.

1. Where one tenant in common occupies the whole property, so that he is held to pay a rent to his co-tenants, he shall pay interest upon the rents.

Early & wife v. Friend & als., 21

INTERPLEADER.

1. A debtor of an absent defendant allows two parties to obtain judgments against him for the amount of his debt, with full knowledge of the pendency of both cases. He cannot then file a bill of interpleader against them, to require them to litigate their respective rights to the fund; but is liable to both judgments.

Haseltine & Walton v. Brickey & als., 116

INTERROGATORIES.

1. In an action against the maker and endorser of a negotiable note, they plead jointly *nil debit* and usury; and file interrogatories to the plaintiff. 1. From whom did you get the note in suit? 2. If from defendant C, what did you pay him for it? He answers to the first: I received the note from C, who, so far as I had any knowledge, was the owner of it. He declines to answer the second question. Defendants move to strike out last part of answer to the first question. *Held*:

1. The only object of the question was to ascertain the character in which C endorsed the note; and the answer is therefore responsive to the question. If that was not the object it was immaterial.

2. The pleas being joint, defendants were not entitled to an answer to the second question to reduce the amount of recovery against C; nor were they entitled to the answer whilst they relied on the defence of usury.

Hogshead & als. v. Baylor, 99

JUDGMENTS.

1. All judgments where there has been no appearance by the defendant, are judgments by default, within the meaning of the act, Code ch. 181, § 5, p. 681.

Davis, sheriff v. The Commonwealth, 134

2. If a party obtains a supersedeas to a judgment by default before applying to the court in which the judgment was rendered or the judge thereof to correct the errors of which he complains, his supersedeas should be dismissed as improvidently awarded. *Idem*, 134

3. A judgment may be confessed either in court or in the clerk's office, by an attorney in fact, though the attorney is not a lawyer.

Insurance Company of the Valley of Virginia v. Bailey's adm'r, 363

4. When office judgment not final, see *Ejectment*, No. 6, and

The James River & Kanawha Company v. Lee, 424

JURIES.

1. An irregularity in forming a jury must be objected to before the jury is sworn, unless the party is shown to have been injured by it.

Parsons v. Harper, 64

2. See *Ejectment*, No. 2, 3, 4, 5, and

Goodwyn & als. v. Myers, 336

3. Persons over sixty years of age are not disqualified from serving on grand juries; though they are exempted from the service if they choose to claim the exemption.

Booth's case, 519

4. See *Criminal Jurisdiction and Proceedings*, No. 6, 10, and

Wash's case, 530

JUSTICE OF THE PEACE.

1. Justice of the peace who has acted as coroner in taking the inquest upon the dead body of the man whom the
581 *prisoner is charged to have murdered, is not thereby legally disqualified from sitting as a member of the examining court.

Forde's case, 547

LIMITATIONS—Statute of.

1. In action to recover property, if the defendant has been in adversary possession a sufficient length of time to render the statute of limitations a bar to the action, this possession gives title; and it is not necessary to plead the statute.

Layne v. Norris' adm'r, 236

2. A life tenant of a slave sells her life interest and dies. The purchaser continuing to hold the slave, does not hold under, but adversely to the remainderman, and the statute commences to run on the death of the life tenant.

Idem, 236

MARRIAGE SETTLEMENTS.

1. A deed of marriage settlement will not divest the marital rights of the husband to a greater extent than the terms of the deed clearly require.

Mitchell v. Moore & als., 275

2. A deed of marriage settlement of the wife's property, provides that the wife dying in the lifetime of the husband may dispose of the property by deed or will, but does not dispose of it upon her failure to execute the power given her. The husband surviving her is entitled to the personal property.

Idem, 275

3. If a party of the trust fund being personality is sold and invested in real estate purchased by the husband, whether it was sold rightfully or wrongfully, the husband is entitled to it and the subject in which it is invested.

Idem, 275

MESNE PROFITS AND IMPROVEMENTS.

How ascertained in action of ejectment, see *Ejectment*, No. 2, 3, and

Goodwyn & als. v. Myers, 336

MILITARY.

1. In April 1862, M joins a volunteer company, and is mustered into the service of the Confederate States. In May 1862, he puts in a substitute who is regularly received; the substitute being over forty but under forty-five years of age, and not then liable to military service. In September, M, who has been before a millwright working regularly at his trade, was employed as a miller in a large flouring mill, and so continued to be employed. Under subsequent acts of Congress the substitute becomes liable to military service, and millers and millwrights working at their vocations are exempted. M is exempted.

Mann v. Parke, 443

2. A person who is embraced by the terms of a conscript act, but claims exemption on grounds exempting him from its operation, must assert and prove his claim to the officer having him in charge, in the mode, if any, prescribed by the lawful regulations of the department; and if he fails to obtain his discharge in that way in a reasonable time, then, and not till then, he may complain of being unlawfully detained, and have the benefit of the writ of *habeas corpus*.

Idem, 443

3. Congress has the constitutional power to raise armies either by contract or coercion.

Burroughs v. Peyton, 470

Abrahams v. Same, 470

4. A person who has put in a substitute who has been regularly received and continues in the service, not liable himself to conscription, is not thereby entitled to be discharged from service under a call made upon him by virtue of a subsequent law of Congress.

Idem, 470

5. Congress has no power to make a contract with the citizen, whereby that body shall be forbid to call him into the military service of the country.

Idem, 470

6. The act of Congress authorizing persons in the military service to put in substitutes does not constitute a contract between the government and such persons.

Idem, 470

7. But if it is to be regarded as a contract, it does not apply to exempt the person who has put in a substitute from any call which may thereafter be made upon him.

Idem, 470

8. Congress has no power to coerce officers of the state government into the military service of the Confederate States.

Idem, 470

NOTICE.

1. Notice of protest of a negotiable note is left at the dwelling house of a member of Congress in Washington after the

582 adjournment of Congress, and after *he had left the city; and it appears that he had kept up his domicile in the district which he represented, and it was his habit to leave Washington directly Congress adjourned. The proof of notice is not sufficient.

Bayly's adm'r v. Chubb, 284

OFFICERS.

1. Congress has no power to coerce officers of the state government into the military service of the Confederate States.

Burroughs v. Peyton, 470
Abrahams v. Same, 470

OFFICIAL BONDS.

1. A will is offered for probate in the proper court, and it is proved by one of three subscribing witnesses; and it is ordered to be certified. At the next term of the court the executors renounce, and the widow relinquishes her right to administer, and administration c. t. a. is committed to G, who executes his official bond with sureties in the proper form. The bond is valid, and binds him and his sureties for his default.

Gibson v. Beckham & als., 321

2. Where a court has cognizance of the subject matter, its judgment though it may be erroneous is not void: it is binding until it is set aside or reversed, and cannot be questioned incidentally: acts done and bonds taken under it bind the obligors.

Idem, 321

3. When a court or officer has authority or capacity to take a bond, and makes a mistake by omitting some condition prescribed, or inserting a condition not authorized or illegal, unless the statute by express words or necessary implication, makes it wholly void, the bond is not void; the good shall not be vitiated by the bad; and the bond may be sued on so far as the conditions are good as a statutory bond.

Idem, 321

4. When the court has cognizance of the subject matter, or capacity to take a bond, and takes a bond which on its face is valid, but contains a recital of facts necessary to its validity, as in case of the election and induction into office of a sheriff, the presence of the justices named as obligees, and the like, the obligors shall be estopped from denying the truth of the recitals.

Idem, 321

OYER.

1. In action of debt on bond, plaintiff to excuse the nonproduction of the bond, in answer to oyer craved by the defendant, says the bond is in another court; that he applied to that court for it, that his application was opposed by the defendant, and was refused by the court. This is a sufficient excuse for not producing the original bond.

Smith's adm'r v. Lloyd's ex'x, 295

2. An excuse for not producing the original bond sued on may be *ore tenus*.

Idem, 295

3. If excuse is made by plea, which is demurred to, the demurrer does authorize the court to decide upon errors in the declaration.

Idem, 295

4. When oyer at rules is refused, and defendant will not plead, without it, clerk may take the rules as if no oyer had been craved.

Idem, 295

PATENTS.

1. If the grantee in a patent for land was

dead at the time the grant issued, the patent is void; and this may be shown on a trial in ejectment in which one party claims under the patent.

Blankenpickler v. Anderson's heirs, 59

PLEADING—At Common Law.

1. Since the act, Code, ch. 148, § 7, p. 489, counts in trespass may be joined to counts in case in an action on the case.

Parsons v. Harper, 64

2. In an action on the case for suing out a *capias* and imprisoning the plaintiff in an action of slander in which he was defendant, it is not necessary to aver malice or want of probable cause in suing out the *capias*.

Idem, 64

3. See *Slander*, No. 1, 2, 3, 4, and

Hogan v. Wilmoth, 80

4. The declaration avers that the payee of a note endorsed and delivered it to the plaintiff, the note not being negotiable but assignable, this is a sufficient averment of its assignments.

The Freeman's Bank v. Ruckman, 126

5. The declaration averring that the note sued on was made in Boston, and on the same day and year was endorsed and delivered to the plaintiff, a banking corporation under the laws of Massachusetts, upon demurrer, the court will consider the assignment was in Massachusetts, where it might legally be made.

Idem, 126

583 *6. A sick man receives a sum of money in bank notes which he hands to his wife for safe keeping until he should get well enough to put them in bank; and he dies a few days after. After his death his executor applies to the widow for the bank notes, which she refuses to deliver to him, saying she intends to keep them. He sues her in assumpsit for the money, and the declaration contains only the common counts. HELD: The action was well brought and he is entitled to recover.

Lawson's ex'or v. Lawson, 230

7. The cause of action not having occurred until the death of the testator, his executor might sue for the money in his own name or as executor.

Idem, 230

8. If it was necessary to sue as executor, as the declaration commenced in the name of B as executor of the testator, though it alleged that the defendant was indebted to the plaintiff and promised to pay to the plaintiff, yet in support of the justice of the case, it may be construed as a declaration in the plaintiff's character of executor.

Idem, 230

9. If excuse for not producing original bond is made by plea, which is demurred to, the demurrer does not authorize the court to decide upon errors in the declaration.

Smith's adm'r v. Loyd's ex'x, 295

10. See *Conditions*, and *Idem*, 295

11. A demurrer to a plea can only operate as a demurrer to the whole declaration; and if any one count is good the demurrer as a demurrer to the declaration must be overruled.

Idem, 296

12. In considering a demurrer to a declaration where oyer is craved of the bond sued on, the court can only look at the declaration and bond, and if words in the bond without the adoption of extraneous facts, are insensible, they will be treated as surplusage.

Idem, 295

13. The hirer of a slave puts him to a dangerous employment in violation of the contract of hiring, and the slave is injured. In an action by the owner against the hirer for the injury to the slave the stating the contract in the count and the injury done in violation of the contract, does not prevent the count being in tort.

Harvey v. Skipwith & als., 393

14. See *Husband and Wife*,
Idem, 393

POLICE.

1. The act of March 17, 1855-56, Sess. Acts p. 38, is not a regulation of commerce but of police.

Baker v. Wise, Governor, 139

2. See Constitutional Law from No. 1 to No. 9, and *Idem*, 139

POWERS OF ATTORNEY.

1. See *Attorney*, No. 1, 2, and
Insurance Company of the Valley of Virginia v. Barley's adm'r, 366

PRACTICE—At Common Law.

1. If a record is offered in evidence, a part of which is objected to by the other party, he must specify the part objected to, or the objection may be properly overruled.

Parsons v. Harper, 64

2. An irregularity in forming a jury must be objected to before the jury is sworn, unless the party in shown to have been injured by it.

Idem, 64

3. The fact that counsel believed that a case had been removed from the county to the circuit court, and was therefore taken by surprise, and had not prepared himself by examining the papers and the law of the case, the original counsel being present and prepared, is not cause for continuance.

Hoghead & als. v. Baylor, 99

4. After a cause is called for trial in the county court and a continuance is refused, a party is not entitled to have it removed to the circuit court though it has been pending more than twelve months.

Idem, 99

5. See *Ejectment*, No. 2, 3, 4, 5, and
Goodwyn & als. v. Myers, 336

¶ 6. By appearance and pleading to the action or by taking or consenting to a continuance the defendant waives all defects in the process or the service thereof.

Harvey v. Skipwith, 410

7. See *Proceedings in the Clerk's Office*, No. 2, 3, and
Insurance Company of the Valley of Virginia v. Barley's adm'r, 363

PRACTICE IN EQUITY.

1. A plea to the jurisdiction in equity is only necessary where the objection is in abatement of the particular suit. See *Equitable Jurisdiction and Relief*, No. 5, and

Jones v. Bradshaw & others, 355

584 *2. When bill will be dismissed at the hearing for want of jurisdiction though sufficient grounds stated in the bill. See *Equitable Jurisdiction and Relief*, No. 6, 7, and *Idem*, 355

3. When order of restitution will be made on reversal of a decree. See *Equitable Jurisdiction and Relief*, No. 8, and *Idem*, 355

PRACTICE IN CRIMINAL CASES.

1. See *Criminal Jurisdiction and Proceedings*, No. 2, 3, and

Rider's case, 499

2. See *Same*, No. 4, 5, and
Bradshaw's case, 507

PROCEEDINGS IN CLERK'S OFFICE.

1. If the bond or deed sued on is not filed with the declaration, and the defendant appears at rules and craves oyer of it, which the plaintiff does not give and the defendant will not plead without oyer, the clerk may properly take the rules without regard to the craving of oyer, so the case may be ready to be disposed of at the next term of the court.

Smith's adm'r v. Loyd's ex'x, 295

2. As actions at law in the county courts are cognizable only at the quarterly terms, so motions to set aside any of the proceedings in the office in such actions are cognizable only at the quarterly term. And therefore the "preceding vacation" referred to in the Code, ch. 171, § 51, p. 715, means, in its application to such cases, the interval between the quarterly terms of the court.

Insurance Company of the Valley of Virginia v. Barley's adm'r, 363

3. A judgment may be confessed either in court or the clerk's office by an attorney in fact, though the attorney is not a lawyer.

Idem, 363

4. The act, Code ch. 171, § 41, only authorizes a confession of judgment in the clerk's office in vacation.

Brown v. Hume, 456

5. A judgment confessed in the clerk's office on the morning of the first day of the term of the court, before the hour for the opening of the court, is a judgment confessed in vacation, and valid.

Idem, 456

PROCESS.

1. "Executed in person" a sufficient return upon a summons.

Barksdale & als. v. Neal, 314

2. QUÆRE: If "executed" without more is sufficient. *Idem*, 314

3. A writ of prohibition from circuit court

to arrest judgment for costs by county court, in a case of contested election, is proper.

West v. Ferguson & als., 270

4. By appearing and pleading to the action, or by taking or consenting to a continuance, the defendant waives all defects in the process or the service thereof.

Harvey v. Skipwith, 410

5. See *Venire Facias*, No. 1, 2, and *Wash's case*, 530

PROHIBITION.

1. When proper remedy, see *Elections*, and *West v. Ferguson & als.*, 270

PROMISSORY NOTES.

1. Note made in Massachusetts payable at either of the banking houses in Wheeling, is to have its character determined by the law of Va. and is not a negotiable note.

The Freeman's Bank v. Ruckman, 126

2. Averment that note was endorsed and delivered, the note not being negotiable, is a sufficient averment of its assignment.

Idem, 126

3. The declaration averring that the note sued on was made in Boston, and on same day and year was endorsed and delivered to the plaintiff, a banking corporation under the laws of Massachusetts, upon demurrer the court will consider the assignment made there, where it might legally be made.

Idem, 126

4. Notice of protest of a negotiable note is left at the dwelling house of a member of Congress in Washington, after the adjournment of Congress and after he had left the city; and it appears that he kept up his domicile in the district which he represented, and it was his habit to leave Washington directly Congress adjourned. The proof of notice is not sufficient.

Bayly's adm'r v. Chubb, 284

RECORDS.

1. If a record is offered in evidence, 585 *a part of which is objected to by the other party, he must specify the part objected to, or the objection may be properly overruled.

Parsons v. Harper, 64

2. In an action on the case for false imprisonment, the whole record of the case in which the imprisonment occurred is competent evidence for the plaintiff.

Idem, 64

3. The act, Code ch. 180, p. 679, authorizing a lost record or paper to be substituted by an authenticated copy or proof of its contents, applies only to civil cases, and does not extend to records or papers in criminal proceedings.

Bradshaw's Case, 507

REMOVAL OF CAUSES.

1. After a cause is called for trial in the county court and a continuance is refused, a party is not entitled to have it removed to the circuit court though it has been pending more than twelve months.

Hogshead & als. v. Baylor, 99

REVERSIONARY INTEREST.

1. A husband in the lifetime of his wife, makes an absolute gift of his wife's remainder in slaves, by deed which is recorded after her death; and he survives both the wife and the life tenant. The gift is valid and effectual against him, though before possession is obtained by the donees he dissents from it.

Henry v. Graves, 244

2. Persons owning a reversionary interest in a slave may sue for an injury done to him whilst held by the life tenant.

Harvey v. Skipwith & als., 393

3. A husband who has survived his wife and qualified as her administrator, may unite with the other joint owners of the reversion of a slave in an action for an injury done to him.

Idem, 393

RIOTS.

1. See *Dwelling House*, No. 1, 2, and *Samanni's Case*, 543

SHERIFFS.

1. A return upon a summons "executed in person" signed by the deputy sheriff with his own name and that of his principal, shows that the summons was actually served on the defendant; and therefore if it is defective the defect can only be taken advantage of by plea in abatement.

Barksdale & als. v. Neal, 314

2. *QUERE*: If a return upon a summons of "executed" merely, would be held to show it was served on the parties.

Idem, 314

SLANDER.

1. To maintain an action at common law for a charge of false swearing, the declaration must show not only the judicial proceedings in which the evidence was given, but that the charge of the defendant had reference to the evidence of the plaintiff given in that case.

Hogan v. Wilmoth, 80

2. In an action of slander, if the plaintiff proceeds under the statute, he must in his declaration aver that the words in their usual construction and common acceptation are construed as insults, and tend to violence and breach of the peace, or else employ some other equivalent averment to denote that the words are actionable under the statute.

Idem, 80

3. Where the declaration does not show by proper averments, that the action is under the statute, it may be demurred to as defective, unless it sets out properly and in substantial compliance with the rules of pleading, such a charge as constitutes defamation at the common law.

Idem, 80

4. The common law and statutory causes of action cannot be blended in one count.

Idem, 80

SLAVES.

1. A slave in the possession of a life tenant, which is neither employed in making a crop, nor let to hire to another, is not embraced either in § 53 or 55, 1 Rev. Code of 1819, v.

388, so as to entitle the administrator of the life tenant dying after the first of March, to retain the slave to the end of the year.

Layne v. Norris' adm'r, 236

2. A life tenant of a slave sells her life interest and dies. The purchaser continuing to hold the slave does not hold under, but adversely to the remainderman, and the statute commences to run on the death of the life tenant. *Idem*, 236

3. See *Pleadings at Common Law*, No. 13, and *Harvey v. Skipwith & als.*, 393

586 *4. See *Actions*, No. 4, 5, 6, 7, and *Idem*, 393

5. See *Evidence*, No. 5, and *Harvey v. Skipwith*, 410

6. A slave tried for a felony the punishment of which may be death, can only be convicted by the unanimous opinion of the justices who compose the court. And the fact that the law authorizes the court in its discretion, to direct the slave to be sold and transported beyond the limits of the United States, instead of being sentenced to death, does not dispense with the necessity of unanimity in the conviction.

Elvira's Case, 561

7. A slave condemned by a majority of the court to be sold and transported, relieved by writ of *habeas corpus*. *Idem*, 561

8. *QUERE*: If in such a case the court of appeals has jurisdiction to award a writ of error to the judgment of the judge refusing to discharge the prisoner. *Idem*, 561

SPECIAL VERDICTS.

1. A special verdict which finds uninterrupted possession of a slave by the purchaser from a life tenant of her interest in the slave, for more than the time which will create the bar of the statute, without finding anything from which it may be inferred that he held by authority of the remainderman or his personal representative, finds in effect an adversary possession.

Layne v. Norris' adm'r, 236

2. When a special verdict finds personal property in possession of a defendant, the law infers it to be adversary, in the absence of any finding to the contrary. *Idem*, 236

SPECIFIC PERFORMANCE.

1. Contracts to sell H a house and lot of ground in a town and an out lot, the first constituting much the most valuable portion, and C sells the property as his own; and H is put in possession. C dies before the contract is executed, and the house and lot is in fact the property of C's wife. *HOLD*:

1. C's widow and children cannot enforce the contract against H.

2. H expressing his wish to have the whole contract rescinded, the court should decree it.

Hoover v. Calhoun & als., 109

2. H having made permanent improvements on the property, but having offered to surrender possession, if an account is taken the rents and profits up to the time of the

decree for the surrender of the property, are to be set off against the said improvements; but H is not entitled to a decree for any balance on account thereof. *Idem*, 109

STATUTES.

1. The act of March 18, 1856, Sess. Acts, imposing taxes, construed in

Fox's adm'r's v. The Commonwealth, 1

2. The act, Code, ch. 145, § 14, p. 586, concerning accounts between joint-tenants, tenants in common, &c., construed in

Early & Wife v. Friend & als., 21

3. The act, Code ch. 148, § 7, p. 589, in relation to actions on the case, construed in

Parsons v. Harper, 16

4. The act, Code ch. 181, § 5, p. 684, in relation to judgments by default, construed in

Davis, Sheriff, v. The Commonwealth, 134

5. The act of March 17, 1856, Sess. Acts 1855-56, to protect slave property, construed in

Baker v. Wise, Governor, 139

6. The act, 1 Rev. Code of 1819, p. 388, §§ 53, 55, in relation to slaves, construed in

Layne v. Norris' adm'r, 236

7. The act, Code ch. 135, §§ 30, 32, as to ascertaining mesne profits and improvements, construed in

Goodwyn & als. v. Myers, 336

8. The act, Code ch. 136, § 10, as to assessing value of land without improvements, construed in *Idem*, 336

9. The act, Code ch. 124, p. 526, in relation to partition, construed in

White v. White & als., 264

10. The act of April 22, 1852, p. 64, in relation to contested election, construed in

West v. Ferguson & als., 270

11. The act, Code ch. 171, § 19, p. 711, in relation to pleading to the jurisdiction in equity, construed in

Jones v. Bradshaw & others, 355

12. The act, Code ch. 171, § 51, p. 715, in relation to setting aside proceedings in office, construed in

Insurance Company of the Valley of Virginia v. Barley's adm'r's, 363

13. The act, Code ch. 171, § 41 in relation to confessions of judgment in clerk's office, construed in

Brown v. Hume, 456

587 *14. The act, Code ch. 180, p. 679, in relation to lost records, construed in

Bradshaw's case, 507

15. The act of April 9, 1853, Sess. Acts, p. 43, ch. 27, § 1, in relation to qualification of jurors, construed in

Booth's case, 519

Wash's case, 530

16. The acts, Code ch. 208, § 5, p. 836, and ch. 205, § 14, p. 828, in relation to summoning venire, construed in

Wash's case, 530

17. The act, Code ch. 194, § 6, concerning riotous destruction of property, construed in *Samanni's case*, 543

18. The act, Code ch. 135, § 13, in relation to pleas in ejectment, construed in

James River and Kanawha Company v. Robinson, 434

19. The act, Code ch. 200, § 5, in relation to the trial of slaves, construed in *Elvira's case*, 561

TAXES.

1. See Collateral Inheritance Tax, No. 1 and

Fox's adm'rs v. The Commonwealth, 1

TENANTS IN COMMON.

1. One tenant in common may maintain a suit in equity against his co-tenant, who has occupied the whole common property for an account of rents and profits.

Early & wife v. Friend & als., 21

2. Whenever the nature of the property is such as not to admit of its use and occupation by several, and it is used and occupied by one only of the tenants in common; or whenever the property, though capable of use and occupation by several, is yet so used and occupied by one as in effect to exclude the others, he receives more than comes to his just share and proportion in the meaning of the statute.

Idem, 21

3. Where the common property is rented out by one tenant in common he is accountable to his co-tenants for their share of the rents he has received: and where he occupies and uses the whole property himself, he is liable to his co-tenants for a reasonable rent for it in the condition it was when he took possession.

Idem, 21

4. Interest is to be paid upon the rents found to be due from the tenant in common in possession to his co-tenants.

Idem, 21

VACATION.

1. See *Proceedings in the Clerk's office*, No. 2, 4, 5, and

Insurance Company of the Valley of Virginia v. Barley's adm'r, 363

Brown v. Hume, 456

VALUE OF LAND WITHOUT IMPROVEMENTS.

1. How ascertained in ejectment, see *Ejectments*, No. 4 and 5, and

Goodwyn & als. v. Myers, 336

VENIRE FACIAS.

1. The act, Code ch. 208, § 5, p. 836, and the act, Code ch. 205, § 14, p. 828, directing the issue of a *venire facias* are merely directory to the officer, and a prisoner cannot object to the writ because the acts have not been complied with.

Wash's case, 530

2. The act, Code ch. 162, § 1, was repealed by the act of April 9, 1853, Sess. Acts p. 47, and jurors in cases of felony are not now required to own estate real or personal, of

the value of one hundred dollars. And if the writ of *venire facias* requires the officer to summon jurors with this qualification, it will be quashed on motion of the prisoner.

Idem, 530

3. When advantage may be taken of error in appellate court.

Idem, 530

VENDOR AND PURCHASER.

1. Who cannot enforce specific performance for sale of lands. See *Specific Performance*, No. 1, and

Hoover v. Calhoun & als., 109

2. When whole contract will be rescinded. See *Specific Performance*, No. 1, and

Idem, 109

3. When contract rescinded rents and profits to be set off against permanent improvements; but purchaser not entitled to decree for balance.

Idem, 109

WILLS.

1. In an olograph will the writing of the name of the testator at the commencement of the paper, is an equivocal act, and therefore is not of itself, a sufficient signing of the paper to constitute it his will.

Roy & als. v. Roy's ex'or, 418

2. The paper being folded up and endorsed by the testator with his name as his "R's will," is not a sufficient signing.

Idem, 418

588 *3. Such a paper being offered for probate by the nominated executor, and its probate opposed by some of the next of kin, the costs should be paid out of the estate.

Idem, 418

WITNESSES.

1. In an action of debt against the makers and four endorers of a negotiable note, they plead jointly *nil debit* and usury. Before the trial the maker confesses a judgment, and there is final judgment against him; and the two prior endorers release him from all liability to them. As the maker is liable to the two last endorers, under the act, Code ch. 146, § 6, p. 587, for five per cent. damages for any amount of the debt they may have to pay, he is not a competent witness for the defendants to prove the usury.

Mills & als. v. The Central Savings Bank, 94

2. In an action of debt against maker and four endorers of a negotiable note, they plead jointly *nil debit* and usury. Before the trial the maker confesses a judgment and there is final judgment against him, and the three prior endorers release him from all liability to them. The maker is still liable to the fourth endorser, and is not a competent witness for the defendants to prove usury.

Hogshead & als. v. Baylor, 99

3. An agreement by the plaintiff not to take a judgment against the last endorser unless he recovered against all, did not release him so as to render the maker a com-

petent witness when released by the prior endorsers. *Idem*, 99

4. The rule that upon cross examination of a witness he shall not be asked a collateral question in order to contradict and thus discredit him, does not apply to the statements made by a witness on his examination in chief; but these statements may be contradicted though collateral to the issue.

Forde's case,

547

5. On the trial of a prisoner for murder, a witness on his examination in chief, makes a statement as to the action of a third person,

and upon his cross examination he is asked whether he did not make a different statement (stating it) before the examining court: to which he says he does not remember. The statement made by the witness before the examining court, may be proved in order to discredit him. And this may be done either by proving by another witness that the statement was made by the witness, or by proving by one witness that only one witness spoke of the act of that third person, and by another person that the witness proposed to be contradicted was that witness.

Idem, 547

REPORTS OF CASES
DECIDED IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA:

BY PEACHY R. GRATTAN.

VOLUME XVII.

FROM APRIL 1, 1866, TO JULY 1, 1867.

JUDGES
OF THE
SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

RICHARD C. L. MONCURE, PRESIDENT.
WILLIAM T. JOYNES. ALEXANDER RIVES.*

Attorney General: THOMAS RUSSELL BOWDEN.

*In the place of Judge Lucas P. Thompson, who though appointed judge of the Court, died before taking his seat on the bench. Judge Rives did not sit in any of the cases reported which were decided at the April term of the Court for 1866.

Entered according to Act of Congress, in the year one thousand eight hundred
and sixty-seven, for the

COMMONWEALTH OF VIRGINIA,

In the Clerk's Office of the Eastern District of Virginia.

TABLE OF CASES REPORTED.

Adams and James River and Kanawha Co.	427	James River and Kanawha Co. v. Adams, note.	441
Adams and James River and Kanawha Co., note.	441	Johnston and Norris.	8
Adams v. Lawson.	250	Jones' Case.	563
Baratta & als. and Mitchell, &c.	445	Kates' Case.	561
Barnum & als. v. Frost's adm'r & als.	398	Lawson and Adams.	250
Booth and Clarkson & als.	490	Longons v. Echols & als.	15
Brockenbrough's ex'ors v. Spindle's adm'rs.	21	Long's adm'rs and City of Richmond.	375
Burton and Matthews.	312	Matthews v. Burton.	312
Cabell & als. and Tabb's curator.	160	Merchants Insurance Company v. Edmond, Davenport & Co.	138
Calwell v. The Commonwealth.	391	Michie & als. v. Michie's adm'r & als.	109
City Council of Alexandria and Orange and Alexandria Railroad Company.	176	Miller & Mayhew and Fant & als.	47
City of Richmond v. Long's adm'rs.	375	Miller & Mayhew and Fant.	187
Clarkson & als. v. Booth.	490	Mitchell, &c., v. Baratta & als.	445
Commonwealth and Calwell.	391	Mitchell, &c., v. Riviera & als.	445
Commonwealth and Davis.	617	Norris v. Johnston.	8
Commonwealth and Hardy and Curry.	592	Nottingham's and Union Steamship Company.	115
Commonwealth and Hewitt.	627	Oneale's Case.	582
Commonwealth and Hughes.	565	Orange and Alexandria Railroad Company v. City Council of Alexandria.	176
Commonwealth and Jones.	563	Orange and Alexandria Railroad Company v. Cowherd.	366
Commonwealth and Kates.	561	Orange and Alexandria Railroad Co. v. Fulvey, for Cowherd.	366
Commonwealth and Oneale.	582	Penn's adm'rs v. Spencer & als.	85
Commonwealth and Speers.	570	Penn & als. v. Whitehead & als.	503
Commonwealth and Sangster & als.	124	Peshine v. Shepperson.	472
Commonwealth and Vaughan.	576	Rayfield & Wife v. Gaines & als.	1
Commonwealth and Vaughan & als.	386	Read's adm'r & als. and Robertson & als.	544
Corse and Sawyer.	230	Rison & al. and Foster's curator.	321
Cowherd and Orange and Alexandria Railroad Company.	366	Riviera & als. and Mitchell, &c.	445
Davis' Case.	617	Robertson & als. v. Read's adm'r & als.	544
Dobson & al. and White.	262	Robertson & als. v. Wright & als.	534
Doggett & als. v. Helm & als.	96	Sangster & als. v. The Commonwealth.	124
Duval & als. and Tebbs.	349	Sawyer v. Corse.	230
Echols & als. and Longons.	15	Shepperson and Peshine.	472
Edmond, Davenport & Co. and Merchants Insurance Company.	138	Smith's ex'or v. Smith & als.	268
Fant & als. v. Fant, who sues, &c.	11	Speer's Case.	570
Fant & als. v. Miller & Mayhew.	47	Spencer & als. and Penn's adm'rs.	85
Fant v. Miller & Mayhew.	187	Spindle's adm'rs and Brockenbrough's ex'ors.	21
Foster's curator v. Rison & als.	321	Steptoe's adm'r & als. and Harvey's adm'r, &c.	289
Frost's adm'r & als. and Barnum & als.	398	Tabb's curator v. Cabell & als.	160
Fulvey, for Cowherd and Orange and Alexandria Railroad Co.	366	Tebbs v. Duval & als.	349
Gaines & als. and Rayfield & Wife.	1	Union Steamship Company v. Nottingham's.	115
Hardy and Curry's Case.	592	Vaughan's Case.	576
Harvey's adm'r, &c., v. Steptoe's adm'r & als.	289	Vaughn & als. v. The Commonwealth.	386
Helm & als. and Doggett & als.	96	White v. Dobson & al.	262
Hewitt's Case.	627	Whitehead & als. and Penn & als.	503
Hughes' Case.	565	Wright & als. and Robertson & als.	534
James River and Kanawha Co. v. Adams	427		

TABLE OF CASES CITED.

Alcock v. Andrews, 2 Esp. 540 n.....	271	Belknap's estate and Barker, 27 Verm.	
Alcock and Delay, 29 Eng. L. & E. 83...	74	700.....	443
Alderson and Faulkner, Gilm. 221.....	487	Belknap's estate, &c., and Herrick, 27	
Allison and Farmers Bank, 6 Rand. 204.	128	Verm. 673.....	443
Almond & Wife v. Mason's adm'r, 9		Bell, &c., and Calhoun, 8 Gratt. 22...	21, 26
Gratt. 700.....	175	Bennett and Hawkins, 97 Eng. C. L. 507	36
Alvis v. Hodgson, 7 T. R. 241.....		Benning and Attorney General, 6 Jur. N.	
..... 61, 68, 69, 70, 71		S. 1087	307
Ambler & als. v. Warwick & Co., 1 Leigh		Betty and Smith, 11 Gratt. 752.....	205
195.....	175	Beverley v. Brooke & als., 2 Leigh 425..	227
Anderson v. Fox, 2 Hen. & Mun. 245....	540	Bibb v. Cawthorne, 1 Wash. 91.....	128
Anderson's heirs and Parker's heirs, 5		Birchett and Townes, 12 Leigh 173..	539, 542
Monr. 445	20	Birch and Reg., 1 Penn. Cr. C. 185.....	599
Andrews and Alcock, 2 Esp. 540 n.....	127	Birdsall and Seeley, 15 John.	267
Andrews v. Pond, 13 Pet. U. S. 65.....	79	Bird & wife and Regina, 2 Eng. L. & E.	
Archer v. Noble, 3 Greenl. 418.....	130	428.....	596, 612, 615
Archer and Reg., 2 Moody Cr. C. 283....	611	Bishop of Chester and Rex, 1 Str. 624....	73
Archer, adm'r of Tanner, v. Saddler, 2		Bishop v. Williamson, 2 Fairf. 495..	237, 247
Hen. & Mun. 370.....	317	Black v. Lamb, 1 Beasl. 108.....	228
Arthur and Bank of Washington, 3 Gratt.		Blake v. Bunbury, 1 Ves. Jr. 194, note 4.	6
173.....	21, 26	Blanton v. Taylor, Gilm. 209.....	512
Atkinson and Hamlin's adm'r, 6 Rand.		Boardman and Lee, 3 Mass. 238....	156
574.....	418	Bolan v. Williamson, 1 Brevard 181	240
Atkinson v. Ritchie, 10 East 530.....	157	Bolling, &c., and Lyon, 14 Alab. 753....	522
Atkinson v. Robinson, 9 Leigh 393....	97, 348	Boston and Thorndike, 1 Metc. 242.....	68
Attorney General v. Benning, 6 Jur. N.		Bowling and State, 10 Humph. 52.....	602
S. 1083.....	307	Brackett and Hutchins, 2 Foster New	
Attorney General v. Viscount Canter-		Hamp. 255.....	235, 246
bury, 1 Philips 306.....	240	Bradley v. Ricardo, 21 Eng. C. L. 220...	210
Avode v. Dixon, 5 Eng. L. & E. 512....	81	Branch Bank of Mobile and Huntington	
Bailey v. Mayor of the City of New York,		& al., 3 Alab. 186.....	80
3 Hill N. Y. 531.....	379, 380	Brandon v. Curling, 4 East 410.....	154
Baird, &c., and Wagner, &c., 7 How. U.		Brandon v. Nesbitt, 6 T. R. 35.....	153
S. 234	97	Brig James Gray v. Ship John Fraser, 21	
Baker v. Lewis, 33 Penn. 301.....	123	How. U. S. 184.....	120
Baltimore & Ohio Railroad Co. and Kid-		Bristow v. Sequeville, 5 Exch. 275. 62, 70, 75	
well, 11 Gratt. 676.....	442	Bristow v. Towers, 6 T. R. 35.....	153
Baltimore & Ohio Railroad Company v.		Britton's Case, 4 McCord 256.....	588
Polly, Woods & Co., 14 Gratt. 447.....	443	Broadwell v. Swigert, 7 B. Monr. 39.....	123
Bank United States v. Richie, 8 Pet. U.		Brooke & als. and Beverley, 2 Leigh 425.	227
S. 128.....	20	Brooke v. Young, 3 Rand. 106	55
Bank United States v. Waggener, 9 Pet.		Brown and Creel, 1 Rob. 255.....	480
U. S. 378	35, 39	Brown v. Smith, 12 Cush. 366....	487
Bank of the Valley v. Stribbling, 5		Buchanan v. Clark, 10 Gratt. 164.....	19
Rand. 132	43	Buckland v. Johnson, 80 Eng. C. L. 149	
Bank of Virginia and Raine, 4 Gratt. 150	113	.....	127, 129
Bank of Washington v. Arthur, &c., 3		Buckley v. Barber, 1 Eng. L. & E. 506....	496
Gratt. 173.....	26	Bucks Co. and Railroad, 6 Barr 70.....	185
Barber and Buckley, 1 Eng. L. & E. 506.	496	Bullard v. Barksdale, 11 Ired. Law 461...	318
Barker v. Belknap's estate, 27 Verm. 673.	443	Bunbury and Blake, 1 Ves. Jr. 194, note 4	6
Barker v. May, 17 Eng. C. L. 426.....	306	Bunker and Drinscomb, 2 Metc. 8.....	77
Barksdale and Bullard, 11 Ired. Law 461	318	Burgess and Rose's adm'r, 10 Leigh 186	
Barksdale v. Finney, 14 Gratt. 338....	304	.....	496, 497
Barnes and Farrant, 103 Eng. C. L. 553..	239	Burnett v. Lynch, 12 Eng. C. L. 237....	239
Barrett and Crease, 1 Crompt. Mees. &		Burns, &c., and McFadden, &c., 5 Gray	
Ros. 919.....	68	599.....	63
Bassett and Lawrence, 5 Allen 140.....	77	Butler and Cullen, 5 Mau. & Sel. 461....	152
Baugh & als. v. Nelson, 9 Gill. 299	78	Butler v. Wildman, 5 Eng. C. L. 324....	152
Bayless and Phil. Wil. & Balt. R. R. Co.,		Cahagan's Case, 1 Parker's Cr. 378.....	588
2 Gill 355.....	182	Calhoun and Bell, &c., 8 Gratt. 22.....	26
Bazett v. Meyer, 5 Taunt 824.....	155	California Stage Co. and City of Sacra-	
Bazett and Simeon, 2 Mau. & Sel. 94.....	155	mento, 12 Gratt. Calif. 134.....	186
Bear and Findlay, 8 Serg. & Raw. 571...	623	Call v. Ruffin, 1 Call 333.....	423
Belches and West, 5 Munf. 187.....	33	Cameron v. Reynolds, Cowp. 493.....	236
Belden and Philips, 2 Edw. ch. 1.....	542		

Campbell <i>and</i> Nebraska City, 2 Black. U. S. 590.....	486	Commonwealth <i>and</i> Davis, 13 Gratt. 139.....	128, 130
Cantrill <i>and</i> Huston's adm'rs, 11 Leigh 136.....	19	Commonwealth <i>v.</i> Drum, 19 Pick. 479.....	600, 612
Carmack <i>v.</i> The Commonwealth, 5 Binn. 184.....	130	Commonwealth <i>v.</i> Hope, 22 Pick. 1.....	572
Carper <i>v.</i> McDowell, 5 Gratt. 212.....	389	Commonwealth <i>v.</i> Kennard, 8 Pick. 133.....	127
Carr's adm'r <i>v.</i> Chapman's legatees, 5 Leigh 104.....	97, 348	Commonwealth <i>and</i> Kite, 11 Metc. 581.....	573
Caruthers <i>v.</i> Eldridge's ex'ors, 12 Gratt. 670.....	138	Commonwealth <i>and</i> Larned, 12 Metc. 240.....	579
Caruthers' adm'rs <i>v.</i> Trustees of Lexington, 12 Leigh 610.....	97, 348	Commonwealth <i>v.</i> McLaughlin, 12 Cush. 615.....	607
Caslon <i>and</i> Catherwood, 13 Mees. & Wels. 261.....	588	Commonwealth <i>v.</i> Murtagh, 1 Ashmead 272.....	588
Cater <i>v.</i> Eveleigh, 4 Dessau 19.....	406	Commonwealth <i>v.</i> Stockton, 5 Monr. 192.....	130
Catherwood <i>v.</i> Caslon, 13 Mees. & Wels. 261.....	588	Commonwealth <i>and</i> Vaughan, 17 Gratt. 386.....	395, 397
Catherwood <i>and</i> James, 16 Eng. C. L. 165.....	61, 69, 70, 71	Conant <i>v.</i> Kendall, 21 Pick. 36.....	408
Cawthorne <i>and</i> Bibb, 1 Wash. 91.....	128	Condon <i>v.</i> South Side Railroad Company, 14 Gratt. 302.....	433
Chaffin <i>and</i> State, 2 Swan Ten. 493.....	602	Conway <i>v.</i> Forbes, 10 East 539.....	154
Chapman's legatees <i>and</i> Carr's adm'r, 5 Leigh 104.....	97, 348	Conway <i>v.</i> Gray, 10 East 536.....	154
Chapman <i>and</i> Smith & ux., 1 Hen. & Mun. 240.....	363	Conwell <i>v.</i> Vorhees, 13 Ohio 523.....	235, 236, 245, 246
Chappedelaine <i>v.</i> Dechenaux, 4 Cranch 306.....	539	Cook <i>v.</i> Gregson, 2 Jur. N. S. 510.....	307, 308
Charlton's adm'r & als. <i>and</i> Unis & als., 12 Gratt. 484.....	226	Cook <i>v.</i> Moffatt, 5 How. U. S. 295.....	77
Cheek <i>and</i> Covington, M. S. Spec'l Ct. 522.....	522	Cook, &c., <i>and</i> Scott, &c., 4 Monr. 280.....	228
Chicago City <i>v.</i> Robbins, 2 Black. U. S. 418.....	379	Cooper <i>and</i> Smith, 6 Munf. 401.....	128
Chitters <i>and</i> Hartwell, Amb. 308.....	306	Cornwall <i>v.</i> Richardson, 21 Eng. C. L. 446.....	259
Chrisman <i>and</i> Lincoln, 10 Leigh 338.....	260, 261	Corporation of Washington <i>and</i> Weightman, 1 Black. U. S. 40.....	242, 379
City of Lexington <i>and</i> Prather, 13 B. Monr. 559.....	382	Cotton <i>and</i> Lane, 1 Ld. Ray. 646.....	236, 239, 247, 378
City of New Orleans <i>and</i> Stewart, 9 La. Ann. 461.....	382	County of Morgan <i>and</i> Sangamon & Morgan R. R. Co., 14 Illinois 163.....	186
City of Pekin <i>and</i> Wilkey, 19 Illinois 160.....	186	Covington <i>v.</i> Cheek, M. S. Spec'l Ct. 522.....	522
City of Richmond <i>v.</i> Daniel, 14 Gratt. 387.....	184	Cox's Creditors, 3 P. Wms. 341.....	306, 308
City of Sacramento <i>v.</i> California Stage Co., 12 Calif. 134.....	186	Coy <i>and</i> Sampson, 15 Mass. 493.....	487
Clark <i>and</i> Buchanan, 10 Gratt. 164.....	19	Crawford's ex'or <i>v.</i> Patterson, 10 Gratt. 364.....	348
Clarke, &c., <i>and</i> Crenshaw's adm'r, 5 Leigh 65.....	32	Crease <i>v.</i> Barrett, 1 Crompt. Mees. & Ros. 919.....	68
Clarke <i>and</i> Regina, 47 Eng. C. L. 421.....	579	Creel <i>v.</i> Brown, 1 Rob. 255.....	480
Clark <i>v.</i> The State, 12 Georgia 350.....	604, 612, 613	Crenshaw's adm'r <i>v.</i> Clarke, &c., 5 Leigh 65.....	32
Clay <i>and</i> Smith, Amb. 645.....	96, 348	Crompte <i>and</i> Martin, 1 Ld. Ray. 340.....	496
Clay <i>v.</i> Willis, 8 Eng. C. L. 103.....	306	Crowley <i>v.</i> Commonwealth, 11 Metc. 575.....	573
Clegg <i>v.</i> Levy, 3 Camp. 166.....	69, 70	Cullen <i>v.</i> Butler, 5 Mau. & Sel. 461.....	152
Clough <i>v.</i> Thompson, 7 Gratt. 26.....	94	Curling <i>and</i> Brandon, 4 East 410.....	154
Coalter <i>v.</i> Coalter, 1 Rob. 79.....	333, 334, 335	Daniel <i>and</i> The City of Richmond, 14 Gratt. 387.....	184
Cobb <i>and</i> Hodges, 8 Rich. S. C. Law 50.....	530	Dargan <i>v.</i> Mayor, &c., of Mobile, 31 Alab. 469.....	382
Cocke's adm'r <i>v.</i> Gilpin, 1 Rob. 26.....	19	Davies <i>and</i> Denton, 18 Ves. 499.....	173
Coger <i>v.</i> Coger, 2 Dana 270.....	20	Davis <i>v.</i> Commonwealth, 13 Gratt. 139.....	128, 130
Cockely <i>v.</i> The State, 4 Iowa 477.....	603	Davis <i>v.</i> Miller, 14 Gratt. 1.....	82
Colclough <i>v.</i> Sterum & al., 3 Bligh Par. Cas. 181.....	20	Day & wife <i>and</i> Stinson's ex'or, 1 Rob. 435.....	515
Cole <i>v.</i> Eaton, 8 Cush. 587.....	408	Decatur Bank <i>v.</i> Spence, 9 Alab. 800.....	80
Collett <i>v.</i> London, &c., Railway Company, 71 Eng. C. L. 984.....	262	Dechenaux <i>and</i> Chappedelaine, 4 Cranch 306.....	539
Colston <i>and</i> Orrick, 7 Gratt. 189.....	80	Delay <i>v.</i> Alcock, 29 Eng. L. & E. 83.....	74
Comm'rs of Berks Co. <i>and</i> Schuylkill Nav. Co., 1 Jones Pa. 203.....	185	De libellis famosus, 5 Coke R. 125.....	582
Common Council of Alexandria <i>and</i> Fowle, 3 Pet. U. S. 398.....	381	Demoville, adm'r <i>and</i> Eppes' ex'or, 2 Call 22.....	128
Commonwealth <i>and</i> Carmack, 5 Binn. 184.....	130	Deneale <i>v.</i> Stump's ex'ors, 8 Pet. U. S. 528.....	540
Commonwealth <i>and</i> Crowley, 11 Metc. 575.....	573	Dennison, &c., <i>v.</i> Plumb, &c., 18 Barb. S. C. 89.....	131
		Denton <i>v.</i> Davies, 18 Ves. 499.....	173
		Dew <i>and</i> McGachen, 15 Eng. L. & E. 97.....	304
		Dixon <i>and</i> Avode, 5 Eng. L. & E. 512.....	81

Doe v. Langford, 16 Mees. & Wels. 497..	68	Gardner v. Gardner, 5 Cush. 483.....	396
Doggett & als. v. Helm & als., 17 Gratt. 96.....	348	Casset & al. and Sherman & al., 4 Gilman 521.....	62, 76, 78
Doherty and Commonwealth, 10 Cush. 52.....	579	Gayford's Case, 7 Greenl. 57.....	588
Dold's ex'or and Wallace & wife, 3 Leigh 258.....	515	Gibson v. Fristoe, 1 Call 54.....	43
Dole & another v. New England Mutual Marine Insurance Company, 6 Allen 373.....	144, 149	Gideon and United States, 1 Minnes. 292	623
Donald and East India Co., 9 Ves. 375.....	208, 209	Gilchrist v. McGee, 9 Yerg. 455.....	319
Donnally and Tyree & als., 9 Gratt. 64..	129	Gilpin and Cocke's ex'or, 1 Rob. 26.....	17
Doughty and Satterthwaite, Busbee Law 314.....	72	Givens v. The State, 6 Texas 344.....	603
Douglas v. Frazer, 2 McCord's Ch. 105..	407	Goode and Hayes, 7 Leigh 452.....	97, 348
Douglas, &c., v. Scott & al., 8 Leigh 43..	80	Goodman v. Simonds, 20 How. U. S. 343.	81
Dowell v. Steam Navigation Co., 85 Eng. C. L. 195.....	123	Goodwin v. McCluer, 3 Gratt. 291.....	318
Downell v. Jones, 13 Alab. 490, 17 Id. 689.	486	Gordon and Thornton, 2 Rob. 719.....	206
Downe v. Morris, 3 Hare 394.....	305	Governor v. Hancock, 2 Alab. N. S. 728.	127
Drinscomb v. Bunker, 2 Metc. 8.....	77	Graves and Henry, 16 Gratt. 244.....	499
Drum and Commonwealth, 19 Pick. 479.....	600, 612	Gray and Conway, 10 East 536.....	154
Dudleys v. Dudleys, 3 Leigh 436....	452, 465	Great Western Railway and Rouger, 27 Eng. L. & E. 35.....	443
Dunlop v. Munroe, 7 Cranch 242. 235, 240,	378	Greenhow's adm'r v. Harris, &c., 6 Munf. 472.....	33, 34, 41, 45
Earl of Scarborough and Sharpe, 4 Ves. 538.....	306	Greenwood v. Wakeford, 1 Beaven 576....	304
East India Co. v. Donald, 9 Ves. 275..	208, 200	Gregson and Cook, 2 Jur. N. S. 510....	307, 308
East India Company and Moodalay, 1 Bro. Ch. 409.....	381	Grigsby v. Weaver, 5 Leigh 191.....	33
Eaton and Cole, 8 Cush. 587.....	408	Grove v. Zumbro, 14 Gratt. 501.....	390
Edwards and Whitehorn, 1 Chanc. Rep. 173.....	166	Guerrant, &c., and Markham, 4 Leigh 297.....	515
Egerton and Knight, 7 Exch. 407.....	484	Guttridges and Reg., 9 Car. & Payne 471.	611
Eldridge's ex'or and Caruthers, 12 Gratt. 670.....	318	Gwinn v. Lee, 9 Gill 137.....	84
Ellis and Forsythe, 4 J. J. Marsh. 299..	130	Hallacher and Forney, 8 Serg. & Raw. 159.....	588
Ellis and Reg., 8 Car. & Payne 654.....	611	Hall v. Smith & als., 2 Bingh. 156, 9 Eng. C. L. 357.....	236, 241, 242, 243, 381
Eppes' ex'r v. Demoville, adm'r, 2 Call 22	128	Ham's Case, 2 Fairf. 391.....	558
Eveleigh and Cater, 4 Dessau 19.....	406	Hamilton and Hillis, 10 Gratt. 300.....	398
Farmers Bank and Allison, 6 Rand. 204.	128	Hamlin's adm'r v. Atkinson, 6 Rand. 574	418
Farrant v. Barnes, 103 Eng. C. L. 553..	239	Hancock and The Governor, 2 Alab. N. S. 728.....	127
Faulkner v. Alderson, Gilm. 221.....	481	Hand and Simpson, 6 Whart. 311.....	123
Fenton v. Read, 4 John. 52.....	588	Hankinson & al. v. Lombard, 25 Illinois 572.....	226
Findlay v. Bear, 8 Serg. & Raw. 571....	623	Hanna's ex'ors and Reed, 3 Rand. 56....	67
Finney and Barksdale, 14 Gratt. 338....	304	Hann and McKee's heirs, 9 Dana 526....	20
Fitzhugh & als. and Propeller Genessee Chief, 12 How. U. S. 443.....	121	Hansbrough's ex'ors v. Thom, 3 Leigh 146.....	120
Forbes and Conway, 10 East 539.....	154	Hanson and Harris, 11 Maine 241.....	130
Forney v. Hallacher, 8 Serg. & Raw. 159.	588	Harkins v. Forsyth, 11 Leigh 294.....	389
Forsythe v. Ellis, 4 J. J. Marsh 299.....	130	Harkinson and Stenndale, 1 Sim. 393....	304
Forsyth and Harkins, 11 Leigh 294.....	389	Harris, &c., and Greenhow's adm'x, 6 Munf. 472.....	33, 34, 41, 45
Fowle v. Common Council of Alexandria, 3 Pet. U. S. 398.....	381	Harris v. Hanson, 11 Maine 241.....	130
Fox and Anderson, 2 Hen. & Mun. 245..	540	Harrison & wife and Waters' heirs, 4 Bibb 87.....	226
Francis v. Ocean Insurance Company, 6 Cow. 404, 2 Wend. 64.....	155	Hart v. Ten Eyck, 2 John. Ch. 62.....	209
Franklin v. Low & al., 1 John. 396.....	240	Hartwell v. Chitters, Amb. 308.....	306
Fraser and Douglas, 2 McCord's Ch. 105..	402	Harvey and Preston, 2 Hen. & Mun. 55..	68
Frazier v. Frazier's ex'or, 3 Leigh 642..	359	Harvey v. Skipwith, &c., 16 Gratt. 393..	497
Freeman and United States, 3 How. U. S. 556.....	182	Hatche v. Searles, 31 Eng. L. & E. 219..	81
French v. French, 3 Jur. N. S. 428.....	307	Hathaway and Wiggins, 6 Barb. S. C. 632.....	240
French and Robertson, 4 East 130.....	145	Hawkeswood's Case, 2 East's P. C. 955..	74
Fristoe and Gibson, 1 Call 54.....	43	Hawkins v. Bennett, 97 Eng. C. L. 507..	36
Fullerton v. Sturges, 4 Ohio St. 529.....	80	Hawkins' adm'x and Perkins' adm'r, 9 Gratt. 649.....	55
Furnival and Rex, Russ. & Pry, 445.....	572	Hayes v. Goode, 7 Leigh 452.....	97, 348
Furtado v. Rodgers, 3 Bos. & Pul. 191..	154	Hays v. Pacific Mail Steamship Co., 17 How. U. S. 596.....	186
Furze and Mayor of the City of New York, 3 Hill N. Y. 612.....	379	Helm & als. and Doggett & als., 17 Gratt. 96.....	348
Gamba v. Le Messurier, 4 East 407.....	154	Henry v. Graves, 16 Gratt. 244.....	449
		Herrick v. Belknap's estate, &c., 27 Verm. 673.....	443
		Hill's Case, 2 Gratt. 594.....	112

Hillis v. Hamilton, 10 Gratt. 300.....	398	Lacy and Quarles, 4 Munf. 251.....	512
Hill & als. and Marks & al., 15 Gratt. 400..	94	Lamb's Case, 9 Rep. 59.....	258
Hill and McClure, 2 Const. Law 420.....	319	Lamb and Black, 1 Beasley 102.....	228
Hilton's Case, 3 Rich. 434.....	588	Lamb and Wise, 9 Gratt. 294.....	205
Hilton and Moore, 12 Leigh 1.....	303	Lambert v. Jones, 2 Pat. & Heath 144..	61, 72
Hilte v. Long, 6 Rand. 457.....	127, 133	Lane v. Cotton, 1 Ld. Ray. 646.....	236, 239, 247, 378
Hodges v. Cobb, 8 Rich. S. C. Law 50.....	530	Landon v. Roane's adm'r, 6 Alab. 518....	539
Hodgkins and The State, 10 Maine 155....	588	Langford and Doe, 16 Mees. & Wels. 497..	68
Hodgson and Alvis, 7 T. R. 241.....	61, 68, 69, 70, 71	Langstaffe and Russell, Doug. 513....	57, 59, 80
Holcombe's ex'or and Miller, 9 Gratt. 665..	303	Langtry v. The State, 30 Alab. 536.....	588
Holliday v. St. Leonards, 103 Eng. C. L. 192.....	241	Lardner and Murray, 2 Wall. U. S. 110..	81
Hoope v. Manhattan Fire Insurance Com- pany, 1 Kernan 532.....	144	Larned v. Commonwealth, 12 Metc. 240..	579
Hope and Commonwealth, 22 Pick. 1....	572	Latham and The State, 34 New Hamp.	523, 623
Horncastle and Wolf, 1 Bos. & Pul. 316....	144	Latouche and Lord Clancarty, 1 Ball & Beat. 420.....	542
Hudson & als. v. Hudson's adm'r, 5 Munf. 580.....	303	Lawrence v. Bassett, 5 Allen 140.....	77
Hughes & wife v. Johnston, 12 Gratt. 479..	19	Lawson and Ingram, 37 Eng. C. L. 350....	486
Humphrey and People, 7 John. 314.....	588	Layne v. Norris' adm'r, 16 Gratt. 236....	499, 500
Hunter v. Jones, 6 Rand. 541.....	170	Lazier v. Wilson, 11 Gratt. 477 ...	58, 59, 81
Hunter and McFarland, 8 Leigh 489.....	206	Leake v. Robinson, 2 Meriv. 363.....	364, 365
Huntington & al. v. Branch Bank of Mo- bile, 3 Alab. 186.....	80	LeDespencer and Whitfield, Cowp. 754	236, 240, 378
Huston's adm'r v. Cantril, 11 Leigh 137..	19	Lee v. Boardman, 3 Mass. 238.....	156
Hutchins v. Brackett, 2 Fost. New Hamp. 252.....	235, 246	Lee and Gwinn, 9 Gill 137.....	84
Ingram v. Lawson, 37 Eng. C. L. 350....	486	Lehigh Co. v. Northampton Co., 8 Watts & Serg. 334.....	185
Ins. Co. of Penn. and Odlin, 2 Wash. C. C. 312.....	156	LeMessurier and Gamba, 4 East 407.....	154
Irvine v. Robertson, 3 Rand. 549.....	542	LeMessurier and Kellner, 4 East 396....	153
Irvine v. Young, 1 Sim. & Stu. 333.....	542	Lenthall and Jones, 1 Ch. Cas. 154.....	166
Jackson and Wynne, 2 Rus. 351, 3 Cond. Eng. Ch. 144.....	70, 71	Leroy and Wade, 20 How. U. S. 34.....	486
James v. Catherwood, 16 Eng. C. L. 165	61, 69, 70, 71	Levy and Clegg, 3 Camp. 166.....	69, 70
James v. Mayrant, 4 Dessau. 591.....	407	Lewis and Baker, 33 Penn. 301.....	123
James and Pettebone & al., 25 Miss. 495..	407	Lewis, Martin & Co. and Wickham, &c., 13 Gratt. 427.....	452, 463
Jane and Paradine, Aleyn 260.....	146	Lightfoot v. Price, 4 Hen. & Mun. 431..	553
Jeffries and Miller & wife, 4 Gratt. 472..	303	Lincoln v. Chrisman, 10 Leigh 338..	260, 261
Jernegan and Willis, 2 Atk. 252.....	539	Littler v. Van Pelt, 4 Calif. 194.....	131
Johnson and Buckland, 80 Eng. C. L. 145	127, 129	Lombard and Hankinson & al., 25 Illinois 572.....	226
Johnson v. The State, 17 Texas 515.....	603	London, &c., Railway Company and Col- lett, 71 Eng. C. L. 984.....	242
Johnston and Hughes & wife, 12 Gratt. 479.....	19	Long and Hite, 6 Rand. 457.....	127, 133
Jones and Downell, 13 Alab. 490, 17 Id. 689.....	486	Lord Clancarty v. Latouche, 1 Ball & Beat. 420.....	542
Jones and Hunter, 6 Rand. 541.....	170	Lord v. Poor, 10 Shepl. 569.....	522
Jones v. Lackland, 2 Gratt. 81.....	305, 308	Lorent v. S. Carolina Ins. Co., 1 Nott. & McC. 505.....	156
Jones and Lambert, 2 Pat. & Heath 144	61, 72	Lovejoy v. Murray, 3 Watts 1.....	129
Jones v. Lenthall, 1 Ch. Cas. 154.....	166	Low & al. and Franklin, 1 John. 396....	240
Jones v. Mackilwain, 1 Russ. 220.....	365	Lubbock v. Potts, 7 East 447.....	154
Jones and Scott & al., 4 Taunt. 865.....	74	Ludlow & al. v. Van Rensalaer, 1 John. 95.....	72
Judith and Green, 5 Rand. 1.....	120	Lynch and Burnett, 12 Eng. C. L. 327... 239	
Kates' Case, 17 Gratt. 561.....	591	Lynch and Schroyer, 8 Watts 453... 235, 240	
Kellner v. Le Messurier, 4 East 396....	153	Lyon, &c., v. Bolling, &c., 14 Alab. 753..	522
Kemp v. Mundell, 9 Leigh 12.....	66	Lyons v. Miller, 6 Gratt. 427.....	211, 212
Kendall and Conant, 21 Pick. 36.....	408	Mackinwain and Jones, 1 Russ. 220.....	365
Kennard and Commonwealth, 8 Pick. 133	127	Maclin's Case, 3 Leigh 809.....	620, 621, 622, 623, 624
Kidwell v. Baltimore & Ohio Railroad Co., 11 Gratt. 676.....	442	Maloney and The People, 1 Parker's Cr. R. 593.....	627
Killam v. Preston, 4 Watts & Serg. 14....	542	Manhattan Fire Insurance Company and Hood, 1 Kernan 532.....	144
Kingston and Rex, 4 Car. & Payne 387..	581	Markham v. Guerrant, &c., 4 Leigh 279..	515
King v. Waring & ux., 5 Esq. 13.....	258	Marks & al. v. Hill & al., 15 Gratt. 400..	94
Kite v. Commonwealth, 11 Metc. 581....	573	Marks v. Morris, 2 Munf. 407.....	25, 26, 28
Knight v. Egerton, 7 Exch. 407.....	484	Marine Ins. Co. and McBride, 5 John. 299..	156
Kuhn and Pryor, 12 Gratt. 615. 452, 462, 464		Marshall v. York Railway Co., 73 Eng. C. L. 655.....	239
Lackland and Jones, 2 Gratt. 81.....	305, 308		

Marsteller v. Weaver's adm'r, 1 Gratt. 391	Mundell and Kemp, 9 Leigh 12. 67
..... 333, 334, 335	Murray v. Lardner, 2 Wall. U. S. 110. 81
Martin v. Crompe, 1 Ld. Ray. 340. 496	Murray and Lovejoy, 3 Wall. U. S. 1. 129
Martin v. Greer, 1 Georgia Dec. 109. 172	Murray v. Toland, 3 John. Ch. 569. 539, 542
Mason's adm'r and Almond & wife, 9 Gratt. 700. 175	Murtagh and Commonwealth, 1 Ashmead 272. 588
Mason's devisees v. Peters' adm'r, 1 Munf. 437. 540	Myers v. Wade, 6 Rand. 444. 301
Mathias v. Mathias, 3 Jur. N. S. 429. 172	Nebraska City v. Campbell, 3 Black. U. S. 590. 486
Maury v. Shedden, 10 East 540. 154	Nelson and Baugher & als., 9 Gill 299. 78
Maxwell v. McIlvoy, 2 Bibb 211. 240	Nesbitt and Brandon, 6 T. R. 23. 531
May and Barker, 17 Eng. C. L. 426. 306	New England Mar. Ins. Co. and Wood, 14 Mass. 31. 156
Mayor of the city of Manchester and Scott, 2 Hurl. & Nor. 204. 379, 242	New England Mutual Marine Insurance Company and Dole & al., 6 Allen 334. 144, 149
Mayor, &c., of Mobile and Dargan, 31 Alab. 469. 382	Newton v. Poole, 12 Leigh 112. 539
Mayor of the city of New York and Bailey, 3 Hill N. Y. 531. 373	Newton and Reg., 2 Mood & Rob. 503. 589
Mayor of the city of New York v. Furze, 3 Hill N. Y. 612. 379	New York and Liverpool U. S. Mail Steamship Company v. Rumball, 21 How. U. S. 372. 121
Mayor, &c., v. Root, 8 Maryl. 95. 183	New York and Virginia Steamship Company and Union Steamship Company, 24 How. U. S. 313. 120
Mayrant and James, 4 Dessau. 591. 407	Nicholas, &c., and Smith, 8 Leigh 330. 33
McBride v. Marine Ins. Co., 5 John. 299. 156	Nicholson v. Morrissey, 15 East 384. 240
McCarthy & als. v. Roots & als., 21 How. U. S. 432. 86	Noble and Archer, 3 Greenl. 418. 130
McCluer and Goodwin, 3 Gratt. 291. 318	Norris' adm'r and Layne, 16 Gratt. 236 499, 500
McClure v. Hill, 2 Const. L. 420. 319	Norris & Co. and Simms, 5 Alab. 42. 405
McCoy and Parker, 10 Gratt. 594. 19	Northampton Co. and Lehigh Co., 6 Watts & Serg. 334. 185
McDowell and Carper, 5 Gratt. 212. 389	Norvell v. Wright, 3 Allen 166. 238
McDuffie and The State, 34 New Hamp. 523. 623	Nottebohm and Mertens, 4 Gratt. 163 212, 542
McFadden v. Burns, &c., 5 Gray 599. 63	Ocean Insurance Co. and Francis, 6 Cow. 404, 6 Wend. 64. 155
McFarland v. Hunter, 8 Leigh 489. 206	Odlin v. Ins. Co. of Penn., 2 Wash. C. C. 312. 156
McGachen v. Dew, 15 Eng. L. & E. 97. 304	Oliver v. Picot, 3 How. U. S. 333. 173
McGee and Gilchrist, 9 Yerg. 455. 319	Ontario Bank v. Bunnell, 10 Wend. 186. 186
McIlvoy and Marshall, 2 Bibb 211. 240	Orrick v. Colston, 7 Gratt. 189. 80
McKee's heirs v. Hann, 9 Dana 170. 20	Owen and Thorpe, 5 Beav. 224. 171
McLaughlin and Commonwealth, 12 Cush. 615. 607	Pacific Mail Steamship Co. and Hays, 17 How. U. S. 596. 186
McLaughlin's adm'r and Vance, 8 Gratt. 289. 129	Page, Governor, v. Peyton & als., 2 Hen. & Mun. 566. 128
McLuer's adm'r and Rogers, 4 Gratt. 81. 20	Page v. Thompson, Park on Ins. 130 n. 155
McNutt v. Young, 8 Leigh 542. 259, 261	Palmer and Smith, 1 Ch. Cas. 133. 166
Mercy Docks & Harbor Boards v. Penhal- low & others, Jurist for 1866, part 1, p. 571. 379, 380, 383	Paradine v. Jane, Aleyn 260. 146
Mertens v. Nottebohm, 4 Gratt. 163. 212, 542	Paramore v. Taylor, 11 Gratt. 220. 620
Meyer and Bazett, 5 Taunt. 824. 155	Parker's heirs v. Anderson's heirs, 5 Monr. 445. 20
Miller and Davis, 14 Gratt. 1. 82	Parker v. McCoy, 10 Gratt. 594. 19
Miller v. Holcombe's ex'or, 9 Gratt. 665. 303	Patterson and Crawford's ex'ors, 10 Gratt. 364. 348
Miller & wife v. Jeffries, 4 Gratt. 472. 303	Payne and Rathbun, 19 Wend. 399. 123
Miller and Lyons, 6 Gratt. 427. 211, 212	Pelfryman & Randall and Rex, 2 Leach 563. 608
Moffatt and Cook, 5 How. U. S. 295. 77	Pelly v. Royal Exchange Insurance Co., 1 Burr. 344. 145
Monroe and Dunlop, 7 Cranch 242 235, 240, 378	Penhallow and others and The Mercy Docks and Harbor Board, Jurist for 1866, part 1, p. 571. 379, 380, 383
Moodalay v. East India Company, 1 Bro. Ch. 469. 381	People v. Humphrey, 7 John. 314. 588
Moore v. Hilton, 12 Leigh 1. 303	People v. Maloney, 1 Parker's Cr. R. 593. 623
Moore and State, 19 Missouri 369. 130	People and Schuyler, 4 Comst. 173. 131
Moore and Taylor, 2 Rand. 563. 512	People v. Spraker & als., 18 John. 390. 127
Morey v. The Town of Newfane, 8 Barb. 645. 381	Perkins' adm'r v. Hawkins' adm'r, 9 Gratt. 649. 55
Morgan and Selby, 3 Leigh 577. 33, 41	Peters' adm'r and Mason's devisees, 1 Munf. 437. 540
Morning Light, 2 Wall. U. S. 550. 120	
Morris and Downe, 3 Hare 394. 305	
Morrissey and Nicholson, 5 East 384. 240	
Morris and Marks, 2 Munf. 407. 25, 26, 28	
Morrow's adm'r v. Peyton's adm'r, 6 Leigh 54. 259, 261	
Mosby's adm'r & als. v. Mosby's adm'r, 9 Gratt. 589. 131	
Mower v. Inh. Leicester, 9 Mass. 247. 381	

17 GRATT.

CASES CITED.

Pettebone & al. <i>v.</i> James, 25 Miss. 495 ..	407	Ritchie and Atkinson, 10 East 530.....	157
Peverly and Wilson, 1 Am. Lead. Cas. 661.....	236	Roane's adm'r and Langdon, 6 Alab. 518. 539	
Peyton's adm'r and Morrow's adm'r, 8 Leigh 54.....	300, 301	Robbins and Chicago City, 2 Black. U. S. 418.....	379
Peyton & als. and Page, Governor, 2 Hen. & Mun. 566.....	128	Robertson <i>v.</i> French, 4 East 130.....	145
Phil. Wil. and Balt. R. R. Co. <i>v.</i> Bayless, 2 Gill 355.....	182	Robertson and Irvine, 3 Rand. 549.	542
Philips <i>v.</i> Belden, 2 Edw. Ch. 1.....	542	Roberts <i>v.</i> Tremayne, Cro. Jac. 507.....	83
Picot and Oliver, 3 How. U. S. 333.....	173	Robinson and Atkinson, 9 Leigh 393. 97, 348	
Pierce's adm'r <i>v.</i> Trigg's heirs, 10 Leigh 406.....	19	Robinson and Leake, 2 Meriv. 363.. 364, 365	
Plumb, &c., and Dennison, &c., 18 Barb. S. C. 89.....	31	Rocca & al. and Steamer Oregon, 18 How. U. S. 570.....	121
Polly. Woods & Co. and Baltimore and Ohio Railroad Company, 14 Gratt. 447	433	Rodgers and Furtado, 3 Bos. and Pul. 191. 154	
Pond and Andrews, 13 Pet. U. S. 65.....	79	Rogers <i>v.</i> McLuer's adm'r, 4 Gratt. 81....	20
Poole and Newton, 12 Leigh 112.....	539	Root and Mayor, &c., 8 Maryl. 95.....	183
Poor and Lord, 10 Shepl. 569.....	522	Roots & als. and McCarty & als., 21 How. U. S. 432.....	82
Potts and Lubbock, 7 East 447.....	154	Rose's adm'r <i>v.</i> Burgess, 10 Leigh 186....	496, 497
Povall & als. and Turpin, 8 Leigh 93.....	66, 78, 79	Rougher <i>v.</i> Great Western Railroad, 27 Eng. L. & E. 35.....	443
Prather <i>v.</i> City of Lexington, 13 B. Monr. 559.....	338	Rowton <i>v.</i> Rowton, 1 Hen. & Mun. 94....	227
Pratt <i>v.</i> Wright & als., 13 Gratt. 175.. 408, 423		Royal Exchange Insurance Company and Pelly, 1 Burr. 344.....	144
Preston <i>v.</i> Harvey, 2 Hen. & Mun. 55....	68	Ruffin and Call, 1 Call 333.....	423
Preston and Killiam, 4 Watts & Serg. 14. 542		Rumball and New York and Liverpool U. S. Mail Steamship Company, 21 How. U. S. 372.....	121
Price and Lightfoot, 4 Hen. & Mun. 431. 553		Russell <i>v.</i> Langstaffe, Doug. 513.. 57, 59, 80	
Prize Cases, 2 Black. U. S. 635.....	150	Saddler and Archer, adm'r of Tanner, 2 Hen. & Mun. 370.....	317
Propeller Genessee Chief <i>v.</i> Fitzhugh & als., 12 How. U. S. 443.....	121	Sally Magee, 3 Wall. U. S. 451... 150, 158, 159	
Proprietors of the Locks and Canals on the Merrimac and Riddle, 7 Mass. 169..	381	Saltmarsh <i>v.</i> Tuthill, 13 Alab. 390.....	58
Pryor <i>v.</i> Kuhn, 12 Gratt. 615.... 452, 462, 464		Sample <i>v.</i> Wynn, Busbee Law 319.....	259
Pryor and Taliaferro, 12 Gratt. 277.....	390	Sampson <i>v.</i> Coy, 15 Mass. 493.....	487
Quarles <i>v.</i> Lacy, 4 Munf. 251.....	512	Sangamon and Morgan R. R. Co. <i>v.</i> County of Morgan, 14 Illinois 163.....	186
Raby <i>v.</i> Ridehalgh, 1 Jurist N. S. 363....	304	Satterthwaite <i>v.</i> Doughty, Busbee Law 314.....	72
Railroad <i>v.</i> Bucks Co., 6 Barr. 70.....	185	Schroyer <i>v.</i> Lynch, 8 Watts 453 ... 235, 240	
Raine <i>v.</i> The Bank of Virginia, 4 Gratt. 150.....	113	Schuyler and The People, 4 Comst. 173..	131
Rathburn <i>v.</i> Payne, 19 Wend. 399.....	123	Schuykill Nav. Co. <i>v.</i> Comm'rs of Berks Co., 1 Jones Pa. 203....	185
Read and Fenton, 4 John. 52.....	588	Scott, &c., <i>v.</i> Cook, &c., 4 Monr. 280.....	228
Reed ex parte, 4 Hill N. Y. 572.....	127	Scott & al. and Douglass, 8 Leigh 43....	80
Reed <i>v.</i> Hanna's ex'ors, 3 Rand. 56.....	67	Scott & al. <i>v.</i> Jones, 4 Taunt. 865.....	74
Regents Canal Co. and Wetherby, 104 Eng. C. L. 2.....	123	Scott <i>v.</i> Mayor, &c., of Manchester, 2 Hurl. & Nor. 204.....	242, 379
Reg. <i>v.</i> Archer, 2 Moody C. C. 283.....	611	Searles and Hatche, 31 Eng. L. & E. 219. 81	
Reg. <i>v.</i> Birch, 1 Den. C. C. 185.....	599	Seeley <i>v.</i> Birdsall, 15 John. 267.....	127
Regina <i>v.</i> Bird & Wife, 2 Eng. L. & E. 428.....	596, 612, 615	Selby <i>v.</i> Morgan, 3 Leigh 577.....	33, 41
Regina <i>v.</i> Clark, 47 Eng. C. L. 421.....	579	Sequeville and Bristow, 5 Exch. 275.....	62, 70, 75
Reg. <i>v.</i> Ellis, 8 Car. and Payne 654....	611	Sharpe <i>v.</i> Earl of Scarborough, 4 Ves. 538.....	306
Reg. <i>v.</i> Guttridges, 9 Car. and Payne 471. 611		Shedden and Maury, 10 East 540.....	154
Reg. <i>v.</i> Newton, 2 Mood. and Rob. 503....	589	Sherman & al. <i>v.</i> Gasset & al., 4 Gilman 521.....	62, 76, 78
Reg. <i>v.</i> Simmonsto, 47 Eng. C. L. 164....	589	Shifflet's Case, 14 Gratt. 652.....	580, 581
Regina <i>v.</i> Watts, 24 Eng. L. & E. 573.. 74, 75		Ship John Frazer and Brig James Gray, 21 How. U. S. 184.....	120
Rex <i>v.</i> Bishop of Chester, 1 Str. 624.....	73	Shugart's adm'r <i>v.</i> Thompson's adm'r, 10 Leigh 434.....	540
Rex <i>v.</i> Furnival, Russ. and Ry. 445.....	572	Simeon <i>v.</i> Bazett, 2 Mau. & Sel. 94.....	155
Rex <i>v.</i> Kingston, 4 Car. and Payne 387....	581	Simmonsto and Reg., 47 Eng. C. L. 164..	589
Rex <i>v.</i> Pelfryman and Randall, 2 Leach 563.....	608	Simms <i>v.</i> Norris & Co., 5 Alab. 42.....	405
Reynolds and Cameron, Cowp. 493.....	236	Simonds and Goodman, 20 How. U. S. 343. 81	
Ricardo and Bradley, 21 Eng. C. L. 220. 210		Simpson <i>v.</i> Hand, 6 Whart. 311.....	123
Rice <i>v.</i> White, 4 Leigh 474.....	14	Skipwith, &c., and Harvey, 16 Gratt. 393.....	497
Richardson and Cornwall, 21 Eng. C. L. 446.....	259	Slaughter's adm'r and Tutt, 5 Gratt. 364. 120	
Richie and Bank United States, 8 Pet. U. S. 128.....	20	Smith's Case, 10 Gratt. 734.....	580
Riddle <i>v.</i> Proprietors of the Locks and Canals on the Merrimac, 7 Mass. 169..	381	Smith <i>v.</i> Betty, 11 Gratt. 752.....	205
Ridehalgh and Raby, 1 Jurist N. S. 363..	304		

Smith and Brown, 12 Cush. 366.....	487	Thom and Hansbrough's ex'or, 3 Leigh 146.....	120
Smith and Chapman, 1 Hen. & Mun. 240.	363	Thompson and Clough, 7 Gratt. 26.....	94
Smith v. Clay, Amb. 645.....	96, 348	Thompson and Page, Park on Ins. 130 n..	155
Smith v. Cooper, 6 Munf. 401.....	128	Thompson's adm'r and Shugart's adm'r, 10 Leigh 434.....	540
Smith & als. v. Hall, 9 Eng. C. L. 357...	381	Thorndike v. Boston, 1 Metc. 242.....	68
Smith v. Nicholas, &c., 8 Leigh 330.....	33	Thornton v. Gordon, 2 Rob. 719.....	206
Smith v. Palmer, 1 Ch. Cas. 133.....	166	Thorpe v. Owen, 5 Beav. 224.....	171
S. Carolina Ins. Co. and Lorent, 1 Nott & McC. 505.....	156	Toland and Murray, 3 John. Ch. 569. 539,	542
South Side Railroad Company and Con- don, 14 Gratt. 302.....	433	Toland v. Sprague, 12 Pet. U. S. 300....	542
Spence and Decatur Bank, 9 Alab. 800...	80	Towers and Bristow, 6 T. R. 35.....	153
Sprague and Toland, 12 Pet. U. S. 300...	542	Townes v. Birchett, 12 Leigh 173....	539, 542
Spraker & als. and People, 18 John. 390..	127	Town of Newfane and Morey, 8 Barb. 645	381
Sprangler v. Springer, 22 Penn. 454....	542	Tremayne and Roberts, Cro. Jac. 507....	83
Springer and Sprangler, 22 Penn. 454....	542	Trigg's heirs and Pierce's adm'r, 10 Leigh 406.....	19
Spring v. Woodworth, 4 Allen 326.....	407	Trustees of Lexington and Caruther's adm'rs, 12 Leigh 610.....	97, 348
State v. Bowling, 10 Humph. 52.....	602	Tuff v. Warman, 94 Eng. C. L. 573.....	123
State v. Chaffin, 2 Swan Ten. 493.....	602	Turner v. Street, 2 Rand. 408.....	173
State and Clark, 12 Georg. 350.. 604, 612,	613	Turpin v. Povall & als., 8 Leigh 93.. 66, 78,	79
State and Cokely, 4 Iowa 477.....	603	Tuthill and Saltmarsh, 13 Alab. 390.....	58
State v. Givens, 6 Texas 344.....	603	Tutt v. Slaughter's adm'r, 5 Gratt. 364....	120
State v. Hodgskins, 19 Maine 155.....	588	Tyree & als. v. Donnally, 9 Gratt. 64....	129
State and Johnson, 17 Texas 515.....	603	Union Steamship Company v. New York & Virginia Steamship Company, 24 How. U. S. 313.....	120
State and Langtry, 30 Alab. 536.....	588	Unis & als. v. Charlton's adm'r & als., 12 Gratt. 484.....	226
State v. Latham, 13 Ired. Law 33.....	623	United States v. Freeman, 3 How. U. S. 556.....	182
State v. McDuffie, 34 New Hamp. 523....	623	United States v. Gideon, 1 Minnes. 292..	623
State v. Moore, 19 Missouri 369.....	130	United States Mining Co. and Crump, 7 Gratt. 352.....	303
State of Ohio and Stewart, 5 Ohio 241....	602	Vaden's Case, 12 Gratt. 717.....	562, 591
State and Sweeden, 19 Ark. 205.....	604, 613	Van Pelt v. Littler, 4 Cal. 194.....	131
State v. West, 1 Wisc. 209.....	588	Vather v. Zane, 6 Gratt. 246.....	58
State and Wilson and others, 24 Conn. 57.	573	Vaughn v. Commonwealth, 17 Gratt. 386	395, 397
Steamer Oregon v. Rocca & als., 18 How. U. S. 570.....	121	Viscount Canterbury v. Attorney General, 1 Philips 306.....	240
Steam Navigation Co. and Dowell, 75 Eng. C. L. 195.....	123	Vorhees and Conwell, 13 Ohio 523.....	235, 236, 245, 246
Stenndale v. Harkinson, 1 Sim. 393.....	304	Wade v. Leroy, 20 How. U. S. 34.....	486
Sterum & al. and Colclough, 1 Bligh. Par. Cas. 181.....	20	Wade and Myers, 6 Rand. 444.....	301
Stevenson v. Tavener, 9 Gratt. 398.....	304	Waggner and Bank of the United States, 9 Pet. U. S. 378.....	35, 39
Stewart v. City of New Orleans, 9 La. Ann. 461.....	382	Wagner, &c. and Baird, &c., 7 How. U. S. 234.....	97
Stewart v. State of Ohio, 5 Ohio 241.....	602	Wakeford and Greenwood, 1 Beav. 576...	304
Stinson, ex'or v. Day & Wife, 1 Rob. 435.	515	Wallace & wife v. Dold's ex'or, &c. 3 Leigh 258.....	515
St. Leonards and Holliday, 103 Eng. C. L. 192.....	241	Waring & ux. and King, 5 Esp. 13.....	258
Stockton and Commonwealth, 5 Monr. 192.....	130	Warman and Tuff, 94 Eng. C. L. 573.....	123
Street's heirs v. Street, 11 Leigh 498....	540	Warner's Case, 2 Va. Cas. 95.....	587, 589
Street v. Turner, 2 Rand. 480.....	173	Warwick, & Co. and Ambler & als., 1 Leigh 195.....	175
Stribbling v. Bank of the Valley, 5 Rand. 132.....	43	Water's heirs v. Harrison & wife, 4 Bibb. 87.....	226
Stump's ex'ors and Deneale, 8 Pet. U. S. 528.....	540	Watts and Regina, 24 Eng. L. & E. 573..	74, 75
Sturges and Fullerton, 4 Ohio St. 529....	80	Weaver and Grisby, 5 Leigh 191.....	33
Swann v. Ligan, 1 McCord, 227.....	172	Weaver's adm'r and Marsteller, 1 Gratt. 391.....	333, 334, 335
Sweeden v. The State, 19 Ark. 205....	603, 613	Weightman v. Corporation of Washing- ton, 1 Black. U. S. 39.....	242, 418
Swigert and Broadwell, 7 B. Monr. 39....	123	West v. State, 1 Wisc. 209.....	588
Taliaferro v. Pryor, 12 Gratt. 277.....	390	Whitehorn v. Edwards, 1 Ch. Rep. 173....	166
Tavener and Stevenson, 9 Gratt. 398....	304	White and Rice, 4 Leigh 474.....	14
Taylor and Blanton, Gilm. 209.....	512	Whitfield v. Le Despencer, Cowp. 754	236, 240, 378
Taylor v. Moore, 2 Rand. 563.....	512		
Taylor and Paramore, 11 Gratt. 220.....	620		
Taylor & als. and Thatcher & al., 3 Munf. 249.....	128		
Tazewell's adm'r v. Whittle's adm'r, 13 Gratt. 349.....	539		
Ten Eyck and Hart, 2 John. Ch. 62.....	209		
Thatcher & al. v. Taylor & als., 3 Munf. 249.....	128		

17 GRATT.

CASES CITED.

Whittle's adm'r <i>and</i> Tazewell's adm'r, 13 Gratt. 349.....	539	Wolverton's Case, 16 Ohio 173.....	588
Wickham, &c. <i>v.</i> Lewis, Martin & Co., 13 Gratt. 427.....	452, 463	Wood <i>v.</i> New England Mar. Ins. Co., 14 Mass. 31.....	156
Wiggins <i>v.</i> Hathaway, 6 Barb. S. C. 632.....	340	Woodworth <i>and</i> Spring, 4 Allen 326.....	407
Wildman <i>and</i> Butler, 5 Eng. C. L. 324....	152	Wright <i>v.</i> Nowell, 3 Allen 166.....	238
Wilkey <i>v.</i> City of Pekin, 19 Illinois 160....	186	Wright & als. <i>and</i> Pratt, 13 Gratt. 175	408, 423
Williamson <i>and</i> Bishop, 2 Fairf. 495..237, 247	240	Wright <i>and</i> Winterbottom, 10 Mees. & Wels. 109	239
Williamson <i>and</i> Bolan, 1 Brevard 181....	240	Wynne <i>v.</i> Jackson, 2 Russ. 351, 3 Cond. Eng. Ch. 144.....	70, 71
Willis <i>and</i> Clay, 8 Eng. C. L. 103.....	306	Wynn <i>and</i> Sample, Busbee Law 319	259
Willis <i>v.</i> Jernegan, 2 Atk. 252.....	539	York Railway Co. <i>and</i> Marshall, 73 Eng. C. L. 655.....	239
Wilson <i>v.</i> Lazier, 11 Gratt. 477.....58, 59, 81		Young <i>and</i> Brooke, 3 Rand. 106.....	55
Wilson <i>v.</i> Peverly, 1 Amer. Lead. Cas. 661	236	Young <i>and</i> Irvine, 1 Sim. & Stu. 333....	542
Winterbottom <i>v.</i> Wright, 10 Mees. & Wels. 109.....	239	Young <i>and</i> McNutt, 8 Leigh 542.....259, 261	
Wise <i>v.</i> Lamb, 9 Gratt. 294.....	205	Zane <i>and</i> Vathir, 6 Gratt. 246.....	58
Witherly <i>v.</i> Regents Canal Company, 104 Eng. C. L. 2.....	123	Zumbro <i>and</i> Grove, 14 Gratt. 501.....	390
Wolf <i>v.</i> Horncastle, 1 Bos. & Pul. 316... 144			

CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Rayfield & Wife v. Gaines & als.

April Term, 1866, Richmond.

1. **Wills—Construction of—Case at Bar.**—C by his will, lends to his wife E. for and during her natural life, all his personal and real estate. At her death he gives the property to be equally divided between a child living, and one of which his wife was then *eniente*. After other bequests over on failure of issue of his children, he says: It is also my desire that my wife should never marry without entering into a marriage contract to secure the property for the benefit of her and my children. **HOLD:** The last clause does not affect the provision in favor of the wife, so as to reduce her interest upon her marriage.

2. **Same—Same.**—Clear and unambiguous provisions in a will expressly made cannot be controlled by mere inference and argument from general and ambiguous provisions in other parts of the will.

2 *This was a bill filed in the Circuit court of Gloucester county in 1859, by William E. Gaines, in his own right, and as administrator of his deceased wife Ann B. Gaines, the daughter of Lewis B. Callis deceased, and Amanda Gaines, an infant child of William E. Gaines and said Ann B., by her next friend, against William Rayfield and his wife Elizabeth, and another child of Lewis B. Callis, and others, to have an account of the estate, and of the

***Wills—Construction of.**—The rule laid down in the principal case that clear and unambiguous provisions in a will expressly made cannot be controlled by mere inference and argument from general and ambiguous provisions in other parts of the will, seems well settled.

The principal case was cited as authority for this proposition in *Barksdale v. White*, 28 Gratt. 223, and *foot-note*: *Simmerman v. Songer*, 29 Gratt. 16, and *foot-note*: *Haymond v. Jones*, 33 Gratt. 340; *Withers v. Sims*, 30 Va. 662; *Gish v. Moomaw*, 39 Va. 355, 15 S. E. Rep. 806; *Gaskins v. Hunton*, 92 Va. 581, 23 S. E. Rep. 886 (deeds also); *Nye v. Lovitt*, 92 Va. 715, 24 S. E. Rep. 345 (deed); *Houser v. Ruffner*, 18 W. Va. 265; *Bartlett v. Patton*, 33 W. Va. 80, 10 S. E. Rep. 24.

See also, in accord, *Mooberry v. Mayre*, 2 Munf. 458; *Stark v. Lipscomb*, 29 Gratt. 323, and *foot-note*: *Bell v. Humphrey*, 8 W. Va. 1, 18.

In *Couch v. Eastham*, 29 W. Va. 788, 3 S. E. Rep. 26, the court said: "When the language of the testator is plain, and his meaning clear, the courts have nothing to do but to carry the expressed will of the testator into effect, if it is not inconsistent with some rule of law. *Whelan v. Reilly*, 5 W. Va. 356; *Graham v. Graham*, 23 W. Va. 36; *Rayfield v. Gaines*, 21 Gratt. 1."

administration of the defendants as executors of Lewis B. Callis, and a decree for one-third of the estate.

Lewis B. Callis died in the latter part of the year 1840, having made a will, which was duly admitted to probate in the County court of Gloucester. So much of the will as was involved in the decision of this case is as follows: "I lend to my beloved wife Elizabeth, for and during her natural life, all my personal and real estate, both in Gloucester and Mathews counties. Out of the bonds that I may leave yet due, I wish her to pay all my just debts. If they are not sufficient, I wish her to sell such property as she pleases to make up the deficiency; and should there be a surplus money, put it out on interest for the purpose of supporting my child or children, as the case may be, and schooling them. After my wife's death, and the child she is now pregnant with should be living, I then wish the property in her possession to be equally divided between that child and my daughter Ann B. Callis. In the case of the death of my child or children, as the case may be, it or they leaving no lawful issue, it is then my request or wish 'that my wife Elizabeth should have all my estate in fee simple. But in case my wife and my child or children all die, leaving no lawful issue, I then wish the estate to go to their nearest relations by blood and kindred. It being my intention to utterly deprive my blood relations from enjoying or possessing one cent of my estate and possessions,

3 with this exception: *that in case my wife and children should all die without lawful issue, I then wish that fifteen hundred dollars should be equally divided among my sister's children (Eliza Creighton) of Middlesex county. It is also my desire that my wife should never marry without entering into a marriage contract to secure the property for the benefit of her and my children or child, as the case may be.' "

The testator appointed his wife Elizabeth sole executor to settle up his estate, without qualifying or giving any security for her administration. In May, 1841, Mrs. Callis qualified as executrix of the will of the testator; and in 1842 she married William Rayfield, having before her marriage conveyed all her property in trust, that Rayfield should enjoy the profits during their joint lives; and reserving to her the power of disposing of it during the coverture, either by deed or will; and if she survived him, that it should be transferred

and paid back to her. The plaintiffs, in their bill, charged that this deed was intended to defeat the plain intent and meaning of the will of Lewis B. Callis, and to deprive them of their rights; and they insisted that upon the marriage of Mrs. Callis, the children, of whom one was born after the death of the testator, were each entitled at once to a third of the whole estate.

Rayfield and wife answered the bill, and contested the construction put upon the will of Callis by the plaintiffs. They insisted that the female defendant was entitled to the whole estate during her life, the bonds mentioned in the will not having been sufficient to pay the debts of the testator, and that the deed was only intended to convey, and did only convey, her interest in the property.

In July, 1859, the cause came on to be heard, when the court held "that the testator, Lewis B. Callis, by the last clause of his will, so far revoked the prior clauses *thereof as to give to his wife and children, upon the marriage of his wife to the defendant Rayfield, an equal interest in his estate, both real and personal; and that upon her marriage as aforesaid, the estate of the testator ought to have been divided into three equal parts, and one part thereof allotted to Rayfield and wife, to be held during her life, and the other parts allotted to the two children." And the court made a decree accordingly; and directed various accounts to be taken. From this decree, Rayfield and wife obtained an appeal to this court.

Daniel, for the appellants.
Wellford, for the appellees.

JOYNES, J. Lewis B. Callis died in the latter part of 1840, leaving one child, Ann B., who subsequently intermarried with the appellee William E. Gaines, and a widow who was enciente of another child, who was afterwards born, and is the appellee Elizabeth L. Callis. The widow intermarried in 1842 with William Rayfield; and by a marriage contract, among other provisions which need not be specified, the property which Mrs. Callis took by the will of her first husband was conveyed to a trustee for the benefit of Rayfield, the second husband, during her life.

After the death of Mrs. Gaines, the appellee William E. Gaines, in his own right and as administrator of his deceased wife, and Amanda Gaines, their daughter, filed their bill in this cause, insisting that, upon the true construction of the will of Lewis B. Callis, his property became, upon the second marriage of the widow, liable to division among her and the children of Callis. The court below sustained this view, reciting, as the ground of its opinion, that the last clause of the will so far revoked the preceding clauses that,

upon the second marriage of Mrs.
5 *Callis, the property became divisible into three equal parts: one to be held absolutely by each child, and the other to

be held by the widow and her second husband during her life.

I am of opinion that the court erred in this construction.

The first clause of the will gives to the widow, in clear and unequivocal terms, a life estate in the entire property of the testator, real and personal. The only clause which (leaving out of view for the present the last clause) qualifies this provision in any respect, is that which directs the widow, who was also the executrix, in case there should be "a surplus money," to put it out on interest for the purpose of supporting and schooling the children. But this clause, whatever its meaning was, applied only to the "surplus money," if there should be any, and did not qualify or impair the rights of the widow as tenant for life of the residue of the property. There was no "surplus money," and this clause may be laid out of view.

The clause upon which the decree rests is in the following words: "It is my desire that my wife should never marry without entering into a marriage contract to secure the property for the benefit of her and my children or child, as the case may be."

The construction placed upon this clause by the court below gives it the effect of controlling the express provisions of previous clauses, in two important particulars: 1. It reduces the estate for life in the whole property, expressly given to the widow by a previous clause, to an estate during widowhood in two-thirds, and an estate for life in only one-third. 2. It converts the estate in remainder, after the death of the wife, in the whole property, which is expressly given to the children by a previous clause, into an estate which, as to two-thirds of the property, is to take effect upon her marriage.

6 *There is certainly nothing in the language of this clause which requires such a construction. Indeed, the language will not admit of it without a departure from its plain and ordinary sense. All that can be said is that the intention imputed to the testator in the event of the second marriage of his wife, may be inferred by argument from this and other parts of the will. But, if entertained, it was not expressed; and it can only be established by overthrowing other purposes distinctly and expressly declared. Clear and unambiguous provisions expressly made cannot be controlled by mere inference and argument from general or ambiguous provisions in other parts of the will. *Blake v. Bunbury*, 1 Ves., Jr., R. 194, note 4, and cases cited.

The manifest intent of the testator seems to have been that, in the event of the marriage of his wife, the property left by him should, by a marriage contract giving her a separate estate, be protected against her second husband, into whose hands it would otherwise pass by reason of her life estate. The property would thereby be secured for the testator's wife and children, according to their respective interests therein, as

provided by his will. The language of this clause does not import the bestowal of new interests upon the wife or children, but has reference to interests already bestowed, and which were to be "secured" to them in the event of the second marriage of the wife. This construction is consistent with every other part of the will, accords with the language of the clause under consideration, and satisfies every word of it.

It is not difficult to surmise the views which influenced the testator in making this provision. He had left the support and education of his children to be provided for by his wife, to whom he gave his whole estate for life. The second husband, 7 who upon his marriage would "become entitled to the whole income, might neglect these provisions, while a separate estate, secured to the wife by marriage contract, would give her the same power of providing for the children as before the marriage. The testator probably desired the property to be secured to the children because, though the second husband would have no legal power to affect their interests by any act of his, he might eloin or waste the property to their prejudice.

I am of opinion that the decree should be reversed, with costs, and a decree entered dismissing the bill, but without costs; and without prejudice to any suit which the appellees may be advised to bring for the purpose of ascertaining the property in which they are interested, under the will of Lewis B. Callis deceased, or of protecting their interests therein.

MONCURE, J., concurred in the opinion of Joynes, J.

Decree reversed.

8 *Norris v. Johnston.

April Term, 1866, Richmond.

Wills—Construction of.—Testator had twelve children, six unmarried daughters. He directed his estate to be divided into twelve parts, and gave a part to each child. He then says: "It is my will and desire that if any of my children die without heirs, for their part to be equally divided amongst all of my children then living." **HELD:** This is a good executory bequest in favor of the children surviving one dying without issue.

This was an action of detinue in the Circuit court of Fauquier county, brought in 1857 by Catherine Johnston against Thomas Norris, to recover two slaves. At the September term of the court for 1859 the parties agreed a case, and submitted it to the judgment of the court. The material facts are as follows:

Prior to April, 1802, Wm. Norris departed this life, having first made his will, which was duly admitted to probate in the County court of Fauquier. At the time of his death he had twelve children, of whom six were

unmarried daughters. He directed that his estate (except that he thereafter mentioned) should be divided into twelve parts; and gave it among his children, making some special provisions for his unmarried daughters. And he then concluded with the following provision: "It is my will and desire that if any of my children die without heirs, for their parts to be equally divided amongst all my children then living."

One of the slaves in controversy and the mother of the other, were allotted on the division of the estate, to Ellen Norris, one of the unmarried daughters, who lived 9 until *March, 1855, and then died unmarried. In February, 1855, she conveyed these slaves to the defendant. At the time of her death the plaintiff and Mrs. Craig were the only two living children of Wm. Norris, the testator, and before the suit was brought Mrs. Craig died, and bequeathed her interest in the slaves to the plaintiff.

Upon the case agreed the Circuit court rendered a judgment in favor of the plaintiff, for the slaves, or their value as agreed, and damages for detention: Whereupon, Thomas Norris obtained a supersedeas to the judgment from this court.

Griswold, for the appellant.

Spillman and Wm. Green, for the appellee.

MONCURE, J., delivered the opinion of the court:

The court is of opinion that the clause in the will of William Norris in these words: "Item—It is my will and desire that if any of my children die without heirs for their parts to be equally divided amongst all my children then living," is a valid executory bequest, being to take effect in the lifetime of a person or persons in being at the time of the testator's death. The word "heirs" in the clause means "issue;" and the words, "all my children then living," mean all his children living at the time of the death of any of his other children without issue. Whether he contemplated a failure of issue happening only at the death of the first taker, or one that might happen afterwards, is immaterial, since by the express terms of the will, it must happen in the lifetime of some of his children, otherwise the limitation over to his "children then living" can have no effect. Ellen Norris, one of the children of the testator, having died unmarried and without issue in the lifetime of two only of the other children, to wit, the plaintiff in the court below and 10 *another, they became entitled at her death, under the executory bequest aforesaid, to her portion of the slaves derived by her under the said will, which embraced the slaves in controversy. And the said plaintiff, being the last survivor of the said two survivors, is entitled to maintain this action. The judgment of the court below is therefore affirmed.

Judgment affirmed.

11 *Fant & als. v. Fant, Who Sues, &c.

April Term, 1860, Richmond.

1. Evidence—Bond—Assignee as Witness—Case at Bar.

—The assignee of a bond transfers it for value, without assignment, but undertakes verbally to guarantee it if the transferee calls upon him to do so, to enable him to dispose of it. The transferee disposes of the bond without calling for the guaranty. The assignee is no longer liable on the promise to guarantee, and is not therefore an incompetent witness for the holder against the obligors.

2. Same—Same—Same—Same.*—There being a plea of usury in the transfer of the bond by the obligee to the assignee; if he transferred it with the knowledge that there was such usury, he was then guilty of a deceit, and the right of action arose upon the transfer; and if time has barred that action, the assignee is not therefore an incompetent witness for the holder of the bond against the obligors.

This was an action of debt in the Circuit court of Fauquier county, brought in the name of E. L. Fant, for the benefit of A. Schumaker, against John L. Fant and six other persons, upon a bond for ten thousand dollars, executed by them to the plaintiff. The bond bore date the first day of September, 1846, and was payable in five years, with interest from the date, payable semi-annually. The case was before this court in 1859, and in March of that year the judgment which had been recovered by the plaintiff was reversed, and the cause sent back for a new trial.

On the former trial the issues were upon the pleas of "payment" and "usury," and after the case went back to the Circuit court, the defendants filed pleas of non est factum.

The cause came on again for trial in April, 1860, when the plaintiffs offered in evidence the deposition of William D. Miller, to which the defendants objected, and moved the court to exclude it on the ground that it appeared by the deposition itself that Miller was an interested witness. But the court overruled the objection, and admitted the deposition; and the defendants excepted.

The facts as taken from the deposition are, that Miller being willing to aid Edward L. Fant to commence business, agreed to advance him \$10,000 for five years, upon Fant's giving him satisfactory security; and this advance was to be made by Miller's giving him his note payable in six months. In pursuance of this arrangement Fant assigned to him the bond sued upon, and Miller gave him his note at six months, which he paid at maturity. On the 2d of September, 1847, Miller, to aid H. H. Williams, who was then in difficulties, transferred the bond to him for other securities, and undertook verbally to guarantee the

bond to him if he should call upon him to do so; but Williams disposed of the bond to Schumaker without calling upon Miller for his guaranty; and none was ever given. Upon the question of usury Miller states emphatically, that he only received six per cent. interest upon the bond; that interest commencing from the payment of his note, and terminating when he passed it to Williams; and he states in detail the mode in which the interest was adjusted between himself and Fant.

The jury found a verdict for the plaintiff for the amount of the bond, with interest thereon from the first day of September, 1850, until paid; and there was a judgment accordingly; and thereupon the defendants applied to this court for a writ of error to the judgment; which was granted.

Griswold, for the appellants.

Daniel, for the appellee.

13 *JOYNES, J. The judgment in this case is founded on a bond for \$10,000, dated September 1, 1846, and payable five years after date, with interest from date, to Edward L. Fant or order. On or about the 15th of September, 1846, Fant assigned the bond to Miller for value. Miller held the bond until the second day of September, 1847, when he transferred it for value by delivery, but without endorsement, to Williams. Williams subsequently assigned it to Schumaker, for whose benefit the present suit was brought. The pleas were payment, usury, and non est factum. The deposition of Miller was read in evidence on behalf of the plaintiff, though objected to by the defendant on the ground that it showed upon its face that Miller was incompetent to testify on the ground of interest. The correctness of this decision is the only question before this court.

There would seem to be only two grounds upon which Miller's competency can be objected to, and I do not think that either of these can be maintained.

1. When Williams obtained the bond from Miller, his object was to raise money upon it to relieve his embarrassments, and Miller agreed to give him a guaranty of it if he should demand it. The object of both parties in this arrangement, as may, I think, be fairly inferred from all the facts, was to enable Williams to effect a negotiation of the bond on satisfactory terms. If Williams could not effect a satisfactory negotiation without Miller's guaranty, Miller was to give his guaranty when demanded. But if the negotiation should be effected without the guaranty, then Miller was no longer bound to give it, because the object for which alone it was to be given had been accomplished without it.

I think, therefore, that when Williams succeeded in passing off the bond without having called for Miller's guaranty, he had no longer any right to call upon Miller

14 *to give a guaranty; and such I infer from Miller's statement was his understanding. It follows that as Miller was

*Fraud—When the Statute Begins to Run.—In *Thompson v. Whitaker Iron Co.*, 41 W. Va. 585, 23 S. E. Rep. 799, the court said: "*Callis v. Waddy*, 3 Munf. 511; *Rice v. White*, 4 Leigh 474; *Cook v. Darby*, 4 Munf. 444; and *Fant v. Fant*, 17 Gratt. 14, say that the statute runs from the act of fraud."

no longer subject to any liability on account of this agreement with Williams, he was not incompetent on this ground.

2. It appears that the controversy under the plea of usury had reference to the transaction between Fant and Miller, in which the bond passed from the former to the latter. If there was usury in that transaction, therefore, Miller was cognizant of it; and when he passed the bond to Williams, as one to which he had a valid title, he was guilty of a deceit which made him liable to Williams, although he did not endorse the bond. But if Miller was liable on this ground, the right of action against him occurred at the time the deceit was practiced (*Rice v. White*, 4 Leigh 474), and was barred by the statute of limitations long before his deposition was taken. And as a liability against which a witness may protect himself by a plea of the statute of limitations, will not disqualify him (1 Greenleaf Evid. § 430), it follows that Miller was not incompetent on this ground.

I am of opinion that the judgment should be affirmed.

MONCURE, J., concurred in the opinion of Joynes, J.

Judgment affirmed.

15 *Londons v. Echols & als.

April Term, 1866, Richmond.

1. **Judicial Sales—Validity of—Purchaser Must Be a Party.**—In a suit for the sale of infants' lands, a sale having been made and confirmed, and a conveyance made to the purchaser; he must be brought before the court as a party, before the court will enquire into the validity of the sale.

2. **Same—Same—Same—Appellate Practice.**—If in such a case an appeal is allowed before the purchaser is made a party in the cause, it will be dismissed as improvidently awarded, and the cause sent back for further proceedings.

In March, 1861, Robert J. Echols, in his own right and as guardian of Lewis P., Sterling C., and Susan V. London, infant children of John J. London deceased, filed his bill in the Circuit court of Nelson county, for, among other things, the sale of the real and personal estate of his wards. The real estate consisted of a large tract of land on James river in the county of Nelson, containing fifteen hundred and forty-

***Judicial Sales—Validity of—Purchaser Must Be a Party.**—In *Heermans v. Montague* (Va.), 20 S. E. Rep. 904, the court said: "While purchasers at judicial sales are universally regarded as parties to the suit under a decree in which they purchased, yet, unless they are already otherwise parties, the mere fact of their being purchasers does not bring them sufficiently before the court to make it proper to render a decree affecting their interests without any further notice to them. *Parker v. McCoy*, 10 Gratt. 504; *Hughes v. Johnston*, 12 Gratt. 479; *Pierce's Adm'r v. Trigg's Heirs*, 10 Leigh 406; *Londons v. Echols*, 17 Gratt. 29." See also, principal case cited as to this point in *Estill v. McClintic*, 11 W. Va. 424.

five acres, called "Soldier's Joy," and a house and lot in the city of Richmond; and the personal estate embraced some sixty slaves. The bill made the children of John J. London deceased, Mrs. Echols, who was his widow and had married the plaintiff, and the trustees in her marriage settlement, and Daniel H. London, William A. London, James Higginbotham and wife, Tirza London, Winston Woodruff and wife, and George W. Davis and wife, defendants, Daniel H. London, and those named after him being made parties as the persons who would be entitled to the estate of the infants, if they died under the age of twenty-one years.

16 *At the March rules 1861, the plaintiff's bill was taken for confessed, as upon service of process returned executed, unless the defendants should appear at the next rules and file their answers; and at the April rules the defendants still failing to appear and file their answers, the bill was taken for confessed and the cause set for hearing. At the October rules 1862, on the motion of the plaintiff, S. H. Loving was appointed guardian ad litem of the infants to defend them in this cause.

James Higginbotham and the trustees of Mrs. Echols filed their answers, and a formal answer was put in by the guardian ad litem, but was not sworn to.

In November, 1862, evidence was taken upon interrogatories agreed upon and signed by Loving as the guardian ad litem of the infants, and the counsel of the plaintiff, in relation to the propriety and expediency of a sale of the real estate and slaves; and this evidence was strong to show that the interest of the infants required it.

By a written agreement, bearing date the 12th of November, 1862, Echols made a sale of the Soldier's Joy tract of land to Dr. Peachy H. Gilmer, for the sum of fifty-two thousand five hundred dollars; of which there was to be paid in cash when a good and clear title was made, twenty thousand dollars, with the privilege of paying at the same time an additional sum of three or ten thousand dollars; and for the residue Dr. Gilmer was to execute his bonds on six years' time, in equal annual payments, bearing interest from the date of the deed, to be paid annually, with a lien upon the land to secure the credit payments. This sale was conditional upon its being approved and confirmed by the court.

At a special term of the court held on the 19th of November, 1862, the cause came on to be heard (as recited in the decree), as having been regularly set for hearing at the rules against Daniel H. London,

17 William A. London, *Davis and wife, and Woodruff and wife, and upon the answers of James Higginbotham, the trustees of Mrs. Echols and of the guardian ad litem, and upon the bill, exhibits and depositions. And the court was of opinion and decided that it was manifestly the interest of the infant defendants and all concerned that the real and personal estate in the proceedings mentioned should be sold, and the proceeds thereof invested in interest

bearing stocks. "And it appearing to the court that the plaintiff, pending this suit, to wit, on the 12th instant, has negotiated a provisional sale of the Soldier's Joy estate situated in this county, containing fifteen hundred and forty-five and a quarter acres, to Peachy H. Gilmer, at the gross sum of fifty-two thousand five hundred dollars; twenty thousand dollars of which sum to be paid when a good and clear title is made him, and for the residue to execute six several bonds for equal sums, payable in one, two, three, four, five and six years, with interest from the date of the deed conveying him title, and a lien reserved in the deed for unpaid purchase money, and moreover that the said Gilmer is to pay annually the interest upon the whole purchase money to be secured by the said bonds, the court doth in all things ratify and confirm the said sale, and will proceed as hereinafter provided, to execute the same. The court doth therefore adjudge, order and decree, that so soon as the said Peachy H. Gilmer shall deposit the sum of twenty thousand dollars in the Citizens' Savings Bank of Lynchburg to the credit of this suit, and execute his bonds for the deferred payments to the plaintiff as commissioner of this court, and deposit the same with the papers in this cause, then the court appoints Robert Whitehead a commissioner to convey the legal title of said land to the said Peachy H. Gilmer (reserving the lien aforesaid), in which deed the defendant Maria W.

18 Echols must unite." The decree then proceeded *to authorize the sale of the house and lot in Richmond, and the slaves, with directions to deposit the proceeds of sale in the Citizens' Savings Bank of Lynchburg.

In April, 1863, Echols reported to the court, that Dr. Gilmer had deposited twenty-five thousand dollars in the Citizens Savings Bank of Lynchburg, and had executed his six bonds for the balance of the purchase money, according to the terms of the decree; and that Robert Whitehead had executed and delivered to Gilmer a deed for the land, in which a lien for the unpaid purchase money was reserved; and in which the plaintiff and his wife had joined. And the cause coming on again to be heard on the 28th of April, 1863, this report, as well as the report of the sale of the slaves, was confirmed.

Daniel H. London for himself, and as next friend of the infants, and the other heirs of these infants having in April, 1864, given a notice to Echols that they would move the judge in vacation to set aside the decrees made in this cause for irregularities in the proceedings, in October, 1864, Echols filed an amended bill for the purpose of correcting these irregularities; and he took testimony to prove the expediency of the sale he had made to Dr. Gilmer.

The motion of which notice was given was not made, but London, as the next friend of the infants, applied to this court for an appeal from the decrees of the 19th

of November, 1862, and the 28th of April, 1863; which was allowed.

John Howard and Green, for the appellants.

Grattan, Macfarland and N. Howard, for the appellees.

19 The only question discussed by the council or decided *by the court, was, whether the court would decide upon the objections to the decrees taken in the petition of appeal, in the absence of the purchaser.

JOYNES, J., delivered the opinion of the court:

The court is of opinion that this case is ruled by that of Hughes and wife v. Johnston, 12 Gratt. 479. The interests of all parties will be best promoted by remanding the case to the Circuit court, to be there further proceeded in, after the purchaser of the "Soldier's Joy" estate, and those claiming under him, if any, and all other parties interested, shall have been brought before the court. Then the alleged irregularities of the proceedings can be investigated upon the evidence now in the cause, and such other as any of the parties may produce, and may be corrected, if they admit of correction; defective proof may be supplied, as far as may be proper; any accounts may be taken which may be necessary to do justice between the parties. And the court, with all the facts and all the parties interested before it, can determine, without the risk of injustice, whether the sale, which is the main subject of controversy, should stand or be set aside.

It would be contrary to natural justice, and to the practice which has prevailed in like cases, to conclude the purchaser, whose purchase has been confirmed and consummated by a conveyance of the title, by a decision of these questions before he has been brought before the court. The purchaser was brought before the court by supplemental proceedings in *Pierce's adm'r v. Trigg's heirs*, 10 Leigh 406, and in *Parker v. McCoy*, 10 Gratt. 594, as well as in *Hughes and wife v. Johnston*, 12 Gratt. 479, before cited; while, in *Huston's adm'r v. Cantrill*, 11 Leigh 136; *Cocke's adm'r v. Gilpin*, 1 Rob. R. 26, and *Buchanan v. Clark*, 10 Gratt. 164, there *was no necessity to resort to supplemental proceedings, because the purchaser was already a party in the cause.* See also *Bank United States v. Ritchie*, 8 Peters R. 128; *Colclough v. Sterum & al.*, 3 Bligh P. Cas. 181; *Coger v. Coger*, 2 Dana's R. 270; *McKee's heirs v. Hann*, 9 Dana's R. 526; *Parker's heirs v. Anderson's heirs*, 5 Monr. R. 445.

It is, therefore, adjudged, ordered and decreed, that the appeal in this case be dismissed as improvidently allowed, that

*Note by the Judge. Such was the case also of *Rodgers v. McCluer's adm'r*, 4 Gratt. 81, as I have ascertained from the original papers. Noffsinger was the purchaser.

Daniel H. London, the next friend of the appellants, who are infants, pay to the appellees their costs, and that the cause be remanded to the Circuit court to be there further proceeded in according to the foregoing opinion, in order to a final decree.

Appeal dismissed as, improvidently allowed.

21 *Brockenbrough's Ex'ors v. Spindle's Adm'rs.

April Term, 1866, Richmond.

1. *Usury—Statutes—Construction of.*—The 10th section, chapter 141, Code of 1860, authorizing a debtor, by bill requiring no discovery of the defendant, to pray an injunction to prevent the sale of property conveyed to secure the payment of money or other thing, borrowed at usurious interest, &c., was designed to adopt the principle of the case of *Marks v. Morris*, 3 Munf. 407, which had been overruled by the *Bank of Washington v. Arthur*, 3 Gratt. 173, and *Bell v. Calhoun*, 8 Id. 22, and therefore permits such bill to be filed against the representatives of the lender after his death.

2. *Same—Same—Relief of Borrower.*—Where a borrower is entitled to relief under this section of the statute, he is to be relieved from the whole debt, both principal and interest, and not merely the usurious excess.

3. *Same—Same—Function of Issue.*—The issue, "whether or no the transaction be usurious," directed by this section to be made by the court and tried at its bar by a jury, is the sole object and not an incident of the suit. Its purpose is, not to inform the conscience of the court, but to conclude the question of fact; and the court is bound to decree in accordance with the verdict, unless for good cause a new trial be granted.

Semble.

The better practice is, that all proceedings under this statute, including the trial of the issue should be had in chancery, although in this case the issue was tried on the law side of the court, and such practice upheld.

**Usury—Statutes—Construction of.*—See the principal case cited and approved in the following cases: *Turner v. Turner*, 80 Va. 382; *Belton v. Apperson*, 26 Gratt. 218; *Davis v. Demming*, 12 W. Va. 270.

†*Same—Same—Relief of Borrower.*—For the proposition that, under section 10, chapter 141, Code of 1860, when the borrower is entitled to relief he is to be relieved from the whole debt, both principal and interest, and not merely from the usurious excess, the principal case is cited and approved in *Davis v. Demming*, 12 W. Va. 273. But see § 2818, Code of 1887, where this rule is modified.

‡*Same—Same—Function of Issue.*—For the proposition that, an issue under section 10, ch. 141 Code, 1860, may be tried on either the law or equity side of the court, the principal case is cited and approved in *Ayres v. Robins*, 30 Gratt. 120. In *Vangilder v. Hoffman*, 22 W. Va. 6, it is said: "If the appellee is correct, that his bill entitles him to the benefit of the said tenth section, then, of course, there was no error in directing the issue, because, under that section the plaintiff is entitled as a matter of right to an issue. *Brockenbrough v. Spindle*, 17 Gratt. 21; *Davis v. Demming*, 12 W. Va. 246."

4. *Same—Proof of.*—It is the established rule of this court, that to convict a person of usury, the usury must be proved beyond a rational doubt to the contrary.

5. *Same—Case at Bar.*—S, in urgent need, asks G where he can get money. G applies to B, and is told by B that he has no money to lend. Believing that Virginia state stock would relieve S, it is suggested by G that such stock would answer in lieu of money; to this proposal B replies that he might perhaps accommodate S, and G in-

forms S of what B said. Subsequently B caused the required amount of stock to be transferred in accordance with the direction of S, who executes to B his bond for \$11,000, payable three years after date with legal interest. The sum of \$11,000 was the par value of the stock, while its cash market value, at the time, was but \$91 in the hundred. **Held:**

The transaction was a fair sale, and not a device to cover an usurious loan of money. The case not distinguishable in principle from *Selby v. Morgan*, 3 Leigh 577, which is approved and confirmed.

6. *Usury—Question of Law and Fact—Appellate Practice.*—The question of usury is a question of law and fact; and the facts being ascertained, it is for the court to determine whether they constitute usury. And the appellate court will pass upon the question either upon an instruction setting out the facts proved and asking the court to instruct the jury that they do not constitute usury, or upon a motion for a new trial, where the court certifies the facts proved.

This is the first case which has come to this court arising under the 10th section of chapter 141 of the Code, p. 625, which is as follows:

"Upon a bill requiring no discovery of the defendant, but praying an injunction to prevent the sale of property conveyed to secure the re-payment of a sum of money or other thing, borrowed at usurious interest, the court shall cause an issue to be made and tried at its bar by a jury, whether or no the transaction be usurious; on the trial of such issue, neither the bill nor the answer shall be given in evidence. If the jury find the transaction usurious, then the same relief shall be given, as if the party claiming under the conveyance had resorted to the court to make his claim

§*Same—Same—Proof of.*—Upon the proposition laid down in the seventh headnote of the principal case, that, to convict a person of usury, the usury must be proved beyond a rational doubt to the contrary, the principal case is cited and approved in the following cases: *Swayne v. Riddle*, 37 W. Va. 291, 16 S. E. Rep. 513; *Vangilder v. Hoffman*, 22 W. Va. 18; *Hall v. Norfolk, etc., R. Co.*, 44 W. Va. 40, 28 S. E. Rep. 759; *Turpin v. Sleds*, 23 Gratt. 240; *Town of Danville v. Pace*, 25 Gratt. 21; *Ward v. Cornett*, 91 Va. 683, 22 S. E. Rep. 494; *Ware v. Bldg. Assoc.*, 95 Va. 684, 29 S. E. Rep. 744.

§*Same—Question of Law and Fact—Appellate Practice.*—That the question of usury is one of law and fact, see the principal case cited and approved in *Brummel & Co. v. Enders*, 18 Gratt. 873.

See upon the question of Usury, monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 698.

available. But the court may grant new trials, as in other cases."

In conformity with this section, and for the purpose of obtaining the benefit thereof, S. W. Spindle's administrators filed their bill in the Circuit court of Essex, charging that a bond, executed by their intestate to Austin Brockenbrough, for eleven thousand dollars, bearing date 23 the 15th day of June, 1857, payable three years after date, with legal interest thereon, payable semi-annually on the first day of July and first day of January, respectively, and a deed of trust bearing the same date, conveying land and slaves to secure the payment of the said bond, were executed for money loaned by Brockenbrough to Spindle, at a greater rate of interest than that allowed by law, and were therefore usurious and void; making Brockenbrough's executor and executrix and the trustee in the deed defendants to the bill, but requiring no discovery of them; and praying an injunction to prevent a sale under the said deed, and that an issue might be made by the court and tried at its bar by a jury, whether or no the aforesaid transaction was usurious. The injunction was awarded.

To this bill Brockenbrough's executor and executrix filed their answer; denying that the said bond and deed of trust were given for money loaned, or that there was any usury whatever in the transaction; but averring that they were given for state stock bona fide sold at par by Brockenbrough to Spindle. The plaintiffs replied generally.

The cause coming on to be heard on the bill, answer, replication and exhibits, the court decreed that a jury be impaneled at its bar to try and determine whether the bond and deed of trust aforesaid were or were not executed upon a usurious consideration. The issue was tried on the law side of the court, and the jury found that the bond and deed of trust were executed upon a usurious consideration. On the motion of Brockenbrough's executor and executrix to set aside the verdict and grant them a new trial on the ground of after discovered evidence, the verdict was accordingly set aside and a new trial granted.

Upon the new trial the jury found a 24 similar verdict. *The executor and executrix of Brockenbrough, on the trial asked for five instructions to the jury, the third of which and also the first, with a slight modification, were given; but the second, fourth and fifth were refused; and they excepted. After the verdict was rendered, the said executor and executrix moved the court to set aside the verdict and award a new trial, which motion was overruled; and they again excepted; and on their motion the court certified the facts proved at the trial. The facts are stated by Judge Moncure in his opinion.

The second and fourth instructions are not noticed by this court, and therefore need not be stated. The fifth instruction, after setting out the evidence substantially as it was certified by the judge, and as it

is given in the opinion of Judge Moncure, asked the court to instruct the jury as follows: "Unless there be other evidence to show that the bond and deed of trust in the issue mentioned were executed on a usurious consideration, that they must find that the said bond and deed of trust was not executed upon a usurious consideration."

The proceedings on the trial of the issue having been certified from the law to the chancery side of the court, the cause came on to be finally heard on the 16th of November, 1860, when the court perpetuated the injunction, with costs. And thereupon Brockenbrough's executor and executrix applied for and obtained an appeal to this court.

The case was most ably and elaborately argued by James Alfred Jones and Conway Robinson, for the appellants, and N. Howard and Macfarland, for the appellees.

MONCURE, J., after stating the pleadings and proceedings in the cause, proceeded as follows:

25 *Before I proceed to consider this case upon its merits, I will notice some questions raised and discussed in the argument, as to the proper construction and effect of the section under which this suit was instituted.

The first of these questions strikes at the whole foundation of the suit. It is whether such a bill can be filed after the death of the supposed usurious lender. It was argued that the usury laws were highly penal, involving the entire loss of the debt, both principal and interest; that it ought not to be considered that the legislature intended to enforce that heavy forfeiture through the agency of a court of chancery, invoked by the borrower or his representatives against the representatives of the lender after his death, unless such intention plainly appears; and that, construing the section in question in connection with other sections of the same chapter, and with the general principles of equity, it cannot be fairly inferred that such was the intention of the legislature.

The section is general in its terms, embracing all cases, whether between the original parties or their representatives; and requires no discovery of the defendant, which is made the foundation for the relief afforded by other sections of the chapter. This section was engrafted in the Code, for the first time, in the revision of 1849; and a reference to the note of the revisors appended to chapter 141, and to the cases noted in the margin of the Code opposite the tenth section of that chapter, and other cases since decided by this court, will show that its true meaning accords with its literal terms. In the case of Marks v. Morris, 2 Munf. 407, it was decided that a borrower of money at usurious interest secured by deed of trust containing a power of sale, might come into a court of equity and have the sale enjoined, until, by some proper proceeding to be instituted by the creditor, he should establish the validity of his

26 contract; in which case the *injunction was to be dissolved, and in the contrary event perpetuated. 2 Rob. Pr. old edition, '63-'4. The reason of this decision was, that such a borrower had no day in court, as other borrowers have; and though he had tied his own hands, yet he was considered as not a free agent, but rather as the slave of the lender, and therefore entitled to the same mode of defence and measure of relief as if the deed had not been made. Much fault was found with this decision, which was from time to time questioned, shaken, or confirmed by this court in subsequent cases (*Id.*), until it was at length overruled. *Bank of Washington v. Arthur, &c.*, 3 Gratt. 173; *Bell, &c. v. Calhoun*, 8 *Id.* 22. The design of the tenth section was to adopt the principle of the case of *Marks v. Morris*, and give it the form and force of statutory law. It therefore applies, as the principle, of that case applied, to all cases where there is a deed of trust to secure an alleged usurious debt, whether the parties to the usurious transaction be alive or dead.

The second question is, as to the measure of relief intended to be given by this section; whether it extends to the whole debt and interest, or only to the usurious excess. If I am right in supposing that the legislature intended to adopt the principle of *Marks v. Morris*, then it follows that the measure of relief extends to the whole debt and interest tainted by the usury; as it did in that case, and as necessarily resulted from the reason on which the case was founded. The intention would perhaps have been more plainly expressed if the section had directed the injunction to be perpetuated or dissolved, according to the result of the issue. But it is, I think, sufficiently expressed to the same effect by saying: "If the jury find the transaction usurious, then the same relief shall be given, as if the party claiming under the conveyance had

27 resorted to the court to make his claim available." *courts of equity, as well as courts of law, are bound by the statute against usury, and must both alike treat a usurious contract as null and void in any suit brought by a party to enforce such contract. It is only in a suit in equity, brought by a party to be relieved from such a contract, that the court, by applying its maxim that he who asks must do equity, can lay upon him the terms of paying the principal and legal interest as the price of relieving him from the usurious excess; unless the case comes under the 7th section; in which case he is compelled to pay the principal only without any interest, and recovers his costs of suit. It is needless to enquire whether there may not be cases in which a party claiming under a conveyance executed to secure a usurious debt, and resorting to a court of equity to make his claim available, may be entitled to some relief, as this is not such a case. It was in reference to this difference in the measure of relief given by a court of equity, according as the usurious borrower or lender

is plaintiff in the suit, that the language just quoted from the 10th section was used: which was in effect saying, that if the jury find the transaction usurious, then although the borrower is plaintiff in the suit, the same relief shall be given him as if the lender were plaintiff seeking to make his claim available. If therefore the jury was right in this case in finding the transaction usurious, the court was right in perpetuating the injunction.

The third and only remaining question on this branch of the subject is, as to the nature of the issue and mode of trying it, and the effect of the verdict, and of the character of the proceedings in this case. An issue directed by a court of chancery in an ordinary suit refers a doubtful question of fact to the decision of a jury, to which such questions properly belong, and the object of it is to satisfy or inform the 28 conscience of the court. It *is a mere incident to the suit, which may or may not be proper, according to the nature and state of the case. The court decides the case not upon the verdict only, but also upon the pleadings and the proofs, and may decide it even against the verdict. The issue is tried before a law court, sometimes on the law side of the court which orders it (if it has a law as well as chancery side), and sometimes before another court. The court before which it is tried decides law questions arising in the progress of the trials, signs bills of exceptions taken to its opinions, and certifies against the verdict if that is its opinion, but does not set it aside. The verdict and all the proceedings on the issue are certified by the court of law to the court of chancery; to which latter court a motion for a new trial of the issue, if desired, must be made; and that court will order it or not, as upon the whole case may seem to it to be proper, and may refuse to do so, notwithstanding any errors committed by the court of law in rejecting or admitting testimony, or instructing or refusing to instruct the jury, provided the verdict, in the opinion of the court of chancery, was unaffected by such errors.

The issue provided for by the 10th section of chapter 141 of the Code is a very different thing in its nature and effects from the issue just described. It is the sole object, and not the mere incident of the suit. It is not to inform the conscience of the court, which is bound to decree according to the verdict, unless for good cause a new trial be granted. It is to be tried in the same manner and the verdict is to have the same effect as if the suit were an action at law to recover the debt alleged to be usurious. According to the principle of *Marks v. Morris*, the sale under the trust deed was enjoined until the plaintiff could have an opportunity of defending himself at law in any action which might thereafter be

29 brought against him to recover the debt or the property *conveyed by the deed. Instead of that, the 10th section provides that the plaintiff shall at once have the opportunity of making his

defence, in an issue to be tried at its bar by a jury. The statute seems to contemplate that all the proceedings, including the trial of the issue, are to be had in the chancery cause, instead of having the issue tried on the law side of the court, and the verdict and other proceedings on the trial certified from that to the chancery side of the court, according to the formality observed in the case of an ordinary issue out of chancery. I can see no well founded objection to the former course, and it seems to be recommended by its simplicity and directness. The latter, however, was pursued in this case. But the difference is only in form, and the substance and effect are the same. All the proceedings were conducted before the same court, and ought to be regarded as proceedings in one and the same suit. So regarding them, all the errors of the said court (whether on its law or chancery side), committed in the suit, are subject to the supervision and correction of this court. With these views I will proceed to consider the case upon its merits.

The question upon the merits, whether the bond and deed of trust in the proceedings mentioned were or were not executed upon an usurious consideration, is presented both by the exception taken by Brockenbrough's representatives to the refusal of the Circuit court to give their fifth instruction, and by their exception to the refusal of the court to set aside the verdict and award a new trial. All the evidence given on the trial is set out in the first bill of exceptions, and is substantially the same with the facts certified by the court to have been proved at the trial.

These facts, so far as they seem to be material, are in substance as follows:

Spindle was indebted to the guardians of William L. *Waring's children in the sum of \$10,000, payable in three equal instalments on the 1st January, 1857-'8 and '9, with interest from 1st January, 1856. The instalment due 1st January, 1857, was not paid by Spindle when due, and judgment was obtained against him for it at the spring term 1857 of Essex Circuit court, and execution issued. Spindle, being pressed for payment of said execution, requested Mr. Garnett to enquire where the sum of \$10,000 could be borrowed, which sum he desired and intended to apply to the payment of the \$10,000 due to the Waring's as aforesaid. Garnett applied to Brockenbrough to know if he could lend that sum; Brockenbrough's reply was, he had no money to lend. Garnett knew that the persons to whom Spindle desired to pay said sum were directed by decree of the Circuit court of Essex to invest the same in stock of the state of Virginia, and suggested to Brockenbrough that if he had such stock which he could let Spindle have, it would answer his purposes. Brockenbrough replied, if state stock would answer Spindle's purpose, perhaps he, Brockenbrough, could accommodate him. Nothing more passed at that time between Brockenbrough and Garnett. Garnett informed Spindle of

Brockenbrough's answer, and, at Spindle's request, it was ascertained that the parties to whom he was indebted as aforesaid, were willing to take state stock in lieu of money. Some time afterwards Brockenbrough was furnished by the attorney of said guardians with a statement showing in what names and proportion the stocks were to be transferred. Brockenbrough after that, applied to one of the parties to whom said stock was to be transferred, to know if he would not take guaranteed bonds of the James River and Kanawha company; but said party refused, and would take only state bonds. Some time afterwards, Brockenbrough went to the city of Richmond

31 about the stock, and on the 3d of August, 1857, certain state bonds, amounting in the aggregate to \$11,000 principal, bearing interest from 1st July, 1857, were transferred on the books of the second auditor, to the respective guardians of the Waring's, as described and set forth in the certificate of facts. At the time of the transfer none of these bonds stood in the name of Brockenbrough on the books of the second auditor, but they stood in the name of other persons by whom, or their attorneys in fact, the transfers were made. Afterwards, in the same month of August, 1857, the certificates of said stock were delivered by Brockenbrough or his agent, by Spindle's direction, to the said guardians of the Waring's; and at the same time the bond and deed of trust in the proceedings mentioned, bearing date on the 15th day of June, 1857, and executed to secure the payment by Spindle to Brockenbrough of \$11,000 (the par amount of the said state bonds so transferred), three years after the said date, with legal interest thereon, payable semi-annually, on the first day of July and January, respectively, were delivered to Brockenbrough by Spindle's agent. The cash market value of the said stock was \$91 in the hundred at the time the Waring's agreed to take it from Spindle, and was received at that price. Its par value was and is \$100. Brockenbrough was a man of wealth and in the habit of lending money, and was an owner of and dealer in stocks. At the time of his death, in December, 1858, he owned stocks to the amount of \$97,000, of which \$36,000 were in Virginia state bonds, dated at different periods from 1837 to 1854, but held no guaranteed bonds of the James river and Kanawha company. Guaranteed bonds sold in the market, universally, for less than state bonds. On one occasion the state failed for two successive years, about 1857 and 1858, to pay interest on her stock for a period of six or eight months.

At one time state bonds were worth in 32 the market more than par. On one occasion Brockenbrough loaned to Q. S. Farland, on terms proposed by himself, \$1,500 for six months, for which interest was paid in advance, and also a premium of \$45. On another occasion Brockenbrough lent the same person \$2,000 for ninety days, at legal interest, and at the maturity of the debt the latter proposed to pay, and did pay

\$350 of it in money, and the balance, \$1,650, on a bond of a third party for \$1,700 or \$1,750, assigned to Brockenbrough. On many other occasions Brockenbrough had loaned said Farland money at six per cent. per annum, and never demanded of him more than six per cent., except as aforesaid on his own proposal. On divers other occasions and to divers other persons, Brockenbrough lent out money without exacting or receiving more than legal interest therefor.

Upon the foregoing facts the jury found the transaction between Brockenbrough and Spindle to be usurious, and the court refused to set aside the verdict. The question now to be considered is, were they right in so doing?

The law against usury is a highly penal law. However small may be the amount of usurious interest contracted for, and however large the amount of money loaned, the contract is declared void, and the lender forfeits the whole amount of the debt and interest; and if he actually receive the usurious interest, or any part of it, he moreover forfeits double the value of the amount loaned. That strong and clear proof should be required to convict a man of usury, and subject him to all the consequences of such conviction, is a proposition which rests on the plainest principles of law, and can require a citation of no authority for its support. It is emphatically affirmed by some of our judges in the following, among other cases; and is, I believe, denied by no judge in any case.

Crenshaw's adm'r v. Clarke, &c., 5 33 Leigh 65; *Grigsby v. Weaver, Id. 191; Smith v. Nicholas, &c., 8 Leigh 330. The usury ought to be proved beyond a rational doubt to the contrary. Is it so proved in this case?

The bond and deed of trust, on their face, are fair and legal, and show no usury. They provide for the payment and security of a certain sum of money, payable three years after date, with legal interest payable semi-annually. They were given for state bonds of the same amount, bearing the same interest, payable semi-annually, sold and delivered by Brockenbrough to Spindle.

It is contended in behalf of Spindle that the transaction was in fact a loan to him by Brockenbrough of \$10,000 for \$11,000, payable three years after date, with interest from date, payable semi-annually; and that it was put in the form of a sale of state bonds as a mere shift or device to evade the law against usury. On the other hand, it is contended in behalf of Brockenbrough that the transaction was in fact, what it purports to be in form, a sale of state bonds and not a loan of money. If the former be the true character of the transaction, then it is clearly usurious. But if the latter be its true character, then it is equally clear that it is not usurious.

That state bonds may lawfully be sold on credit at par when they are below par in the market is admitted, and cannot be denied.

Nothing is better settled, in Virginia and elsewhere, than that stock, bonds and notes may be sold, like any other property, at any price not above par which may be agreed between the parties. And sales of stock and notes on credit at par when the market price was as much as twenty per cent. below par, have been sustained as lawful by this court. West v. Belches, 5 Munf. 187; Greenhow's adm'r v. Harris, &c., 6 Munf. 472; Selby v. Morgan, 3 Leigh 577. The cash market price of the state bonds sold in this case was nine per cent. below par at the time of the sale. In Greenhow v. Harris, Judge Roane says: "I distinctly admit the right of a party to sell property, such as bank shares, at whatever price is agreed on. The transaction becomes usurious only when the object is to borrow money, and not to purchase stock, and the price of the stock is graduated as a device to effect the purpose; or where there is a combination between the seller of the stock on credit and the purchaser for cash." The sale, to be valid, must of course be bona fide, and not a mere pretence to cover a usurious loan. Then, was the transaction in this case a bona fide sale of state bonds, or a disguised loan of money at usurious interest?

It was in form a sale of bonds. Why was it not so in fact? Had Brockenbrough any conceivable motive for making a loan instead of a sale? Had he not the strongest motive for making a sale instead of a loan? Such a sale was lawful. He had \$36,000 in state bonds, which the law gave him a right to sell to the best advantage, and which he certainly had a right to sell on three years' credit at par. They had been issued, every one of them, at par by the state, which was bound to pay the full amount at maturity in gold or its equivalent, and to pay legal interest thereon in the meantime semi-annually. State bonds had at one time been worth in the market more than par; and might again be worth more when or before Spindle's bond was to become payable. Brockenbrough may have given more than par for some of the bonds held by him. There is nothing unreasonable or unfair, in appearance at least, in a sale or exchange of these bonds for the bond of an individual of like amount, payable three years after date. It may well be supposed that the market value of the former was at least equal to that of the latter; and there is nothing in the record to show that the former would not have sold in the market at par on a credit of three years. "If A holds the note of B for \$100 and legal interest, and he exchange it with C for his note for the same sum and legal interest, and B and C are both solvent, the transaction in no way trenches upon the statute against usury." So said Mr. Justice Story in delivering the opinion of the court in the Bank of the United States v. Waggener, &c., 9 Peters' R. 378, 402. Now that is precisely this case, except that here state bonds were exchanged for the bond of an individual, which surely can

make no difference. By making a loan instead of a sale, Brockenbrough would not only have done an unlawful act, but incurred a forfeiture of the entire debt. It must be presumed therefore that he intended to make a sale, as he had a right to do, and did in form do, unless it be clearly proved that he intended to make a loan. Is there any such proof in this case?

The fact that Spindle owed a large debt, for part of which he was pressed by execution, and wished to obtain money to discharge the debt, and that his situation and wish were known to Brockenbrough at the time of the transaction between them, are relied on as material to prove it usurious. They tend to awaken suspicion and induce scrutiny, and lead us carefully to enquire whether the transaction was usurious. But they certainly do not prove that it was. Brockenbrough had a right to sell his state bonds to the best advantage to any person who would buy them, no matter what the situation of such person was, and no matter what disposition he intended to make of them, even though Brockenbrough were fully informed of such situation and intention; provided the sale was not a mere device to evade the law against usury; and of that, we have seen, there must be strong and clear proof. Not only had Brockenbrough a right to sell, but Spindle had a right to buy the bonds, and for the very purpose of raising money by selling

36 them in the market to relieve "his necessities. They may have afforded him the very best means he could have resorted to for his relief, and may have saved his property from sacrifice at a forced sale under execution. It would be a strange state of things if he could not do for such a purpose what any unembarrassed man could certainly do for speculation merely. It may be said that this would be opening a wide door for the evasion of the usury laws. If it be clearly proved that the parties intended to make a usurious loan in the form of a sale, then of course the transaction will be illegal and void; but if it appear that a sale was really intended, then it is equally clear that the transaction is legal and valid. The difference between the two cases is, that the law allows the one and condemns the other; and though you cannot do what the law condemns, you may do what the law allows, even though the effect be precisely the same. The remarks made by some of the judges in *Hawkins v. Bennet*, 97 Eng. C. L. R. 507, cited by the counsel for the appellants, are here very appropriate; but I will not quote them. The law, in protecting needy men against usury, does not undertake to protect them against all improvident purchases and other acts to which they may resort for the purpose of raising money. It would be too great a clog on commerce and the right of alienation of property to do so, and might injure, rather than benefit, the very class which the usury laws were designed to protect. It is at least as much the policy of the law that the right of alienation of property should be unre-

strained as that usurious loans should be prevented.

Another fact relied on as material is, that the transaction was preceded by an offer to borrow money. A negotiation for a loan of money, afterwards turned into a sale, has been generally considered an important circumstance, tending to show that the transaction was usurious. But a mere offer 37 for a loan, though stress has *been laid upon it in some of the cases, is really of little or no importance except to excite inquiry. In this case the application for a loan was not for a moment entertained by Brockenbrough, but was promptly met by the plain and conclusive answer, "I have no money to lend." And here the communication between the parties would have ended. But it occurred just then to Garnett that the money which Spindle owed to the guardians of the Warings had been decreed to be invested by them in state bonds; that they might be willing to receive state bonds instead of money from Spindle, and that Brockenbrough had such bonds and might be willing to let Spindle have them, or enough to answer his purposes. And accordingly Garnett suggested to Brockenbrough that if he had state stock which he could let Spindle have it would answer Spindle's purpose: and Brockenbrough replied, if State stock would answer Spindle's purpose, perhaps he (Brockenbrough) could accommodate him. The arrangement was afterwards made and carried into execution accordingly. It appears to have been made and carried out in good faith, and I do not see how it can be considered usurious. To constitute usury there must be a loan, but here there was no loan. The proposition for a loan was at once rejected by Brockenbrough, and there is no reason to doubt that the rejection was in good faith. Spindle finding that he could not borrow money, but could buy state bonds, and ascertaining by inquiry of the Warings that, as the money when received had been directed by the court to be invested in state bonds, they would be willing to receive such bonds at their market value instead of money from Spindle, the latter accordingly bought the bonds of Brockenbrough, and had them transferred by him to the Warings. There was certainly no usury in the arrangement between Spindle and the Warings to pay 38 them in state bonds at their *market value—that is, \$11,000 in bonds in discharge of a debt of \$10,000 in money. Spindle being then indebted to the Warings in state bonds to the par amount of \$11,000, for the purpose of fulfilling his contract, buys them of Brockenbrough for the same amount on a credit of three years. This is plainly a sale, unless there be something in the case not yet noticed to show that it was a device for a loan.

The facts that after the arrangement was made between Spindle and Brockenbrough for the sale and transfer of the bonds, but before it was executed, though at what precise time does not appear, Brockenbrough

applied to one of the parties to whom the stock was to be transferred, to know if he would not take guaranteed bonds of the James river and Kanawha company; that said party refused and would take only state bonds; and that the guaranteed bonds sold in the market universally for less than state bonds, are also relied on as material. I cannot see that they are of any importance. Brockenbrough having made an arrangement with Spindle to transfer to the Warings \$11,000 in state bonds, and supposing that as they were to stand as a permanent investment for the benefit of infant heirs, guaranteed bonds might suit as well as state bonds, accordingly made an inquiry to that effect; but when told that state bonds only would be received, he proceeded to discharge his obligation by the transfer of state bonds. Whether his idea was to transfer guaranteed bonds, as of their market value, or as of the same market value with state bonds, we are not informed. Nor is it material. Nor is it material whether Brockenbrough had any guaranteed bonds or not at the time he made the inquiry. He might have had some at that time, though he had none at the time of his death.

Another fact relied on as material is, that the bond and deed of trust bear date on the 15th day of June, from
39 *which day the bond bears interest, while the state bonds bear interest from the 1st day of July following. This discrepancy is, I think, susceptible of easy explanation. The arrangement having been made, was no doubt intended to be carried into effect at the earliest convenience of the parties. Spindle wishing to be ready on his part, prepared and executed the bond and deed of trust on the 15th of June, and the latter was acknowledged by himself and wife, and certified for record by justices a few days thereafter. Brockenbrough did not complete the execution of the arrangement on his part until early in August thereafter, though the state bonds he transferred bore interest from the 1st of July preceding, just fifteen days after the day from which the bond on its face bore interest. It is impossible to suppose that the parties intended that one should bear interest before the other. This little matter was no doubt intended to be and probably has been adjusted between them. It might be adjusted by a simple endorsement on the bond, such as was made under similar circumstances in the Bank of the United States v. Waggener, &c., 9 Peter's R. 376. The bond was delivered in August, from which time only it was a complete obligation; and as interest, by the terms of it, was payable semi-annually on the 1st of July and January, as on the state bonds, the first half year's interest run from the 1st of July preceding, as in the case of the state bonds. No objection of this kind was taken on the trial, when it might have been explained. It ought not to be entertained now. To say the most of the matter it is a mere mistake or oversight, which can never constitute usury. To have that effect it must clearly

appear that the act was knowingly and wilfully done.

The only remaining fact which can be of any importance in showing that the transaction was usurious is, that the state bonds transferred by Brockenbrough to the
40 *Warings, stood on the books of the second auditor in the names of other persons than Brockenbrough at the time of the transfer; thus showing, or tending to show, that these bonds were purchased by Brockenbrough at the time and for the purpose of being transferred to the Warings. My first impression during the argument was, that this was a material fact in favor of the appellees, but their counsel attached little or no importance to it, and I am now satisfied that it is wholly unimportant. Brockenbrough at the time of the contract of sale held state bonds to the amount of \$36,000, and there is no good reason to believe that he did not intend to sell a portion of those bonds. It is probable that he did, as he then said he had no money to lend, and he expected no doubt to have to transfer the bonds very soon thereafter, when he might still have no money. The date of the contract does not appear. The bond and deed of trust of Spindle bear date the 15th of June, 1857, and the state bonds were not transferred till the 3d of August. By that time Brockenbrough may have received funds and had them in hand for investment. He had no doubt received his July interest on his stocks, which amounted to a large sum. Having an investment to make, it would be convenient to have the bonds purchased by him at that time transferred directly to the Warings, instead of bonds already standing in his name. This is a reasonable solution of the matter. It may be, however, though not probably, that these bonds, though standing in the name of others, were in fact his bonds at the time of the contract with Spindle. But however these things may be, it was admitted in the argument, and indeed has been admitted or decided by this court, that there may be a valid sale of stock at par when the market price is below par, though the vendor has no such stock at the time of the sale, or not enough to fulfill his contract, and has to go into the market and buy
41 it for the purpose. *Greenhow's adm'x v. Harris, &c., 6 Munf. 472; Selby v. Morgan, 3 Leigh 577.

It would be impossible to reconcile all the cases which have been decided in England and in this country on the subject of usury; and I will not be so rash as to attempt it. Nor will I comment upon the many cases which were cited by the learned counsel who argued this cause. There is one case, however, decided by our own court, which is, I think, conclusive of this, and which, therefore, I will especially notice. I mean the case of Selby v. Morgan, 3 Leigh 577. The marginal abstract of that case is this: "S., being under an urgent necessity to raise a sum of money, requests M. to assist his agent in negotiating a loan thereof at bank: M. lends his assistance, but the bank

refuses to lend the money; then M. proposes to S. to sell him bank stock at par upon a credit, the stock being then twenty per cent. below par in the market; and M. enters into a negotiation with the bank to borrow the money S. wanted for S. upon a pledge of the stock; the bank offers to lend the money upon a pledge of the stock and S.'s note endorsed by M.; and M. having thus settled the terms of the loan with the bank, sells his stock to S. at par on a credit, and, immediately, the bank lends S. a sum equal to four-fifths of the par value of the stock, on a pledge of the stock, and on S.'s note endorsed by M. Held, this is a fair sale of bank stock by M. to S., and not a device to cover an usurious loan of money." The case was earnestly argued by very able counsel, and was unanimously decided by the court, consisting of Judges Carr, Cabell and Brooke; President Tucker having decided the same case in the same way in the court below. The decision of this court was in 1832, and has never since been overruled, or, so far as I have seen, been questioned by any judge in any case. It is therefore a binding authority and must govern this case unless materially *distinguishable from it. It seems to me that in every material feature, that case has more the marks of a loan than this; if this can be said to have any. I refer to the facts of that case as set out in the report and to the opinion of Judge Carr, without quoting from them. It was argued in this case that in that the bank stock was bought to be used as a pledge for raising money and not to be sold, and was in fact so used. It was bought to be used by the purchaser according to his pleasure, and as might best serve his purpose of raising money. He was informed by the seller that it would serve his purpose, either by a pledge or a sale, though the former was recommended as preferable. But it can surely make no difference what the purchaser did with the stock. It was further argued that no application was made by S. to M. for a loan in that case, as was made by Spindle to Brockenbrough in this. But in that case S. had been trying in vain, through the agency of M. to borrow money from the banks to relieve his pressing necessities, when M. in communicating the failure of his efforts to S., proposed, as a measure of relief, to sell him bank stock at par, which was selling in the market at twenty per cent. discount. In this case Brockenbrough was not the agent of Spindle; rejected promptly the application of Spindle through Garnett for a loan; made no proposition at all for the sale of state bonds or otherwise, and only assented to a proposition of Garnett for such a sale for the accommodation of Spindle. There is a manifest difference between the two cases in this respect, but the difference is certainly and decidedly in favor of Brockenbrough in this case.

It was argued that the question of usurious intent in cases of this kind is a question of fact for the jury, and not a question of law for the court; and that the jury in

this case having decided the transaction to be usurious, their verdict ought not to be set aside even by the Circuit *court, and still less by this court; at least unless it was plainly wrong. The law which authorizes the proceeding in this case expressly provides that the court may grant new trials, as in other cases. The question of usury is a question both of law and fact. There cannot be usury without facts; and those facts, when they are controverted, must be tried and ascertained by the jury. Whether upon those facts the transaction be usurious, is a question of law which addresses itself alone to the court. It is argued that intention, or the "corrupt intent" as it is called, is a necessary element in the constitution of usury, and is a question which peculiarly belongs to the jury. But a man may be guilty of usury without actually intending it. The case of *Marsh v. Martindale*, 3 Bos. & Pul. 158, was a case of that kind. There the jury, in a special verdict, expressly found that Marsh did not think he was acting contrary to law, and yet the court decided that upon the facts found he was guilty of usury. A man must knowingly and intentionally commit the acts which constitute the usury, but the law presumes that he intended the necessary consequence of those acts, and presumes, even in opposition to the fact, that he knew those acts were usurious and unlawful. I will not review all the cases on this subject which were cited in the argument, but will notice only two which were decided by this court and settle the law beyond controversy. One of these is *Gibson v. Fristoe*, 1 Call 54, 63; in which the jury found a special verdict without finding a corrupt intent, and yet the transaction was held by this court to be in law usurious. The other is the case of *Stribbling v. The Bank of the Valley*, 5 Rand. 132. There the jury found a general verdict for the plaintiff, which the court below refused to set aside. This court reversed the judgment. In regard to an instruction asked for by the defendant, which, like the fifth instruction asked for here, "set out the whole evidence.

Judge Carr said: "The court refused the instruction, either on the ground that the question, whether the facts amounted to usury, belonged exclusively to the jury, or that the facts as stated did not amount to usury, and therefore did not justify a verdict for the defendant. Upon either hypothesis I think the court was wrong;" and he then proceeds to review the cases. He thought the court erred in refusing to give the instruction, and also in refusing to grant a new trial; the verdict being against law and evidence. Judge Green agreed with him on both of these points. Judge Cabell, the remaining judge who concurred in the decision, said nothing about the verdict, but was for reversing the judgment on the ground that the court erred in not giving the instruction. "It is contended," he said, "that the court could not give the second instruction asked for without invading the province of the jury. I

admit that it is the exclusive province of the jury to determine disputed facts. But when the facts of a case shall be ascertained by a special verdict, or shall be admitted by the pleadings, it is the province of the court to state the law arising upon those facts; and in all such cases the question, whether the facts constitute a sale or loan, or whether they constitute usury or not, is a question of law which the court must decide." "But the most usual mode of obtaining the opinion of the court on points of law, is for the party desiring it to move the court to instruct the jury. All that is necessary for this purpose is, for him to state his case hypothetically, and if it be pertinent to the cause, the court is bound to pronounce the law on the case thus stated." After this decision, which still remains in full force, there can be no doubt on the subject in this state. It is therefore a question of law for this court to decide, whether upon the evidence, as set out in the instruction, supposing it to be true, and

45 *whether upon the facts set out in the certificate of the court below, which are substantially the same, the transaction is usurious or not; and, if of opinion that it is not, it is the duty of the court to reverse the judgment, set aside the verdict, and award a new trial.

My opinion on this question has been already too plainly expressed to require repetition. The transaction on its face is a sale of state bonds at par for a sum of money payable at a distant day, with legal interest from the date, payable semi-annually. If it be in fact what it purports to be, it is a valid and legal transaction. None of the facts set out in the certificate are at all inconsistent with a bona fide sale of state bonds, or such as would not naturally occur, or might not even be expected to occur, supposing the sale to have been bona fide. To justify the verdict, usury ought to have been proved, as I have before said, beyond a rational doubt to the contrary. Instead of that, the facts certified by the court do not raise a well-founded suspicion of guilt. We cannot say of this case as Judge Roane said of *Greenhow's adm'r v. Harris*, 6 Munf. 472, "that it is possible and even probable that these transactions were founded in usurious views on the part of all the parties," and yet he could "not say so upon the record," but concurred with his brethren in deciding that the said transactions were not usurious. The jury must have found their verdict in this case either on mere suspicion and conjecture, unwarranted by the facts proved, or upon a misapprehension of the law; and in either case the verdict is against law, and ought to have been set aside. I think the court below erred, first, in refusing to give the fifth instruction moved for by the appellants; and secondly, in overruling their motion to set aside the verdict and award a new trial. Therefore (without expressing any opinion in regard to the other instructions refused to be *given), I am

46 for reversing the decree, setting aside

the verdict, and remanding the cause to the Circuit court for a new trial of the issue to be had therein, on which new trial, should the evidence be the same, substantially, as on the former trial, the court (if requested by the appellants) is to instruct the jury that if they believe the facts to be according to the said evidence, they ought to find the transaction not to be usurious.

JOYNES, J., concurred in the opinion of Moncure, P.

Decree reversed, and new trial directed.

47 *Fant & als. v. Miller & Mayhew.

October Term, 1866, Richmond.

1. **Pleading and Practice—Usury in Foreign State—What Plea Must State.**—A plea of usury of a foreign state, must state what the law of usury is in that state.

2. **Same—Nil Debet—Defences under.**—In an action of debt upon a negotiable note, the defence that the plaintiffs are not holders for value of the note, may be made under the plea of *nil debet*.

3. **Same—Special Plea—Defective—Case at Bar.**—A special plea is demurred to and the demurrer is sustained. At the same term, on motion of plaintiffs, the order is set aside, the defendants withdraw their joinder in the demurrer, the plaintiffs withdraw their demurrer, and then move the court to strike out the plea; which is done. The plea being defective, or setting up a defence which may be made under the general issue, which is then in the record, the striking out the plea does the defendants no injury, and is not error.

***Pleading and Practice—General Issue—Special Pleas Provable under the General Issue.**—Several subsequent cases cite the principal case as authorizing the rule that, where the general issue is pleaded, it is not error to reject a special plea alleging matter which could be given under the general issue. See

Steptoe v. Read, 19 Gratt. 6; Va., etc., *Ins. Co. v. Buck*, 88 Va. 519, 18 S. E. Rep. 973; *Hale v. The W. Va., etc., Co.*, 11 W. Va. 236; *Moore v. Wetzel County*, 18 W. Va. 641; *State v. Evans*, 33 W. Va. 420, 10 S. E. Rep. 793; *C. & O. Ry. Co. v. Rison (Va.)*, 37 S. E. Rep. 825.

In the *Guarantee Co. v. Nat. Bank*, 95 Va. 490, 28 S. E. Rep. 909, the court said: "The multiplication of pleas multiplies issues, and the multiplication of issues tends to embarrass and confuse juries, and to defeat the ends of justice. Courts do not, therefore, regard with favor the practice of multiplying issues by unnecessary pleas, and it is not error to exclude a plea which presents a defense that may be made under a plea already in. *Archer v. Archer*, 8 Gratt 539; *Fant v. Miller & Mayhew*, 17 Gratt. 47; *Elam v. Commercial Bank*, 86 Va. 92, 9 S. E. Rep. 498; *George Campbell Co. v. Angus & Co.*, 91 Va. 438, 22 S. E. Rep. 167."

See, in accord, *B. & O. R. Co. v. Polly*, 14 Gratt. 447; *B. & O. R. Co. v. Laffertys*, 14 Gratt. 478; *Merchants & Mechanics' Bank v. Evans*, 9 W. Va. 873; *Van Winkle v. Blackford*, 28 W. Va. 670; *Balt. & O. R. R. Co. v. Whittington*, 30 Gratt. 806; *Crews v. Farmers' Bank*, 31 Gratt. 348; *Fire Ass'n v. Hogwood*, 83 Va. 342.

See the decision of the principal case criticised in a note appended to *C. & O. Ry. Co. v. Rison*, 6 Va. Law Reg. 679.

Yet "no case has been found which was reversed

4. **Foreign Law—Effect of—Question for Court or Jury**—*Quere. QUERE:* Whether on a trial at law the construction and effect of the law of a foreign state are to be determined by the jury or by the court.

5. **Same—Construed by Court—Effect.**—In an action at law upon a note executed in a foreign state, the defendant moves to exclude the note as evidence, because by the law of the state where it was made, it was not competent evidence; and he offers the statute of that state in evidence upon that motion, which is rejected; the court being of opinion that the note might be read in evidence, notwithstanding the provisions of the statute. If the court gave the correct construction to the statute, the rejection is not ground for reversing the judgment, though it were held that it was for the jury to construe the statute.

6. **Conflict of Laws—Notes—Formal Validity of—Stamps.**—If the law of the state where a note is made, declares that it shall be void unless it is stamped, it is void everywhere and an action cannot be maintained upon it in another state.

7. **Same—Same—Same—Same.**—If in such a case the law only declares that the note shall not be available as evidence, an action may be maintained upon it in another state.

48 *8. **Same—Same—Same—Same.**—The stamp act of the state of Maryland does not avoid the instrument, but renders it unavailable as evidence; and an action may be maintained in Virginia upon a note made in Maryland; though it has not been stamped as required by the Maryland statute.[†]

9. **Same—Contracts to Pay Money—Situs of.**—A paper signed in blank in Virginia is sent to Maryland to be filled up there. It is filled up there, and at the same time and place is endorsed by the payee to the holders, for value; the note being in fact for the accommodation of the payee. This is a Maryland contract to be governed by the Maryland law; though the note is headed W, a place in Virginia.

10. **Usury—Law of Maryland.**—By the usury law of Maryland a contract or evidence of debt, though tainted with usury, is not null and void, but is a

because such pleas were admitted." C. & O. Ry. Co. v. Rison (Va.), 37 S. E. Rep. 325.

[†]See the statute copied in the opinion of JUDGE JOYNES.

[‡]**Conflict of Laws—Contracts—Situs of.**—The principal case was cited and approved on this point in *Bowman v. Miller*, 25 Gratt. 385; *Heflebower v. Detrick*, 27 W. Va. 26.

See also, *foot-note* to *Freeman's Bank v. Ruckman*, 16 Gratt. 126.

Same—Matters Affecting Remedy—Lex Fori.—In *Union, etc., Co. v. Pollard*, 94 Va. 155, 26 S. E. Rep. 421, the court said: "The admission of evidence and the rules of evidence are matters of procedure rather than matters touching the rights of the parties under their contracts, and are generally to be governed by the law of the country where the court sits. That portion of the statute does not affect either the validity, nature, or interpretation of the contract, but applies alone to the remedy; and in the enforcement of the contract in this State will not be regarded, but our mode of procedure will be followed. *Fant v. Miller*, 17 Gratt. 47; *Corbin v. Planters' Nat. Bank*, 87 Va. 661, 13 S. E. Rep. 98; *Story on Conflict of Laws* (8th Ed.). § 634a."

valid contract, upon which an action may be maintained to recover the principal and six per cent. per annum interest thereon; and is void for the excess.

11. **Conflict of Laws—Usury—What Law Governs.**—In an action in Virginia upon a note made in Maryland, on which more than six per cent. per annum of interest was charged, the plaintiff may recover the principal and six per cent. per annum; and where a separate note was given for the excess of interest, which is still in the hands of the plaintiff unpaid, he will be permitted to recover the principal of the note sued on and six per cent. per annum interest thereon.

12. **Negotiable Paper—Holders for Value—Case at Bar.**—Negotiable notes made for the accommodation of F are endorsed by him to the holders in consideration of money previously advanced by them to him, of money advanced to him at the time of the transfer, and of notes of F falling due at a future day, which they undertake to pay and do pay as they fall due; all of which amount to the full amount of the notes so endorsed to them. The holders are holders for value.

This was an action of debt in the Circuit court of Fauquier county, brought by Miller & Mayhew, of Baltimore, against John L. Fant and William F. Phillips, upon a negotiable note of three thousand seven hundred and fifty dollars. The action was one of four which were tried together, brought

by the plaintiffs against the defendants, *upon four notes for the same amount made by the defendants to E. L. Fant & Co., and endorsed by E. L. Fant, by the name of E. L. Fant & Co.; that being the name under which he did business.

In April, 1857, the plaintiffs recovered a judgment in the case against the defendants, which, upon an appeal to this court, was reversed in May, 1858; and the cause was sent back for a new trial. The grounds of this appeal was the exclusion of the following letter from E. L. Fant to the defendant John L. Fant.

Baltimore, June 7th, 1850.

Dear Father: I write in great haste. I have made a new arrangement with Miller & Mayhew, and have determined to go on again; they to advance me what money I want; but they say the amount is large, and want me to borrow for them your four blank notes, to be signed by yourself first and uncle William last; as they say they want them to raise money upon. They are only loaned to them, and are secured by the collaterals that I have placed with them, which amount to sixty thousand dollars. You can run no risk, either of you. Sign above the last line and let uncle William sign under your name, and send them back by mail. No trouble, I assure you both, can come to either of you, as Mr. Miller says he will see me through, and advance me all the money I want; and as the notes are loaned to Miller & Mayhew only, and for their accommodation, you see you can run no risk. I want your answer with the blank signatures by return mail.

Your affectionate son,
Mr. John L. Fant, E. L. Fant.
Warrenton, Fauquier County, Va.

Endorsed—Baltimore, Md., June 7th.
 50 *On the first trial the issues were upon the pleas of "nil debit" and "usury." After the cause went back, the defendants filed six special pleas. Five of these pleas set up in different forms and more or less detail the defence based upon the letter of E. L. Fant to his father, that the note sued on was signed by the defendants in blank, and sent to E. L. Fant, to be filled up and delivered to Miller & Mayhew, as a loan to them for their accommodation, and without consideration therefor, either from E. L. Fant or the plaintiffs. The sixth plea, after reciting the application to the defendants by E. L. Fant for their notes as a loan to the plaintiffs for their accommodation, and their signing the blanks and sending them to E. L. Fant, to be filled up and delivered by him to the plaintiffs as a loan to the plaintiffs, proceeds: The said plaintiffs caused and procured the said note in their declaration mentioned, to be written upon one of the said four pieces of paper, over the names of the defendants so signed as aforesaid, and procured the same to be endorsed by the said E. L. Fant & Co., and delivered to them in consideration of a loan of money by the said plaintiffs to the said E. L. Fant & Co.; upon which loan the said plaintiffs received a greater rate of interest than six per centum per annum; and so the said defendants say that the said plaintiffs are not and never have been bona fide holders for value of the said note in their declaration mentioned; and this they are ready to verify, &c.

The plaintiffs filed special replications to the first five special pleas, in which they denied any knowledge of the letter of E. L. Fant, or that the notes were lent to them for their accommodation; and averred that the notes were endorsed by E. L. Fant & Co. to the plaintiffs for full and valuable consideration. And upon these replications issues were made up. To the sixth plea the plaintiffs demurred; and the court sustained the demurrer.

51 *At the same term of the court, on the motion of the plaintiffs, the order sustaining the demurrer was rescinded; and thereupon the defendants by leave of the court withdrew their joinder in the plaintiffs' demurrer to the sixth plea; and the plaintiffs thereupon withdrew their demurrer to that plea. And the plaintiffs then moved the court to strike out the said sixth special plea of the defendants, and the court sustained the motion and struck out the plea.

The cause came on for trial at the April term 1860, when there was a verdict and judgment for the plaintiffs for three thousand seven hundred and fifty dollars, with six per cent. per annum interest from the 21st day of January, 1851, until paid, and their costs.

On the trial of the cause the defendants filed two bills of exception to rulings of the court, and also filed a bill of exception to the refusal of the court to grant a new trial. The first was, that the plaintiffs

having read in evidence to the jury the note and the endorsement thereon, on which the suit was brought, the defendants moved the court to exclude the note from going in evidence to the jury, because by the law of Maryland the paper on which it was written had not been stamped, pursuant to the stamp act of Maryland; and to that end offered to read in evidence to the jury the stamp act of the state of Maryland, which was admitted to have been the law of the state of Maryland at the date of the note; and to the introduction of which the plaintiffs objected. And the court being of opinion that the said note might be read in evidence in this state, notwithstanding the provisions of the Maryland statute, sustained the plaintiffs' objection, and excluded the said law from being given in evidence to the jury. For the provisions of the statute see the opinion of Judge Joynes.

When all the evidence had been introduced, the *defendants moved the court to give nine several instructions to the jury. Of these the first six were given. The third instruction was: "If the jury believe from the evidence that the note in the declaration mentioned was endorsed and delivered by the said E. L. Fant to the plaintiffs on a usurious consideration, then the plaintiffs are not bona fide holders of said note." The seventh, eighth and ninth are as follows:

7. Instruct the jury that if they believe from the evidence the defendants have received no consideration for the said note in the declaration mentioned, and that the said E. L. Fant negotiated and transferred the same to the plaintiffs upon a contract upon which interest at a greater rate than six per cent. per annum was reserved, then they must find for the defendants.

8. If the note in the declaration mentioned was given in part liquidation of a balance stated upon an account between the plaintiffs and the said E. L. Fant, and that interest at a greater rate than six per cent. per annum was embraced in the said balance, then the said notes are usurious, and the jury must find for the defendants.

9. If the jury believe from the evidence that the names of the defendants John L. Fant and William L. Phillips to the note upon which this suit is founded were signed by them to a blank piece of paper in the state of Virginia, and such piece of paper, so signed, was without consideration received by them, and solely for the accommodation of Edward L. Fant, transmitted to said Edward L. Fant, and received by him in the state of Maryland, and in that state filled up by him, and dated at Warrenton, in the state of Virginia, payable to him by the name and style of E. L. Fant & Co., and was by him negotiated to the plaintiffs; if such negotiation was made upon a contract between said payee and plaintiffs, usurious under the laws of Virginia, that the law of Virginia governs *the liability of the defendants, and the plaintiffs are not entitled to recover in this suit.

These instructions the court refused to give; and the defendants excepted. The exception sets out all the evidence in the cause, and is very voluminous, consisting almost wholly of documents and depositions, including the letter of E. L. Fant herein before given. There were also depositions of counsel practicing in Maryland, stating what was the law of that state on the subject of usury at the time of the execution of the note sued on, and the statutes of Maryland on the subject. These are stated sufficiently in the opinion of Judge Joynes.

In the bill of exceptions overruling the motion for a new trial, the court certified the facts substantially as follows: On the 28th of June, 1850, Edward L. Fant, who was at that time a merchant conducting business in the city of Baltimore, in the state of Maryland, under the name and style of E. L. Fant & Co., was in possession of the four pieces of paper, blank, except that the names of the defendants were written by themselves at the foot of each piece of paper; that he brought the papers, signed by the defendants, into the counting-room of the plaintiffs, in the city of Baltimore; they being also merchants in said city, trading in the name of Miller & Mayhew. That Edward L. Fant having due authority from the defendants to fill up negotiable notes over the said signature, then and there in the presence of William D. Miller, one of the said firm, under the supervision and suggestion of Miller, wrote over the signatures of the defendants upon each piece of paper, a promissory note for the sum of three thousand seven hundred and fifty dollars, payable to the order of E. L. Fant & Co., which notes are the notes upon which the four actions were instituted. As soon as the notes were filled up, Edward L.

Fant wrote the words E. L. Fant
54 Fant & Co., found on the *back of each note, and delivered the notes so endorsed to Miller, and they were put away in the place where Miller & Mayhew usually kept their securities or evidences of debt; and an entry was made upon the books of the plaintiffs, of bills receivable to E. L. Fant, debtor for the amount of said notes. The defendant John L. Fant is the father and William L. Phillips is the uncle of Edward L. Fant. It was further proved that in the state of Maryland, where said notes were so endorsed, they were at the time of their endorsement and since, mercantile securities subject to the law merchant. The consideration for which the four notes were so endorsed to the plaintiffs consisted of cash advanced, a note due to the plaintiffs and other notes due by E. L. Fant to various persons, payable at subsequent dates, which the plaintiffs assumed to pay, and did pay; which said notes and cash amounted to the sum of \$15,074.44, exceeding by \$74.44 the amount of the four notes. It was also proved that interest and commissions, amounting to \$1,253, being added to the sum of \$74.44, constituted the sum of \$1,327.44, for which E. L. Fant, by the name of E. L. Fant & Co., gave his

note to the plaintiffs to close the account; which said note was produced at the trial by the plaintiffs; the same not having been paid or taken up. A copy of this note, dated Baltimore, June 11th, 1850, and payable at ten months, and also a copy of the statement showing the several items of cash and notes above mentioned, are set out in the bill of exceptions; and it was proved that the note and statement were made on the 28th of June, and that the statement was then shown and delivered to Edward L. Fant.

It was also proved that in Maryland, where the said notes were endorsed to the plaintiffs, by the law thereof, before and at the time of said endorsement, a contract or evidence of debt, though tainted
55 with usury, is not null *and void, but is a valid contract, upon which an action may be maintained for the recovery of the principal and interest actually due on said contract or evidence of debt, and that it is only void to the extent of the usurious interest.

Upon the application of the defendants, a writ of error was allowed to the judgment.

The case was elaborately argued by Griswold and Tucker, for the appellants, and Daniel, for the appellees.

RIVES, J. The appellants John L. Fant and William F. Phillips, in June, 1850, gave four blank notes with their signatures to E. L. Fant, a merchant of Baltimore, who was son of the first and the nephew of the second. This accommodation was in compliance with E. L. Fant's letter to his father of 7th June, 1850, which, under the decision of the Court of Appeals of 24th May, 1858, was given in evidence to the jury at the late trial of this cause, and constitutes a part of the record now under review. It is not included in the judge's certificate of facts proved at the trial; but is embodied in the second bill of exceptions, to which, I think, resort can now be had for this substantive fact, without contradicting the authority of Brooke v. Young, 3 Rand. 106, as qualified by Perkins' adm'r v. Hawkins' adm'r, 9 Gratt. 649. It would seem from this letter that E. L. Fant had suspended his business, but determined to resume it in consequence of facilities offered him by the appellees Miller & Mayhew. He does not withhold the fact that the appellees were to make the advances of money to him; but he represents them as wishing to "borrow these four blank notes to raise money upon" as a loan to themselves, they being adequately secured by "collaterals to the amount of over sixty thousand
56 dollars." It would *be idle to inquire whether this representation was correct or not, and how far it influenced the conduct of the appellants in this transaction. It is sufficient that the appellants were allowed in the recent trial of this cause the full benefit of every plea for relief, grounded on this letter, and growing out of alleged imposition or failure of consideration. Signal ingenuity has been dis-

played by their counsel in so framing the pleadings and inviting the rulings of the judge on the trial as to meet every conceivable phase of such a defence. Five different pleas were allowed, setting forth, in varying form, the accommodation and loan sought by the plaintiffs; the want of consideration as between them and the defendants; the fraudulent abuse of authority; the alleged undertaking of plaintiffs to pay the notes at maturity; their knowledge of the failing circumstances of E. L. Fant; of his want of authority from the drawers to use their notes for his own advantage, and of plaintiffs' consequent fraud in procuring such use without due inquiry of him, &c., &c. Corresponding instructions were sought and given from the bench, extending to the defendants below every possible advantage they could derive from the letter of 7th June, 1850, the exclusion of which was among the errors corrected by the Court of Appeals in 1858. Nevertheless, proofs were wanting to sustain this skillful defence; the jury rendered its verdict, and the court its judgment against it.

It seems to me there was no error in this, either in reason or law. Men must abide the proper consequences of their acts. They cannot shelter themselves under the plea of ignorance, or of being misled. The appellants well knew they were lending their credit to an embarrassed relative, whose necessities might betray his veracity, and whose hopes might prevail over his fidelity to his friends. They were also in-

57 formed by whom the *advances were to be made to re-establish the son and nephew in business. To give him, then, the benefit of their names to blank commercial paper was, upon every principle of fairness and reason, full authority to raise money by it of the appellees or others; and if they desired to protect themselves from such liability, it was emphatically their business to refrain from the act, or else accompany it by patent restrictions. They should have imposed some express limitation upon the power of the payee, or else they were guilty of a fraud upon the commercial public by any evasion of this liability. How easily, in this case, could the wrong have been avoided by notice to the intended and known endorsees of these blank notes! That none such was given would render this making in blank a clear fraud by the makers upon the endorsees of these notes, provided the makers could now defend themselves by such a plea. Let it be conceded that the appellants and appellees were equally innocent in this transaction; but one or the other must now suffer by the wrong of E. L. Fant: who shall it be? Surely the party that enabled him to do the wrong.

These obvious dictates of reason are fully sustained at law. The parties to every accommodation note hold themselves out to the world, by their signatures, to be absolutely bound to every person who shall take the same for value to the same extent as if that value were personally advanced to

them, or on their account, and at their request. Story on Prom. Notes, § 191 to 197; Smith's Mer. Law, H. & G. ed., 261 to 263, and citations in notes. In the case of *Russel v. Langstaffe*, Dougl. R. 513, Ld. Mansfield speaks of an endorsement on a blank note as "in the nature of a letter of credit for an indefinite sum." Public policy upholds and facilitates the negotiability of such notes, and promotes their circulation for the ends of trade. Hence it is 58 held, that a bona fide holder for value, without notice, is entitled to recover upon any negotiable instrument which he has received before its maturity, notwithstanding any defect or infirmity in the title of the person from whom he derived it, although such person may have acquired it by fraud, or by theft, or robbery, except where, by legislative enactment, the instrument is made absolutely void in the hands of every holder, as by the statutes against gaming and usury. *Saltmarsh v. Tuthill*, 13 Alab. R. 390. The possession of a negotiable instrument is prima facie evidence that the holder took it for value, and that he came to it honestly. *Wilson v. Lazier*, 11 Gratt. 477. The evidence in this cause does not disclose to my mind any such proof or suspicion of fraud in the procurement of the notes by the payee as to impose upon the holder the onus of proving his bona fides, or his payment of value for it, under the authority of the cases, cited by appellants' counsel, of *Vathir v. Zane*, 6 Gratt. 246, and *Wilson v. Lazier*, 11 Gratt. 477. But even if the burden of proof was so shifted, it sufficiently appears, that the appellees took the notes in question in the regular course of business, and for value, and without knowledge of any fraud in the procurement of them by the payee. There is, therefore, no error, as it appears to me, in the court's refusal to award the appellants a new trial upon the general principles of law that define the rights and obligations of the parties to this contract.

Two special errors are further assigned: First, that the demurrer to the 6th plea was sustained, and that afterwards said demurrer was allowed to be withdrawn, and the said plea was, on plaintiffs' motion, stricken out of the pleadings in the cause; and secondly, that the court did not exclude said notes from going in evidence to the jury because unstamped, and therefore void under the stamp act of Maryland. The plea, 59 which was disallowed, *set up the general defence of usury, and the additional defence that the plaintiffs were not bona fide holders of said notes for value. Besides, a plea of usury under the law of this state had been previously filed.

Before considering these points, it is necessary to determine whether this be a Virginia or a Maryland contract; if the former, the defence of usury was already made, and no stamp was necessary; if the latter, the plea should conform to the Maryland law, and it should be determined whether the stamp act of Maryland is to be enforced by our courts. The general rule is, that all

instruments take effect and are to be construed as to their nature, operation and extent, according to the law of the country where they are made and executed. *Locus regit actum*. Story's *Conf. of Laws*, § 286 d. A note made in a particular country is to be deemed a note governed by the laws of that country, whether payable there or generally without naming any particular place. *Wilson v. Lazier*, 11 Gratt. 477. These principles are predicated of the intentions of the parties, who are naturally and reasonably supposed to contemplate in the transaction the *lex loci contractus*. Here the appellants, in sending their signatures to Baltimore, did so with the intention that the blanks should be filled and used there. They were "incipient bills," as termed by *Le Blanc, J.*, in the case, already cited, of *Russel v. Langstaffe*; and when perfected by the payee, and made payable in Baltimore, they must be taken as subject to the law of Maryland by the combined operation of the acts and intentions of the parties. Maryland fulfills the twofold designation of the "*Locus, ubi contractus celebratus est; locus, ubi destinata solutio est.*" I therefore feel no hesitation in pronouncing this a Maryland contract.

If such, the appellants were properly disallowed *a general plea of usury, and could only plead the law of the jurisdiction governing the contract. In such case, they would have had to set forth the principal and interest actually due, and to ask relief to the extent of the usurious excess. They did not do this; and therefore the demurrer was properly sustained. For some reason that does not appear, the parties were not content with this position of the pleadings, which seems to me satisfactory; but, at a subsequent day, this order was, on plaintiffs' motion, rescinded; whereupon the defendants withdrew their joinder in demurrer, and the plaintiffs their demurrer to said plea; and the court then, on plaintiffs' motion, ordered the said plea to be stricken out. The plaintiffs did not gain, nor did the defendants lose anything by it. I should infer it was taken with the consent of the defendants, because of the withdrawal of their joinder in demurrer. But however that may be, or whatever irregularity may exist in this proceeding, it now presents no matter for correction by this court. The reasoning by which I thus justify the disallowance of this plea applies to and sustains the judgment of the court in refusing to give the seventh, eighth and ninth instructions asked for by the appellants in the trial below.

The only remaining question to be considered on this record, is one of some novelty and conflict of authorities. Did the court err in disregarding and refusing to enforce the stamp act of Maryland, it being conceded that that act made these notes void for want of a stamp? Although this question arose on the motion of defendants to exclude these notes from going in evidence to the jury, because unstamped, it would be too technical to deem it re-

stricted to a question of evidence; but I assume it as involving the general question of validity, and as if it had arisen upon a motion to instruct the jury that they were void and could not be recovered upon, because of the want of *a stamp. A discrimination of this sort is made by Justice Story, who, after a broad and positive statement that "if by the laws of a country a contract is void, unless it is written on stamped paper, it ought to be held void everywhere; for unless it be good there, it can have no obligation in any other country," nevertheless admits, "it might be different if the objection were not to the validity of the contract, but merely to the admissibility of other proof of the contract." Story's *Conf. L.*, § 260 (4). In the case of *James v. Catherwood*, 16 Eng. C. L. R. 165, receipts required by the laws of France to be stamped, were allowed as evidence without such stamps. It was said by Abbott, J.: "In the time of Lord Hardwicke, it became a maxim that the courts of this country will not take notice of the revenue laws of a foreign country. There is a reciprocity between nations in this respect. Foreign states do not take any notice of our stamp laws, and why should we be so courteous when they do not give effect to ours." He adds, "it would be productive of prodigious inconvenience, if in every case in which an instrument was executed in a foreign country we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid." Our special Court of Appeals in the case of *Lambert v. Jones*, took the same view of this question, and received as evidence an unstamped instrument, not admissible by the *lex loci contractus*.

As a question, therefore, of the admissibility of evidence, it seems well settled, that the fiscal laws of another state prescribing the stamping of papers, are not to prevail in our courts. But where the legal effect or obligation of the paper is in issue, a different rule has been laid down in some cases. A leading one is that of *Alves v. Hodgson*, 7 T. R. 241. Hodgson gave a promissory note at Jamaica to Alves as a seaman, for his wages; but *the note was not stamped as required by the laws of that island. Held, that the plaintiff could not recover on a written contract made in Jamaica, which by its laws was void for want of a stamp. *Ld. Kenyon, Ch. J.*, said: "This is a promissory note, though not negotiable; and as it is not stamped, it cannot be received in evidence. Then, it is said, we cannot take notice of the revenue laws of a foreign country; but I think we must resort to the laws of the country in which the note was made, and unless it is good there, it is not obligatory in a court of law here." To the same effect is the case of *Bristow v. Sequeville*, 5 Exch. R. 275, where it was admitted that a foreign court might disregard the statutory fiscal enactments of the country of the contract on a question of evidence;

but it was further decided that where the instrument was void for want of a stamp, it will be so deemed by the foreign court.

Amid this contrariety of authorities, I gladly accept a limitation or qualification of this doctrine, laid down by Judge Story in 1 Gallison 374. It seems to me eminently judicious, and as affording the means of reconciling to some extent these opposing decisions. While affirming "that the *lex loci* is to govern all questions as to the nature, validity and construction of contracts, and is to be enforced everywhere," this able judge excepts "cases in which the contract is immoral or unjust, or in which the enforcing it in a state will be injurious to the rights, the interest or the convenience of such state or its citizens." There are two cases cited in the argument of this cause, one from Illinois and the other from Massachusetts, that strikingly illustrate and exemplify the reasonableness and necessity of this exception. The first is the case of *Sherman et al. v. Gasset et al.*, 4 Gilman's R. 521. This was a suit to foreclose the mortgage of lands in Illinois,

63 given to secure a debt *contracted in Massachusetts at ten per cent. interest, while twelve per cent. was legal in Illinois; but the law of Massachusetts gave only six per cent. and specially provided that, "whenever an action shall be brought upon any contract or assurance, and it shall appear upon special plea to that effect, that a greater rate of interest has been directly or indirectly reserved, taken or received, the plaintiff shall forfeit three-fold the amount reserved or taken, and shall have judgment for the balance only, which shall remain due after deducting said three-fold amount." The question, then, was whether the Illinois court would execute these penal provisions of the Massachusetts law; and it was held that it would not, and declared to be "a settled rule of jurisprudence that the courts of one country will not enforce either the criminal or penal laws of another. The second case is *McFaden, &c. v. Burns, &c.*, 5 Gray's R. 599, where the chief justice ruled that though it was a Missouri contract, the law of Missouri did not apply to this action and could not be enforced therein. That law fixed the rate of interest at six per cent., and provided "that in any action on a contract made within that state, in which it should be found that more than that rate was agreed for or taken, the court should give judgment for the principal sum due, after deducting the amount of unlawful interest taken or agreed for; and also judgment for interest at the rate of six per cent. on the balance; and order the whole amount of interest to be set apart for the use of the common schools of the country in which the action was brought, and when collected, to form part of the common school fund for the county, and that the defendant should recover his costs."

It is manifest, how 'inconvenient,' if not impracticable, it would have been for the Massachusetts court in this case to administer the Missouri law, so peculiarly

64 local in *its provisions and policy.

Where the principle of the *lex loci* is the offspring of a mere domestic policy, and does not pretend to the sanctions of common morality and general jurisprudence, it may be safely assumed as without the pale of that international comity, upon which this doctrine partly rests, and as coming within the exception of cases, in which it would be "injurious to the rights, interests and convenience of a foreign state or its citizens" to respect and enforce it. Whether it would be different where the foreign law was of universal application, and in complete harmony with the *lex fori*, I need not now decide; it is sufficient that I see no reason and recognize no authority requiring a Virginia court, while bound by no stamp acts of this state to observe and enforce the penalties of the stamp act of Maryland; but I do discern many ways in which such course would be injurious to the rights, the interest or convenience of this state or its citizens;" and I therefore claim the benefit of the exception, so well and fitly made by Judge Story. If Massachusetts may not and cannot enforce the peculiar local provisions of the Missouri usury law; if Illinois, in like manner, disregard the penalties and forfeitures of a similar statute of Massachusetts, why should our courts volunteer to guard and protect the treasury of Maryland by enforcing her revenue laws? Let it even be conceded that the *lex loci* should prevail here and elsewhere, where it embraces and effectuates general principles, known to and accepted by the jurisprudence of enlightened nations; but cases, like the present, involving no universal interest, but such only as pertain to a state in its revenue service, must be deemed as within the exception of inconvenience or injury," authorizing the court exercising jurisdiction to decline enforcing the general doctrine.

In the view, therefore, which I have taken of this question, it is immaterial how
65 the stamp act of Maryland *may be construed, whether as making the unstamped instrument absolutely void, or as subjecting it to transient disabilities without destroying the original vitality of the contract. I need not, therefore, enter into the disquisition seeking to establish a difference between the terms "invalid and unavailable for any purpose," on the one hand, and the epithet "void" on the other. I regard them as tantamount, and presume this discrimination rests, not on this difference of phraseology, but rather on the nature of the proviso, which restores the instrument to validity upon certain prescribed conditions, so that the advocates of this distinction would not vary their construction of the act though the latter epithet had been used. The 'invalidity' of the instrument is to be deemed a penalty, denounced against the violation of the law, just as much as if a pecuniary mulct or forfeiture had stood in its stead. There can be no question, if this cause was now before a Maryland court, no recovery would be allowed on these notes,

because they have never been stamped, in conformity with the requirements of the proviso; and if this court does not follow the same course, it is due to its refusal to execute a revenue law of Maryland. Whether such refusal can be better justified, where the law appoints a mode of relief against the penalty of 'invalidity' than where there is no escape from it, I have no occasion to inquire or decide. My opinion rests on the broad ground, that whatever may be the character of the revenue laws of another state, no matter what penalties it affixes, whether it declares a contract void or invalid, or provides relief from its penalties, the courts of this state are not bound by authority or reason to regard or enforce such laws.

It has been argued, that though the contract in this case be admitted to be a Maryland contract, yet our courts, when called on to execute it, should administer 66 *the *lex fori*. For this position, the appellants' counsel have relied on the case of *Turpin v. Povall et als.*, 8 Leigh 93. That case, however, was decided on the principle of its being a Virginia contract; the loan was made by an agent, the bond given and the mortgage executed in Richmond; and hence it was held a Virginia contract. But though this was decisive of the case, the president of the court proceeded further, in the delivery of his opinion, and argued the hypothesis of its being a Pennsylvania contract; and in doing so, as it seems to me, gave the weight of his opinion to the position taken by the appellants' counsel. But this was plainly extrajudicial; and it is compatible with the highest respect (and such I certainly entertain) for the opinions of this distinguished judge, to suppose that he did not express himself with the care and precision he would have done had this point entered into the decision of the cause. Whatever doubts I entertain of the assertions and reasoning of this able judge on this hypothesis, I am not called upon to state them here, inasmuch as these observations were incidental, and not required by any necessity of the decision he was pronouncing.

I have thus briefly reviewed all the points presented by this record, and am of opinion that the judgment of the court below should be affirmed.

JOYNES, J. After this cause went back from this court in 1858, the defendants filed six special pleas. To the first five pleas the plaintiffs replied, and issues were joined upon them. No question arises in respect to these pleas. To the sixth plea the plaintiffs demurred; and, on the 16th of September, 1859, the court sustained the demurrer. On the 19th of the same month, on motion of the plaintiffs, the order entered on the 16th was rescinded; the defendants, by 67 leave of the court, withdrew *their joinder in the demurrer, and the plaintiffs thereupon withdrew their demurrer; and, then, on motion of the plaintiffs, the plea was struck out by the court.

The plaintiffs in error assign as grounds of error: 1. That the demurrer was sustained. 2. That the order sustaining the demurrer was rescinded, and the plea struck out.

I do not understand this plea as designed to set up the defence of usury. The plea of usury had been filed in 1855. If it was designed to set out the defence of usury under the law of Maryland, upon the view that the general plea of usury allowed by the statute would not cover that defence, it was defective in not stating what the law of Maryland was. 1 Chitty Plead. 247. If the plea was bad, the striking it out cannot be assigned as error.

I think the object of the plea was to set up the defence that the plaintiffs were not bona fide holders of the note on which the action was founded. That defence, however, might have been made, as, in point of fact, it was made, under the plea of *nil debet*, upon which issue had already been joined in 1853. The plea was, therefore, wholly unnecessary, and this would have been good ground for rejecting it when offered, if it had been objected to; *Reed v. Hanna's ex'ors*, 3 Rand. 56; and it was competent for the court to strike it out after it was raised, even though issue had been joined upon it. *Kemp v. Mundell*, 9 Leigh 12. The plaintiffs in error not having been deprived of any defence by the striking out of this plea, have not been injured by it, and cannot complain. The multiplication of issues by special pleas tends to embarrass the jury, and ought not to be encouraged, "except in cases where by law the defence would otherwise be excluded or rendered unavailing."

After the plaintiffs had given the 68 note in evidence to *the jury, the defendant moved to exclude it, because it had not been stamped in pursuance of the law of Maryland; and offered to read in evidence to the jury a paper containing the statutes of Maryland on the subject of stamps, which were in force at the date of the note. The plaintiffs objected to the introduction of this evidence, and the court sustained the objection; being of opinion that the note might be used in evidence in this state, notwithstanding the provisions of the Maryland statutes.

Authorities are divided upon the question whether the construction and effect of the law of a foreign state are to be determined by the jury or by the court. 1 Rob. Pract. (new ed.) 257, 259. But it is not necessary to decide that question in this case. For even if it was the duty of the court to admit the evidence, and to leave it to the jury to decide from it what the law of Maryland was, this court will not reverse the judgment, if upon consideration of the statutes which were offered in evidence, it shall appear that the construction adopted by the court was correct. For in that case it would appear that the rejection of the evidence did the defendants no injury, because the verdict of the jury would have been set aside, if the evidence had been admitted, and the jury had put a different construc-

tion on the statutes from that adopted by the court. *Crease v. Barrett*, 1 *Crompt. Mees. and Ros.* 919; *Doe v. Langfield*, 16 *Mees. and Welsb.* 497; *Thorndike v. Boston*, 1 *Met. R.* 242; *Preston v. Harvey*, 2 *Hen. & Mun.* 55.

The question, therefore, is, whether the fact that this note had not been stamped according to the law of Maryland, was a bar to a recovery upon it in the courts of Virginia.

In *Alves v. Hodgson*, 7 *T. R.* 241, which was an action on a contract made in Jamaica, the court considered that the contract was void in Jamaica for want of a stamp; *and on that ground held it void in England. Lord Kenyon said: "Then it is said that we cannot take notice of the revenue laws of a foreign country; but I think we must resort to the laws of the country in which the note was made, and unless it is good there, it is not obligatory in a court of law here. *Clegg v. Levy*, 3 *Camp. R.* 166, also proceeded on the ground that the agreement was void where it was made; and Lord Ellenborough expressed the opinion that if so it was void the world over.

The next case was *James v. Catherwood*, 3 *Dowl. & Ryl.* 199 (16 *Eng. C. L. R.* 165), in which to prove a loan of money in France, unstamped receipts were offered in evidence. The defendant's counsel objected to the admission of the receipts as evidence, and offered to prove that by the laws of France such receipts required stamps. The court excluded the evidence, and the Court of King's Bench refused a rule on the ground that one country will not take notice of the revenue laws of another. This disposed of the case; but the report makes the chief justice say, "it would be of prodigious inconvenience if in every case in which an instrument was executed in a foreign country, we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid."

Now in this case it did not appear, and was not alleged, that the instrument was void under the law of France for want of a stamp. The case was not, therefore, put on the same ground as *Alves v. Hodgson* and *Clegg v. Levy*. The remarks attributed to the chief justice, above quoted, would certainly not have been sound if they had asserted, as a general proposition, what the language taken literally seems to intimate, to wit: that the courts of England will enforce a contract made in a foreign country, without reference to the question whether it is valid or void in that country.

And in that sense the remark would have *had no just relation to the case: for there was nothing to show that receipts were void in France for want of stamps. I think the only fair interpretation of the case is, that the defendant did not offer to prove that the law of France made the unstamped instrument void. In this view the case is not in conflict with those above cited. *Wynne v. Jackson*, 2

Russ. R. 351, 3 *Cond. Eng. Ch. R.* 144, turned also on the law of France. It did not appear and was not alleged, that the bills were void by the law of France. It appeared that the bills were stamped, but that they were drawn in such a form that the holder could not recover upon them in France. What the defect was does not appear; it does appear that it was not the want of stamps. All the vice chancellor decided on this point was, that the "circumstance of the bills being drawn in such a form, that the holder could not recover on them in France, was no objection to his recovering on them in an English court."

I see nothing in *James v. Catherwood* and *Wynne v. Jackson* inconsistent with *Alves v. Hodgson* and *Clegg v. Levy*. The last two relate to cases in which the foreign law makes the contract void for want of a stamp; the first two relate to cases where, by the foreign law, the instrument is not void, but cannot be used in evidence, or made the foundation of a suit, for want of a stamp or other formality.

The distinction between the two classes of cases is clearly pointed out in *Bristow v. Sequeville*, 5 *Exch. R.* 275. It appeared in that case that the receipts would not be admissible in the courts of Cologne for want of a stamp; and it was objected that they were, for that reason, not admissible in England. The objection was overruled, and the Court of Exchequer sustained the decision. Alderson, B., said: "It is very different whether the law makes a stamp necessary to the validity of an instrument, *or to its admissibility in evidence. An unstamped deed is a valid contract here, although it cannot be given in evidence. If, by the law of a foreign country, a document is only inadmissible for want of a stamp, it is a valid contract, and admissible in evidence in another country." Pollock, C. B., following immediately upon these remarks of Alderson, B., said that *James v. Catherwood* was an authority in point. He had previously said, immediately before the remarks of Alderson, B., that *Alves v. Hodgson* proceeded on the ground "that if it be not a contract at the place where it is alleged to be made, it is no contract at all." Rolfe, B. (the present Lord Cranworth), said, of *Alves v. Hodgson*, that the marginal note, "the plaintiff cannot recover upon a written contract made in Jamaica which, by the law of that island, was void for want of a stamp," was perfectly correct. He added: "I agree that if, for want of a stamp, a contract made in a foreign country is void, it cannot be enforced here. But if that case meant to decide that where a stamp is required by the revenue laws of a foreign state before a document can be received in evidence there, it is inadmissible in this country, I entirely disagree."

This case throws light upon *James v. Catherwood* and *Wynne v. Jackson*, for the Code Napoleon, which is the law of France, was the law involved in this case. It thus appears that, by the law of France, which

was involved in *James v. Catherwood*, and in *Wynne v. Jackson*, the unstamped instrument was not void, but was only not available as evidence.

I have made this examination of the English cases because I have not seen them discussed anywhere in a manner satisfactory to my mind. It seems to me, with deference, that it is a mistake to suppose that there is any inconsistency in these cases.

72 *In *Ludlow & al. v. Van Renselaer*, 1 John. R. 95, the action was on an unstamped note made in France; and it appeared that, without a stamp, "no note could be recovered in that country." The court held that the action could be maintained, on the ground that they did not sit to enforce the revenue laws of other countries. In *Lambert v. Jones*, 2 Pat. & Heath 144, a recovery was had on an endorsement made in Maryland, which required a stamp; and the court put its decision on the ground that one country will not take notice of the revenue laws of another. And Judge Story, while he maintains that a contract, void for want of a stamp where it is made, ought to be held void everywhere, appears to concede that where such is not the effect of the *lex loci*, a recovery may be had in the foreign court. Conf. *Laws*, sec. 260, note.

In *Satterthwaite v. Doughty*, *Busbee's Law R.* 314, the Supreme court of North Carolina maintained the doctrine that an instrument void where made for want of a stamp, is void everywhere, and applied it to the case of an unstamped bond made in Maryland. The court assumed, without any examination of the Maryland statute, that the unstamped instrument was declared void by it. I cannot concur in that opinion; and I think an attentive consideration of the subject will show that the true construction of the Maryland statute is, that it does not make the instrument void for want of a stamp, but only prevents its being used as evidence.

The provision of the statute of Maryland, applicable to this case, is as follows:

"And be it enacted, that no instrument of writing whatsoever, charged by this act with the payment of a duty as aforesaid, shall be pleaded or given in evidence in any court of this state, or admitted in any such court to be available at law or in

73 equity, or shall be valid *or available for any purpose whatsoever, unless the same shall be stamped or marked as aforesaid: provided, that if any such instrument of writing shall have been written or printed upon vellum, parchment, paper or other material, not marked or stamped according to this act, or upon vellum, parchment, paper or other material marked or stamped at a lower duty than ought to be paid upon the same, then and in that case it shall be lawful for the persons holding such instrument to make oath," &c., and "to pay to the clerk," &c., "the duty chargeable by law on such instrument or writing, together with ten dollars in addi-

tion thereto," * * * "after which," &c., "such instrument or writing shall be, to all intents and purposes, as valid and available as if the same had been or were stamped or marked as by this act required."

The provisions of this statute are substantially the same as those of the English statutes. The act 9 and 10, William III, provides, that an instrument which has not been duly stamped, may have the stamp affixed afterwards, upon payment of the duty and a penalty of £10; and declares, that "no such instrument shall be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or equity," until payment of the duty and penalty. By the act 31 George III, it is provided, that no instrument liable to the duty imposed by that act "shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful or available in law or equity," unless duly stamped. This provision is incorporated in all the subsequent stamp acts. The act 31 George III, contained no provision for subsequent stamping on payment of a penalty, but such a provision was made by the act 37 George III, and has been retained in subsequent acts.

In *Rex v. Bishop of Chester*, 1 Stra. R. 624, the court said, that "the stamp act 74 was never intended to avoid *deeds that were not stamped, but only to add a penalty to enforce the duty."

In *Hawkeswood's case*, 2 East P. C. 955, the prisoner was convicted of the forgery of an unstamped bill of exchange. The judges, in sustaining the conviction, said, "the stamp act, in saying that a bill without a stamp shall not be pleaded or given in evidence, or be available in law or equity, means only that it shall not be made use of to recover the debt; and, besides, the holder might get it stamped after it was made."

Scott & al. v. Jones, 4 Taunt. R. 865, was an action of trover for an unstamped instrument. The court said: "This instrument is a thing capable of having a value given to it by being stamped. The meaning of the act is, that it shall not, without a stamp, be available as between the parties, so as to enable them to enforce the agreement."

Regina v. Watts, 24 Eng. L. & Eq. R. 573, was an indictment for stealing a piece of paper upon which was written an agreement requiring a stamp, but on which there was no stamp. It was objected at the trial, that the paper contained a subsisting valid agreement, and therefore was not the subject of larceny as a piece of paper only. The court of criminal appeal, eleven judges being present, and only one dissenting, held that the paper, though unstamped, was an agreement, though it could not be used as evidence of the rights of the parties without being stamped. Lord Campbell said, that the distinction was between instruments which, being unstamped, are wholly void, and those which may be made available by having a stamp subsequently impressed. Coleridge, J., said: "The only

object of the stamp laws is to enforce the duty by making a document not available in evidence without a stamp." In *Delay v. Alcock*, 29 Eng. L. & Eq. R. 83, the county court judge had treated
75 *an unstamped agreement as a nullity; but the Court of Queen's Bench, on the authority of *Regina v. Watts*, held it to be error so to treat it, on the ground that "the potentiality of having it stamped precluded it from being treated as waste paper."

The English statutes, therefore, while they declare that the unstamped instrument shall not be "good or available," do not make it void. The instrument, as was said by Alderson, B., in *Bristow v. Sequeville*, before cited, "is a valid contract, although it cannot be given in evidence." The subsequent affixing of the stamp, as was said by Lord Campbell in *Regina v. Watts*, "relates back to the time of the signature." The stamp acts are measures of revenue only, and the whole object of rendering the unstamped instrument unavailable to the parties is to compel the payment of the duty.

Now it seems to me that the same construction must be applied to the statute of Maryland, which was evidently modeled after those of England. Although it declares that the unstamped instrument shall not be "valid or available for any purpose," it allows it to be stamped subsequently. The subsequent stamping relates back to the time of execution, and makes the instrument as "valid and available" as if stamped at first. See also act of March, 1857, §§ 1 and 2. In short, it contains every feature of the English statutes, upon which the construction I have been explaining has been established.

I am of opinion, therefore, that the statute of Maryland requiring certain instruments to be stamped is nothing more, as its title imports, than a measure for raising revenue for the benefit of that state. As a means of securing the payment of the duty, and for that purpose only, the payment of the duty is made a condition of the right to use the instrument in the courts of

76 Maryland. To impose a like condition on the right to *use the instrument here, would be lending the courts of Virginia to enforce the payment of revenue to the state of Maryland, contrary to the settled doctrine that the courts of one state will not enforce the revenue laws of another. Such a rule would not only be anomalous in principle, but inconvenient in practice, and inconsistent with the dignity of an independent state.

The result of these views is, that the court did not err in excluding the statute of Maryland from the jury.

Upon the trial, the defendants in the court below asked nine instructions to the jury. The 7th, 8th and 9th were refused, and the refusal of the 7th and 8th is assigned as error. These instructions are substantially the same, and affirm, that if the transaction between Fant and Miller &

Mayhew involved the payment, or a contract for the payment, of interest at a greater rate than six per cent. per annum, the jury ought to find for the defendants.

The court had already instructed the jury that Miller & Mayhew could not be regarded as bona fide holders, if they acquired the note through a usurious transaction; so that it could not have understood these instructions as bearing on that proposition. They were, no doubt, understood by the court below, as they were treated in the argument here, as affirming that the rights of the plaintiffs were to be determined by the law of Virginia. This was maintained on several grounds: 1. That the law of Virginia was the *lex loci* of the contract. 2. That the provisions of the Maryland statute of 1845 are remedial, and cannot be enforced here on the principle of *Sherman v. Gussett*, 4 Gilm. R. 521, and other cases of that class (vide 7 Metc. R. 14; 5 Gray's R. 599; 31 New Hamp. R. 582), and that only the act of 1704 can be enforced, which makes the usurious instrument void. 3. That the case is governed by the *lex fori*.

77 *1. If we look to the contract imported by the note, it was made in Maryland, and was to be performed there. The mere signing of the blank piece of paper in Virginia did not create a contract. There was no contract until the blank had been filled up so as to make a note, nor until the note so made had been delivered to the plaintiffs. All this was done in Maryland. It was, therefore, a Maryland contract. *Drinscomb v. Bunker*, 2 Metc. R. 8; *Lawrence v. Bassett*, 5 Allen's R. 140; *Cook v. Moffatt*, 5 How. U. S. R. 295. If we look to the contract imported by the endorsement and transfer of the note by Fant to the plaintiffs, it was likewise made in Maryland, and was governed by its laws.

2. The law of Maryland applicable to the case consisted of the first and second sections of the act of 1704, entitled "an act against excessive usury;" and the act of 1845, entitled "a supplement to an act entitled an act against excessive usury." The first section of the act of 1704 prohibited the taking of interest at a greater rate than six per cent. per annum; and the second section declared all contracts for a higher rate of interest to be utterly void. The act of 1845 provided that, in any suit at law or in equity thereafter to be brought on any contract, &c., in which any person shall seek to avail himself of the act of 1704, it shall be incumbent on such person to plead the same specially, and to set out the true amount due, principal and interest, at six per cent., and that judgment should be rendered in favor of the plaintiff for the amount of such principal and interest. The settled construction of these acts in Maryland, as appears by the evidence, is, that usurious contracts are not avoided under any circumstances, but are valid securities to the extent of the principal and six per cent. interest. In the view of the law of Maryland under the act of 1845, there

are two distinct contracts, or two distinct parts of the *same contract, one for the principal and six per cent. interest, which is valid, the other for the excess of interest above six per cent., which is void.

The second section of the act of 1704, which declared usurious contracts to be utterly void, was repealed by the third section of the act of 1845, which repealed all acts and parts of acts inconsistent with the provisions of that act. For the provision that the usurious instrument should be utterly void was inconsistent with the provision that the plaintiff should recover to the extent of the principal and six per cent. interest, and it was accordingly held in *Baughner & als. v. Nelson*, 9 Gill's R. 299, that the second section of the act of 1704 was repealed by the act of 1845.

It follows that if the provisions of the act of 1845 are such that they cannot be enforced in this state, then no part of the law of Maryland applies to this contract, and it must be enforced to its whole extent, unless affected by the *lex fori*. I do not think, however, that the provisions of the act of 1845 come within the principle of *Sherman v. Gussett*. But I do not think it worth while to enter into any discussion on that point.

3. It was argued that *Miller & Mayhew* cannot avail themselves of the law of Maryland to sustain the contract to the extent of principal and six per cent. interest, because the contract violated that law, and that the courts of Virginia must apply the rule of our own law, and refuse to enforce the contract altogether. For this, *Turpin v. Poval*, 8 Leigh 93, was relied upon. That was the case of a bill in equity for relief from a contract for the payment of interest at the rate of ten per cent. One question was, whether the relief was to be granted on condition of paying the principal, without interest, according to the law of Virginia, or on condition of paying the principal with six per cent. interest,

79 according to what *was assumed to be the law of Pennsylvania. If it was a Virginia contract, it was clear that the Virginia rule must apply. That it was a Virginia contract was clearly shown by Judge Tucker, and is confirmed by *Andrews v. Pond*, 13 Peter's R. 65. But Judge Tucker, with whom the other judges concurred, went further, and held that if it was a Pennsylvania contract the creditor had no right to claim any benefit under the law of Pennsylvania, because he had not made his contract with reference to that law, but in defiance of it. In this connection he said: "A contract made in any state contrary to its laws, must in any other state be looked upon as uninfluenced by them, and must therefore always fall within the influence of the *lex fori*. The foreign state can indeed only act upon the contract remedially." I understand Judge Tucker's meaning to be, that as the contract was usurious under the law of Pennsylvania, the debtor was entitled to relief in equity

from the usurious excess, and as the courts of Virginia could not administer any remedies but such as the law of Virginia affords, the relief could only be given according to that law.

There are expressions in the subsequent part of Judge Tucker's opinion, which, taken in their strict sense, would seem to import, that, because the taking of interest at a greater rate than six per cent. is against the policy of Virginia, the courts of Virginia will refuse to enforce a contract for a greater rate of interest, though valid where made. This, we know, would be in conflict with a well settled principle, on which our courts act every day. Usurious contracts do not fall within the principle cited by Judge Tucker from the *Conflict of Laws*, in reference to vicious and immoral contracts. What was said upon that subject was wholly unnecessary to the decision of the case.

But *Turpin v. Poval* is no authority 80 in the present *case, because the contract which *Miller & Mayhew* seek to enforce in this case, to wit, the contract for the principal and interest at six per cent., was valid under the law of Maryland. The ground, therefore, on which the remedial provisions of the *lex fori* were held applicable in that case does not exist in this. It is the common case of a contract valid under the *lex loci*.

I am of opinion, therefore, that the instructions were properly refused. The only remaining error assigned is the refusal of the court to grant a new trial.

There can be no doubt, according to well settled principles, that E. L. Fant had the right to fill up the blank pieces of paper by writing over the signatures promissory notes for such sums, and with such dates and times of payment as he might choose, and that the notes so made would be valid in the hands of bona fide holders for value. *Russell v. Langstaffe*, Douglas' R. 495; *Douglas, &c. v. Scott & al.*, 8 Leigh 43; *Orrick v. Colston*, 7 Gratt. 189. And it is equally well settled that the knowledge on the part of the plaintiffs that the signatures of the defendants were attached to mere blank pieces of paper, and that the notes were filled up by Fant in the absence of the defendants, does not impair their right to be considered bona fide holders of the notes. Same cases. Also, *Huntington & al. v. Branch Bank of Mobile*, 3 Alab. R. 186; *Decatur Bank v. Spence*, 9 Id. 800; *Fullerton v. Sturges*, 4 Ohio St. R. 529. There is no proof that the defendants imposed any restrictions upon Fant as to the manner in which the blanks should be filled up, or as to the purpose for which they should be used. It is not necessary, therefore, to inquire whether the knowledge of the plaintiffs that the papers signed by the defendants were blanks, afterwards filled up by Fant, imposed on them the duty of inquiring into the limitations which the defendants

81 placed upon Fant's authority. *The cases upon this point are not agreed. See 3 Alab. R. 186, 9 Id. 800; 4 Ohio St. R.

529, above cited; *Avode v. Dixon*, 5 Eng. L. & Eq. R. 512; *Hatche v. Searles*, 31 Ibid 219. See also 1 *Parsons on Notes*, &c. 111, 115.

It is hardly necessary to say that if the plaintiffs in the court below were bona fide holders for value, it was no defence that they knew that the note was made for accommodation only. Story on Notes § 194. And it follows from what has been said, that the question whether they were bona fide holders for value depends upon precisely the same principles as if the note had been filled up in its present form by the defendants, and had been given for value.

As a general rule the possession of the note by the endorser is prima facie evidence that he holds it bona fide and for value, and there is nothing in this case to take it out of this general rule. *Wilson v. Lazier*, 11 Gratt. 477; *Goodman v. Simonds*, 20 How. U. S. R. 343; *Murray v. Lardner*, 2 Wallace U. S. R. 110. The burden of proof, therefore, rests upon the defendants to impeach the title of the plaintiffs by rebutting this legal presumption.

It appears from the certificate of facts that the consideration on which the four notes were transferred by E. L. Fant to Miller & Mayhew, consisted of cash advanced, together with certain notes due by said E. L. Fant to various persons, payable at subsequent times, which the plaintiffs assumed to pay, and did pay, which said notes and cash amounted to \$15,074.44; exceeding by \$74.44 the amount of said four notes.

These facts constituted a valuable consideration to the whole amount of the four notes. That the agreement to take up Fant's notes in consideration of the transfer of the four notes, constituted a valuable consideration to that extent, is too clear to require argument or authority to prove it. The advances of cash on the 28th and 29th, it may fairly be inferred, were made as part of the consideration of the transfer agreed upon at the time. As to the advances made prior to the transfer of the notes, while it is not stated as a fact that the notes were received in payment of them, the mode of stating the account justifies the inference that they were. If the defendants allege the contrary, the burden is on them to show it. That the payment of these previous advances was a valuable consideration, and in the usual course of business may now be considered as fully established in England and in this country. 1 *Parsons on Notes*, &c. 218, 228.

I do not wish to be understood as saying that the position of the plaintiffs would have been a worse one, if the notes had been taken as security only for these prior advances; but as that question does not arise, it is not necessary to express any opinion upon it. Vide *McCarty & als. v. Roots & als.*, 21 How. U. S. R. 432; 1 *Parsons ubi supra*; *Davis v. Miller*, 14 Gratt. 1.

The only remaining question in the case

is, whether the title of the plaintiffs can be impeached on the ground of usury.

As I have already stated, this question must be determined by the law of Maryland. All that is before us in reference to that law is what is contained in the certificate of facts, in which it is said that by that law "a contract or evidence of debt, though tainted with usury, is not null and void, but is a valid contract upon which an action may be maintained for the recovery of the amount of principal and interest actually due on said contract or evidence of debt, and is only void to the extent of the usurious interest." We must take this to be a true statement of the law of Maryland, as undoubtedly it is, and are not at liberty to look into the statutes and evidence in bill of exceptions No. 2, as we were asked to do by the counsel for the plaintiffs in error.

That the statement of account between the plaintiffs and E. L. Fant contained usurious charges, is not disputed. But it appears distinctly from the certificate of facts that no part of these charges entered into the consideration for the transfer of the four notes, and that they were all embraced in the note of \$1,327.44, executed at the same time, and still unpaid. If the law had made the whole transaction void on account of the usury, the transfer of the four notes would have been affected by the usury, although it was embraced altogether in the note for \$1,327.44; because it was all one transaction. *Roberts v. Tremayne*, Cro. Jac. 507. But the law of Maryland makes a separation between the good and the bad parts of the transaction—between the money advanced and six per cent. interest upon it, which is unaffected by the usury, and the excess above six per cent., which cannot be recovered. I do not see why the parties may not themselves make this separation in the beginning, by giving one security for the debt and lawful interest, and another for the usury; and if that is done, it seems to me that the law of Maryland will enforce the former and only avoid the latter, especially if it appears that the latter has not been paid. On this ground, I incline to think that the consideration for the transfer of the four notes is wholly unaffected by the usury. But if I am mistaken in this view, I still think that the usury does not prevent the plaintiffs being considered bona fide holders of the four notes. The contract upon which they received these notes was valid to the extent of the principal and legal interest, and to that extent no right of the plaintiffs, arising out of that contract, is affected by the usury. To that extent they have the same right to enforce the contract by action, and to enforce all securities, as if there had been no usury. The note for \$1,327.44 being still unpaid, the recovery of the plaintiffs upon the four notes does not enforce the contract beyond the extent allowed by the statute.

This view is fully sustained by the Court of Appeals of Maryland in *Gwynn v. Lee*,

9 Gill's R. 137. In that case, a note had been hypothecated with Lee as security for the payment of money lent at more than legal interest, and one of the questions was, whether, in consequence of the usury, Lee was a bona fide holder. It was held by Chancellor Johnson that under the law of Maryland the contract being valid to the extent of principal and legal interest, Lee was a bona fide holder to that extent, notwithstanding the usury; and his decree was affirmed by the Court of Appeals.

I think there is no error in the judgment, and that it ought to be affirmed.

MONCURE, P., concurred with Joynes, J. He thought it unnecessary to decide whether the action could be maintained in Virginia, if the effect of the Maryland statute had been to make the unstamped instrument void. His impression was, that in that case the action could not have been maintained here.

Judgment affirmed.

85 *Penn's Adm'rs v. Spencer & als.

[91 Am. Dec. 375.]

October Term, 1866, Richmond.

1. **Settlements on Wife—Case at Bar.**—A full settlement made upon the wife of an insolvent man, though a partial provision previously made for her by her father's will.
2. **Commissioner's Report—Exceptions to—Waiver.**—* Though a cross bill sets up a special charge against a party, if upon taking the account by a commissioner, this item is not charged, and the plaintiff in the cross bill does not except to the report for the failure to make this charge, it will be considered as abandoned by the plaintiff.
3. **Deeds of Trust—Impeachment of.**—A cross bill is filed to impeach deeds of trust set up by co-defendants, both plaintiff in cross bill and these defendants claiming satisfaction out of the same fund. Though the deeds are sustained, plaintiff is entitled to have an account of the fund. And if it is doubtful if the debt for which one of the deeds is given is not in part due to the plaintiff, that should be inquired into, and in the absence of fraud, the deed be held valid for the balance.
4. **Sale under Execution—Failure to Ascertain Estate—Effect—Liability of Purchaser.**—A sale by the sheriff of the interest of an execution debtor in an estate, before it is ascertained, is void; and the purchaser, if he took possession of the property, will be liable for the rents, hires and other profits of the property, and for the value of such of it as

***Commissioner's Report—Exceptions to—Waiver.**—If the report of a commissioner is not excepted to, objections are thereby waived, and it cannot be impeached, either at the hearing of the cause or in the appellate court, unless it be for errors apparent upon its face. *Hyman v. Smith*, 10 W. Va. 317; *Wyatt v. Thompson*, 10 W. Va. 661; *Keck v. Allender*, 37 W. Va. 202, 16 S. E. Rep. 520; *Ward v. Ward*, 21 W. Va. 371, all citing the principal case. See also, monographic note on "Commissioners in Chancery," sec. V, A and B, appended to *Whitehead v. Whitehead*, 23 Gratt. 376.

he has sold or otherwise converted to his own use, or has been lost by his act or wilful neglect; and he will be entitled to be reimbursed for the amount paid by him to the sheriff for the property.

On the 20th of February, 1852, William Spencer and Sarah P. his wife filed their bill in the Circuit court of Henry county, setting out the death of David R. Hill, the brother of the female plaintiff, intestate; claiming that as his sister she was entitled to one-fourth of his *estate, which consisted of valuable real estate, slaves, &c. and asking for distribution.

At the May term of the court, 1852, Mrs. Spencer filed her petition, by her next friend, stating that her husband had brought the suit without her consent; that he was insolvent and improvident; and asking for a settlement upon her out of property coming to her from her brother's estate. The court directed that she should be made a party in the suit, and have leave to prosecute her claim by her next friend. And at the same term, the plaintiff William Spencer dispensing with further pleadings and admitting her right to a settlement, the court made a decree appointing commissioners to divide the land and slaves of which David R. Hill died possessed, into four equal parts, and directing that they should assign the different parts to the parties named, one-fourth to Sarah P. Spencer, this part to be subject to a settlement to be made upon her, which the court would decree when the facts were ascertained so as to enable the court to fix the amount thereof. The decree further directed a commissioner to fix the yearly value of the lands and slaves; to ascertain whether any property had been settled upon her; and that he also take an account of the administration upon the estate of David R. Hill deceased.

At the October term 1852 of the court, Samuel Hairston and Greenville Penn's administrators filed their petitions, stating that they were creditors by judgments obtained at the May term 1852, of William Spencer, on which they had sued out executions, which had been returned no effects; contesting the right of Mrs. Spencer to a settlement, on the ground that she had already been provided for under her father's will, and that all her children were grown, married and well to do in the world; and asking that they might be made parties defendants in the cause. And the court made an order directing the *plaintiffs to amend their bill and make the petitioners parties. Though the order was made at the October term 1852, the amended bill was not filed until the May term 1854.

On the 6th of December, 1852, the commissioners appointed to divide the estate of David R. Hill deceased, made their report, by which they allotted to Mrs. Spencer eight slaves, valued \$3,050, out of which she was to pay \$87.50, and a tract of land of two hundred and twelve acres at nine dollars per acre, equal to \$1,912.50, and she was to receive \$125. At the May term of the

court for 1853, the commissioner reported a settlement of the administrator's account, showing Mrs. Spencer entitled to receive from the administrators \$765.82. He reported that there had been settled upon her, under her father's will, four slaves, one old man and a woman and two children, the annual value of which he put at forty-five dollars. And estimating that it would take three hundred dollars a year to support her, and deducting the forty-five dollars from that, and taking her age to be seventy-five years, he estimated it would require the sum of \$1,556.30 to raise the income of two hundred and fifty-five dollars for her life.

At the May term 1854, David H. Spencer the son, and Greenberry Nickols the son in law of the plaintiffs, filed their petition to be admitted defendants to the suit, claiming that they were creditors of William Spencer, and David H. claiming also as a purchaser of William Spencer's interest in the estate of David R. Hill under a sale by the sheriff under execution. David H. Spencer claimed under a deed of trust executed by William Spencer to Hughes Dillard. It bore date the 28th day of January, 1852, and was admitted to record on the next day, and was in trust to secure to David H.

Spencer a bond of the same date with 88 the deed, for \$413.88. *Nichols claimed under a deed of the same date and recorded on the same day, but it recognized the prior execution of the deed to secure David H. Spencer; and it was in trust to secure a bond of \$1,519.50, of the same date with the deed.

David H. Spencer further claimed under a sale made by the sheriff under an execution, which was issued on a judgment recovered by John Stone, jr., against William Spencer. This judgment was recovered in May, 1837. In the same month an execution of fieri facias was issued upon it, which was returned "no effects." In September, 1843, a ca. sa. was issued on which William Spencer was taken in custody and took the benefit of the act for the relief of insolvent debtors. And without any application to the court, so far as this record shows, Stone sued out another execution of fieri facias on the 14th of January, 1852, which went into the hands of the sheriff, and is returned satisfied in part by the sale of the defendant's interest in David R. Hill's estate.

It appears that William Spencer was summoned before a commissioner, by summons dated the 14th of February, 1852, and service acknowledged the 17th, to state what property he had on the 15th of January; and he gave in his interest in David R. Hill's estate, and conveyed this interest to the sheriff. This interest was sold by the sheriff on the 12th of April, 1852, to David H. Spencer, for three hundred and five dollars.

At the May term 1854 the plaintiffs amended their bill and made Hairston, Penn's administrator, David H. Spencer and Nickols defendants. And at the same time David H. Spencer and Nickols answered, setting up their claim as hereinbefore stated.

On the 5th day of October, 1854, Hairston and Penn's administrators filed their answers, claiming under their judgments, which were recovered at the May term 89 1852, *and the executions which were issued upon them, which they insisted gave them a lien upon William Spencer's interest in the estate of David R. Hill. They insisted that Mrs. Spencer and her children were in comfortable circumstances; Mrs. Spencer by means of a provision made for her by her father's will: and they exhibited a copy of the will and of the record of a suit in the county court of Henry for a division of his estate and a settlement upon Mrs. Spencer according to its directions. By the will of Mrs. Spencer's father, William Hill, after making a provision for his wife, he directs the balance of his personal property to be divided into five parts; one part to remain in the hands of his son John W. Hill for the benefit of his daughter Mrs. Spencer and her four children, with authority to deliver it to the children as they come of age if he thought proper, but to keep enough in his possession to support Mrs. Spencer. And by the 13th clause he directs the balance of his lands to be divided into four parts; one part to John W. Hill for the four children of Mrs. Spencer, to be given them as they come of age, reserving as much as he may think proper for the support of his daughter Mrs. Spencer.

By the record of the suit in the county court it appears that the property was sold under the decree of the court by David R. Hill, and that the share of each amounted to \$1,476.79; a part of this sum the court decreed to be invested in land for Mrs. Spencer; and it appears by the report in the cause that David R. Hill did buy a part of the testator's land to the amount of \$504; and he is credited for the amount of that purchase in the account stated between himself and Mrs. Spencer; and she lived on that land from that time until the final decree in this cause. She says that it is not hers, but that David R. Hill purchased it and conveyed it to David H. Spencer; but it does not appear that David R. Hill

90 accounted to *her or her children for the price. In addition to the land she received the slaves hereinbefore mentioned.

At the same term of the court, and on the first day of the term, Penn's administrators asked leave to file their cross bill in the cause, which was allowed, but so as not to delay the hearing of the cause; and in the same decree in which the permission is given, viz. the 10th day of October, 1854, the court proceeded to make a decree which confirmed the report of the division of David R. Hill's estate, made a settlement on Mrs. Spencer of \$1,556.30, and gave her the option to take the amount in slaves belonging to her share of the estate, or a part in money in the hands of the administrator of David R. Hill's estate, and the balance in slaves.

The cross bill of Penn's administrators sets out the proceedings in the first cause

and their judgment and execution against William Spencer. They object to a settlement upon Mrs. Spencer for the reasons before given; and charge that the claims of David H. Spencer and Nickols are pretended; that David H. Spencer's purchase at the sheriff's sale is void; and making these persons and others parties, they ask that the deeds of trust and sale may be declared null and void, and that they may have satisfaction of their judgment out of the property, and for general relief.

In May, 1855, these parties answer. William Spencer and wife insist upon her right to a settlement. David H. Spencer and Nickols insist that their debts are upon full and valuable consideration. Nichols says the bond given to him by William Spencer, which is secured by his deed, was given in part for one-half of the debt for which Penn's administrators had recovered judgment. That their judgment was upon an old bond given by William Spencer to J. & O. Williams, of Richmond, which was assigned

to Greenville Penn to enable him to
91 collect it, *for which he was to receive one-half. That Nickols had purchased the other half from O. Williams, the surviving partner, and he exhibited with his answer a note from O. Williams to Penn stating that he had sold his interest in the claim of J. & O. Williams on William Spencer, and requesting Penn to endorse on the note the assignment without recourse to him.

At the October term 1855, Hairston and Penn's administrators filed a petition for a rehearing of the decree of the 10th of October, 1854, setting out the proceedings; showing by the answer of Mrs. Spencer to the cross bill that, whilst in the commissioner's estimate of the value of her life estate she was taken to be but seventy-five years old, her answer shows she was eighty-two; and that the commissioner had made a mistake as to the annual value of the property: and they further state, that about two years before the filing of the petition, and pending this suit, Mrs. Spencer had recovered from D. H. Hill's estate the sum of \$781.50, a part of the sum of \$1,476.79 settled on her by her father, and that she had voluntarily distributed the same among her children.

At the April term 1857, the death of William Spencer was suggested; and, on the 4th day of September, 1857, by an order of the court, the commissioner returned his amended report, reducing the settlement of Mrs. Spencer to \$1,224.06; and on the same day, the two causes came on to be heard, when the court dismissed the cross bill with costs; and in the first cause, deducting \$60 as the annual hires settled on Mrs. Spencer by her father, reduced the allowance to Mrs. Spencer to \$1,164.06; and directed that the administrators of David R. Hill should pay to Mrs. Spencer \$763.82, the amount in their hands, and that if David H. Spencer or Greenberry Nickols did not pay to her the balance, a commissioner named should

take one or more of the slaves assigned
92 to Spencer and *wife under the parti-

tion made in the cause, and sell them and pay her, and the balance of the purchase money return to D. H. Spencer and Nickols. From this decree Greenville Penn's administrators applied to this court for an appeal, which was allowed.

Grattan, for the appellants.

There was no counsel for the appellees.

JOYNES, J., delivered the opinion of the court:

The court is of opinion that there is no error, to the prejudice of the appellants, in so much of the decree as makes a provision by way of settlement for the appellee Sarah P. Spencer. The court is of opinion that the amount of said settlement ought not to be abated by deducting therefrom the sum of \$781.50, recovered from the estate of David R. Hill on account of what was bequeathed to said Sarah P. Spencer by her father, William Hill, and by her divided among her children, because, though the act of Mrs. Spencer in thus giving up that amount during the progress of this cause, was urged by the appellants, in their petition for a rehearing, as a ground of objection to any settlement upon her, no exception was filed by them to the amended report of the commissioner, made two years after the filing of that petition, correcting other errors in the former report pointed out by the petition, but taking no notice of this objection. The objection must, therefore, be considered as abandoned by the appellants, and the court must presume that it would have been repelled if it had been insisted on.

But the court is of opinion that there is error in that part of the decree, to the prejudice of the appellee Sarah P. Spencer, in deducting the sum of sixty dollars from the amount reported by the amended re-
93 port as the amount *that ought to be settled upon the said Sarah, which error, however, may be corrected in the subsequent progress of the cause, by decreeing to her that additional amount, with interest thereon; and does not make it necessary to reverse the decree.

And the court is further of opinion, that there is error in so much of the decree as dismisses the cross bill of the appellants, for which the cause should be reversed. The cross bill was necessary to put in issue the fairness and validity of the deeds of trust in favor of David H. Spencer and Greenberry Nickols, and the validity of David H. Spencer's purchase at the sale under Stone's *fi. fa.* The court is of opinion, that the deed of trust of David H. Spencer has not been successfully impeached, and that the same must be taken to be valid, and that there should be an inquiry by a commissioner whether the one-half of William Spencer's debt to J. & O. Williams, claimed by Greenberry Nickols in his answer, and forming part of the amount provided for in his deed of trust, belonged, at the date of said deed of trust, to the said Nickols, or to the appellants P. P. and T. J. Penn, administrators of Greenville Penn deceased.

If, upon such inquiry, it shall be found that the said half of said debt belonged to the said Greenberry Nickols, then the amount thereof should be deducted from the amount of the judgment and execution of the said appellants, which should be held valid only for the residue after such deduction, and the deed of trust of said Greenberry Nickols should be held valid for the whole amount provided for thereby. But if, upon such inquiry, it shall be found that the said half of said debt belonged to the said appellants, then the amount thereof should be deducted from the amount provided for in the deed of trust of said Nickols. And it not appearing that the said sum was included in the amount provided for by said deed

94 with "any fraudulent intent in case such deduction should be made, should not be set aside altogether, but should be held valid for the residue after such deduction.

The court is further of opinion, that the sale under Stone's fi. fa. of the interest of William Spencer in the estate of David R. Hill deceased, was invalid upon the principles of *Clough v. Thompson*, 7 Gratt. 26, and ought to be set aside and annulled. It does not appear whether David H. Spencer went into possession under his purchase at the said sale, but if he did, he is liable to account for all the rents, hires, and other profits of the property embraced in said sale, while the same remained in his possession or under his control, and also for the value of any of the said property that may have been sold by him, or otherwise converted to his use, or lost by his act or willful default. He will be entitled to be reimbursed the sum of \$305, paid by him to the sheriff as the consideration for said purchase, with interest from the time of payment, inasmuch as in this collateral proceeding Stone's execution must be held to have been regular and valid, but he is not entitled to be reimbursed out of the real estate, which is the property of said Sarah P. Spencer, nor out of the fund already settled or to be hereafter settled upon her.

The court is further of opinion, that the decree dismissing the cross bill is also erroneous in not directing an account of the surplus of the property in question after satisfying the provision decreed to said Sarah P. Spencer, though, if there were no other error, this might be corrected without reversing the decree, as was done in *Marks & al. v. Hill & al.*, 15 Gratt. 400.

It is therefore adjudged and ordered, that so much of the decree in this cause as makes a provision by way of settlement for the appellee Sarah P. Spencer, be affirmed, and that the said decree be in all other

95 things "reversed and annulled, and that the appellees, who are personal representatives, out of the assets in their hands respectively, and the other appellees, out of their own estates respectively, pay to the appellants their costs about their appeal expended. And the cause is remanded to the Circuit court for further proceeding, according to the foregoing opinion and decree.

Decree reversed.

96 *Doggett & als. v. Helm & als.

October Term, 1866, Richmond.

1. *Chancery Practice—Land Warrants—Laches.*—Bill in relation to land warrants issued for services in the revolutionary war dismissed on the ground of laches and lapse of time.

2. *Evidence—Claims for Revolutionary Services.*—When a claim for revolutionary services is brought before the court, the ordinary rules of evidence must be applied to it.

3. *Chancery Practice—Suit in Name of Several Heirs—One Dead—Effect.*—When a suit in equity is brought in the names of several heirs, all having the same interest, if one of them is dead at the time the suit is brought in his name, and his heirs, or their agent, is connusant of the fact that the suit is so brought, and make no objection, but intend to claim the benefit of the decree, they will be bound by the decree dismissing the bill.

The case is stated in the opinion of the court, which was delivered by Judge Moncure.

There was no counsel for the appellants. Daniel, for the appellees.

MONCURE, J., delivered the opinion of the court.

The court is of opinion, without deciding any other question in this cause, that laches and lapse of time afford a sufficient ground for affirming the decree of the court below, dismissing the plaintiff's bill. It is an inherent doctrine of courts of equity to refuse to interfere where there has been gross

**Chancery Practice—Laches.*—A court of equity, which is never active in relief against conscience, or public convenience, has always refused its aid to stale demand where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence. Where these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced.

As said in the principal case, the above rule laid down by LORD CAMDEN in *Smith v. Clay*, Ambler R. 646, has been approved by many decisions in Virginia and West Virginia, several cases citing the principal case also as authorizing it. See *Carr v. Chapman*, 5 Leigh 164, 171; *Hayes v. Goode*, 7 Leigh 452; *Atkinson v. Robinson*, 9 Leigh 398; *Caruthers v. Trustees of Lexington*, 12 Leigh 610; *Foster v. Rison*, 17 Gratt. 348; *Bargamin v. Clarke*, 20 Gratt. 553; *Trader v. Jarvis*, 23 W. Va. 108; *Walker v. Ruffner*, 33 W. Va. 309, 9 S. E. Rep. 230; *Duffield v. Butler*, 34 W. Va. 629, 12 S. E. Rep. 778; *Bill v. Schilling*, 39 W. Va. 122, 19 S. E. Rep. 519; *Swann v. Young*, 36 W. Va. 57, 14 S. E. Rep. 426; *Kelly v. McQuinn*, 43 W. Va. 732, 26 S. E. Rep. 520.

On the subject of laches, the principal case was also cited as authority in *Wilson v. Barclay*, 23 Gratt. 542; *Knight v. Watts*, 26 W. Va. 175; *Pusey v. Gardner*, 21 W. Va. 485; *Hale v. Cole*, 31 W. Va. 585, 8 S. E. Rep. 521; *Connell v. Connell*, 33 W. Va. 325, 9 S. E. Rep. 254; *Whittaker v. So. W. Va., etc., Co.*, 34 W. Va. 230, 12 S. E. Rep. 511.

In *Cranmer v. McSwords*, 24 W. Va. 603, the court, while admitting that the rule laid down by LORD

laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights. 2 Story's Eq. § 1520. As was said by Lord Camden, in *Smith v. Clay*, Ambler R. 645, "a court of equity, which is never active in relief against conscience, *or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence. Where these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced."

This doctrine of courts of equity has been always recognized and acted on, and these observations of Lord Camden have been often repeated and approved by the courts of England and this country. *Id.* note 3, and cases cited. *Wagner &c. v. Baird &c.*, 7 How. U. S. R. 234, 258. This is emphatically the case in our own state, in which there are many decisions to that effect; of which *Carr's adm'r &c. v. Chapman's legatees*, 5 Leigh 104, 164, 171, is the leading one. See also *Hayes v. Goode*, 7 *Id.* 452; *Atkinson v. Robinson*, 9 *Id.* 393; and *Caruthers's adm'r v. The Trustees of Lexington*, 12 *Id.* 610.

On the 7th of April, 1838, an order was made by the executive department of Virginia in these words:

"The heirs of George Doggett are allowed land bounty for his services as a carpenter in the state navy for three years. The register will issue a warrant accordingly, if not heretofore drawn."

Under this order it was the duty of the register of the land office to issue a warrant for the proper quantity of land to such per-

CAMDEN is popular and often quoted, said that it is altogether too general and indefinite to furnish much practical aid in the determination of particular cases. The court continued by saying: "Where the lapse of time has been less than twenty years the decided cases show that the most important considerations in support of this defence are: first, the death of the parties to the original transactions involved or the intervention of the rights of third persons; second, the loss of evidence where the transactions are complicated so as to render it difficult if not impossible to do justice; and third, the character of the evidence by which it is sought to establish the demand, for instance, if the important facts are to be proved by parol testimony depending on the mere recollection of witnesses. But this last consideration has very little weight when the proof is written or the subject is susceptible of clear and distinct proof. Where these elements exist, or some of them, courts have denied relief after a lapse of much less than twenty years, but I have found no case in which relief was denied when the lapse of time was less than fourteen years. And when none of these elements exist and the court is satisfied that justice can be certainly attained notwithstanding the lapse of time, relief has been granted after a period much greater than twenty years."

See, also many cases collected on this point in foot-note to *Bargamin v. Clarke*, 20 Gratt. 544.

son or persons as might claim, and, to his satisfaction, prove themselves to be the heirs of the George Doggett referred to in the order.

Accordingly on the 30th day of July, 1838, a few months after the order was made, William Helm, claiming to be the agent and assignee in part of William Chitwood, and that said Chitwood was the sole heir of the said George Doggett, and having exhibited satisfactory evidence to that effect to the register, obtained from him two land *warrants, one to said Helm and the other to said Chitwood, each for 1,333 $\frac{1}{3}$ acres of land, making together 2,666 $\frac{2}{3}$ acres, the quantity to which the heirs of George Doggett were considered to be entitled under the order, and forthwith forwarded the said warrants to the general land office at Washington, to be exchanged for scrip.

But it turned out that there was another class of persons claiming to be the heirs of the George Doggett referred to in the executive order, who had employed A. M. Green as their agent, who had for years been pressing the claim for bounty land before the executive, and upon evidence furnished by whom, it seems, the claim was at length allowed. These alleged heirs, it seems, had not matured to their satisfaction the evidence of their heirship to be exhibited before the register, but were engaged in doing so, when the competing claim of Chitwood was presented to and allowed by him, without knowing, or remembering, that the class of persons represented by Green claimed to be entitled under the said order. The latter persons, by their agent Green, proceeded to mature their evidence of heirship, and in November of the same year 1838 applied to the register, Selden, to correct the supposed error, by recalling the warrants he had issued, and issuing others in their place to the said persons as the parties really entitled. But the register declined doing so, upon the ground that in his opinion he had no legal right to recall the warrants, then out of the state and filed in another department. He said, however, that should the warrants be returned, he would carefully examine all the proofs connected with them, and do impartial justice to the parties, as far as he could. Green seems then to have sent the papers supporting the claim of his principals to the commissioner of the general land office, for the purpose of proving that the warrants had been issued erroneously, and having the supposed error corrected. The

*commissioners, in a letter dated October 5th 1839, to Stafford H. Parker, then register of the land office at Richmond, enclosed the said papers; saying that if, on examination thereof, connected with the evidence already in the register's possession, and upon which the warrants were granted, the latter should be satisfied that the said warrants issued erroneously, they should, at his request, be returned; and that he had so advised the said Helm, by whom the warrants had been filed in his

office. The register declined recalling the warrants for the purpose of cancelling them and issuing others to the adverse claimants, believing that he had no authority to do so.

Shortly thereafter, and during the same month, to wit, on the 24th of October, 1839, a suit in chancery, called in the record the "Richmond suit," was instituted in the Circuit Superior court of law and chancery for the county of Henrico and city of Richmond, in the name of the heirs of the George Doggett, whose heirs were represented by Green, against the adverse claimants Helm and Chitwood, to which suit the register, Parker, was also made a defendant; the object of which suit was to have the warrants which had been issued recalled and cancelled, and new warrants issued to the plaintiffs as the parties entitled thereto. The defendants thereafter filed their answers, and on the 19th of June, 1843, an issue was ordered to be tried at the bar of the Circuit court of Lancaster, to ascertain—first, whether one or two persons of the name of George Doggett served in the revolutionary war. Secondly. If there were two, whether the plaintiffs and the defendant Chitwood were their heirs, respectively. And thirdly. If there was but one, whether the plaintiffs or the defendant Chitwood are his true heirs. That issue was not tried until the 1st of April, 1848, when a verdict was found, first, that there were two George

Doggetts of the county of Lancaster, 100 employed in the naval state *service in the revolutionary war. Secondly. That said Chitwood is the heir of one of them; that is, the one who shipped as carpenter on board the Tartar; and, there being no evidence before the jury but what was contained in the record, they referred the question to the court upon that evidence, whether the plaintiffs were the heirs of the other George Doggett. The last part of the verdict of course amounted to nothing. Nothing further seems to have been done in the case until June 28th, 1848, when the cause came on further and finally to be heard in the Richmond court, on the papers formerly read, and the verdict certified from the Lancaster court; and the bill was dismissed with costs.

On the 31st of August, 1852, an act of congress was approved, making further provisions for the satisfaction of Virginia land warrants; the provision made by previous acts having long before been exhausted. This act authorized the secretary of the interior to issue land scrip in favor of persons then entitled under unsatisfied Virginia land warrants, fairly and justly issued in pursuance of the laws of said commonwealth, for military services rendered in the war of the revolution.

On the 30th of April, 1853, Thomas Green, brother of A. M. Green, and counsel, it seems, of the parties of whom said A. M. Green was agent as aforesaid, addressed and sent a long letter to the commissioner of the general land office, requesting him not to issue scrip to Helm on the warrants

which had been issued to him and Chitwood, but to retain them for the right heirs; and maintaining, on grounds and for reasons fully set forth, that the parties represented by him, and not Chitwood, were the heirs of the George Doggett, the claim of whose heirs had been allowed by the executive of Virginia aforesaid. In that letter the Richmond suit was referred to, and it was argued that the decree in that suit interposed no bar to the 101 claim *of the plaintiffs, and at all events that the commissioner was not bound unless he thought the warrants were "fairly and justly issued," according to the terms of the act of congress. Similar letters were written by said Thomas Green to the said commissioner, and to the secretary of the interior, bearing date, respectively, on the 19th of May, 1854, and the 21st of June, 14th and 21st of July, and 12th of November, 1855. In the letter of the 21st of July, 1855, the writer mentions, for the first time, that William Doggett, in whose name, as one of the plaintiffs, the Richmond suit was brought and prosecuted to a decree, was dead at the time of the institution of the suit, which fact, he contends, renders the proceedings in the suit null and void. "It is fortunate," he says, "the discovery is made in time to prevent injustice by the technical trammels of the law, if indeed the act of congress did not already authorize you to review the case, and to seek out the real proprietors, independent of any pre-existent state trammels;" and he requests a few days delay in order to obtain conclusive proof of the death of William Doggett long before the institution of the suit in his name, if the secretary should regard such proof as material to a fair and just decision of the case. In the letter of the 12th of November, 1855, the writer encloses a copy of William Doggett's will, admitted to probate on the 18th of February, 1839, and the affidavit of Murdaugh in regard to the death and heirs of William Doggett.

The question on the conflicting claims for land scrip preferred in the name of "George Doggett," having been referred by the secretary of the interior to the attorney general, the latter officer gave an opinion on the 10th of March, 1856, in which, after stating and commenting on the conflicting claims, he thus concludes: "I think the true course in the case, if you are not 102 satisfied as to the *fairness, justice and legality of the issue of the warrants, is to refuse to grant scrip to either party. Green's Doggett has no warrant to surrender, and cannot demand scrip in lieu of a mere undetermined claim of and right to a warrant. Helm's Doggett is not entitled, unless he can satisfy you that the warrants were issued to him fairly and justly and in pursuance of law. If he does not, then it would seem that neither party has made out a case, requiring or justifying the affirmation, or any other decisive action of the department."

In a letter from the commissioner of the

general land office to Helm, dated March 24th, 1856, enclosing a copy of the above mentioned opinion, the commissioner says: "In view of the proof presented by the party representing the 'Lancaster Doggett,' showing that one of the heirs specified in the bill was not in life at the time it was filed, and that his representatives therefore could not be affected by the decision rendered in the case; and furthermore, that as that decision does not appear to decide the question as to whether the warrants were allowed and issued pursuant to the laws of the commonwealth, I am of the opinion that no further action should be taken by this office in the premises, until it is shown that the parties interested have exhausted their legal remedies before the courts of Virginia."

The controversy before the land office department at Washington being thus brought to a stand still, and the conclusion to which that department arrived on the case, as it then stood, inviting further litigation in the courts of Virginia, as a necessary means to the final settlement of the matter, a suit in chancery was brought in the Circuit court of Fauquier county, called in the record the "Fauquier suit," on the 11th of September, 1856, in the name of William H. Doggett, and the other heirs of William

Doggett, the dead plaintiff in the 103 "Richmond *suit," against Helm, Chitwood, and other defendants; the plaintiffs praying in their bill for a decree that Chitwood and Helm had no right to any portion of the said warrants; that said Helm should deliver them up; that the plaintiffs might receive their one-fourth share thereof; and for general relief. The only answer filed to that bill was filed by Helm in February, 1857; and on the 10th of September, 1858, the cause came on to be heard, and a decree was rendered dismissing the bill, for reasons set forth in the decree. From that decree this appeal was taken.

There can be no doubt but that all the plaintiffs in the Richmond suit, except William Doggett, are bound by the decree which was rendered therein. Nor can there be any doubt but that William Doggett's heirs are bound thereby, in a court of equity at least, if the suit was prosecuted in William Doggett's name with their knowledge and acquiescence, they intending to claim the benefit of the decree which might be rendered therein, should it be in the plaintiff's favor.

The circumstances of the case, as disclosed by the record, tend strongly to show, that the heirs of William Doggett had knowledge of the pendency of the suit shortly after its institution, and acquiesced in its prosecution for their benefit. They certainly had knowledge of the existence of the claim before the suit was instituted. They knew that their father had employed Felix Richards to prosecute the claim in his behalf; and one of them, William H. Doggett, wrote to Richards on the 19th of June, 1839, informing him that his father

was then dead. In fact, his father died in the preceding January, and the suit was brought in the succeeding October. Some time after the death of William Doggett, his son William H. Doggett spoke to Mr. Murdaugh, a lawyer, in relation to the claim, and brought him some letters,

104 *purporting to have been written by Felix Richards, and directed to William Doggett or William H. Doggett. The parties, William H. Doggett and his sisters, were anxious to employ Mr. Murdaugh to attend to the claim, but he declined, as it was under the care and management of Mr. Richards. While William Doggett had employed Felix Richards, the other heirs of the George Doggett, under whom William Doggett claimed, had employed A. M. Green to prosecute their claim. Thus all that class of claimants was represented by Green and Richards, who, as might be expected (having a common object in view), and as the record shows, communicated with each other, and acted in concert in the prosecution of the claim. Thomas Green, in his letter to the secretary of the interior of the 21st July, 1855, which is filed as an exhibit with the bill in the Fauquier suit, in accounting for the Richmond suit being brought in the name of William Doggett instead of his heirs, says, that Felix Richards left the conduct of the controversy to A. M. Green, and as he kept up no correspondence with the William Doggett branch of the family, he was not aware of the death of William Doggett, and did not communicate the fact to Mr. Patton, who prepared the bill. It is difficult to believe that the heirs of William Doggett remained in ignorance of the existence of the Richmond suit, from the time of its institution in October, 1839, to the time of the final decree in June, 1848, nearly nine years. They probably knew of it during the whole, or greater part, of that period. Their agent Richards must have known of it, and no doubt communicated the fact to them. But notice to the agent was notice to the principals. In the bill in the Fauquier suit, not one word is said about the ignorance of the plaintiffs of the Richmond suit, at the time of its institution or during its pendency. So important a 105 fact, if it had been true, *would hardly have been omitted in that bill. The Richmond suit was negligently prosecuted. It was brought in 1839. The issue was not ordered until 1843, and not tried until 1848. The suit was pending nearly nine years, when due diligence would have brought it to a conclusion in one or two. The nature of the case required the utmost diligence. The doctrines of a court of equity require, that a suit shall not only be brought in due time, but prosecuted with due diligence.

But whether the heirs of William Doggett had notice of the pendency of the Richmond suit or not, or whatever may be the effect upon their rights, of that suit, or the decree rendered therein, laches and lapse of time certainly interposed a bar to their recovery in the Fauquier suit. The controversy

about these warrants arose immediately after they were issued, in July 1838. They were issued to one of two sets of conflicting claimants; and if a resort to a court of equity by the other set was necessary to determine the controversy, it was all-important that such resort should be had as soon as possible. The evidence called for by the nature of the controversy was, of the identity of a man who died at least as far back as 1785, fifty-three years before the warrants were issued. It appeared, strangely enough, that there had been two George Doggetts of Lancaster, who had been carpenters in the state navy during the revolution, while land bounty had been allowed to the heirs of only one of them. But which one, was the question in controversy; and a difficult question it certainly was. It would have been difficult, if not impossible, for a court to have decided that question, even if the suit had been brought immediately after the claim was allowed by the executive. The lapse of time since the death of the party whose identity was in question was so great as to render it almost impossible

106 *to adduce that kind of evidence which a court must require as the foundation of its decrees. The law has prescribed rules of evidence for the government of the courts which must remain inflexible, and cannot be moulded or changed to suit particular cases. The same rules of evidence must, therefore, be applied by courts to controversies about claims to bounty land for military service as to all other controversies. The legislature, in view of the difficulty of proving such claims by legal evidence after a great lapse of time, by an act passed February 28, 1816, authorized the governor and council to allow and certify them upon satisfactory evidence. 2 Rev. Co. 1819, p. 480. And the governor and council have accordingly been in the habit, and properly so, of allowing such claims upon ex parte affidavits, certificates of courts and other like evidence, which, though not legal in a court of law or equity was yet the best of which the nature of the case would admit, and satisfied them that the claims were just. But the case is different when a controversy about these claims comes before a court. Then the fixed legal rules of evidence must govern it.

But it would have been difficult, and almost impossible, for a court to have settled this controversy when it first arose; that difficulty was greatly increased by lapse of time afterwards, and the claimants must have known that such would be the necessary effect of delay in bringing their suit. They ought, therefore, to have brought it immediately. Instead of doing so, the heirs of William Doggett delayed in bringing their suit from July, 1839, to September, 1856!—a period of more than seventeen years. This was an inexcusable delay, and no attempt has been made to assign for it any adequate excuse. When that suit was brought it was certainly impossible, if not before, to settle the controversy according to the legal rules of evidence. And ac-

cordingly, when the cause came on 107 *to be heard though the amplest opportunity had been afforded the parties to prepare the case for trial, the evidence mainly consisted of copies of the ex parte affidavits and certificates of courts which had been exhibited by the parties, in support of their respective pretensions, before the register of the land office in Richmond and the commissioner of the general land office in Washington. Such evidence, however satisfactory it might be to those officers, and properly so, afforded no sufficient foundation for a judicial decree upon the merits of the controversy, and the only decree which the court could properly make was to dismiss the bill. There was not sufficient ground for ordering an issue; and the fruitless attempt to ascertain the facts in controversy by the issue which was ordered in the Richmond suit, and which was tried in 1848 in the county of Lancaster, where both of the George Doggetts are said to have resided, shows how vain such an attempt would have been in 1858.

It is said, in excuse of the delay in bringing the suit, that until the act of Congress of August, 1852, was passed, no provision existed for the satisfaction of the land warrants in question, and it was uncertain when such provision would be made, or whether it ever would be made; and, therefore, that until then, the warrants were of little or no value. If they were of no value, or of so little value as not to be worth suing for, then the plaintiffs, by not bringing their suit, in effect abandoned their claim. But if they were worth suing for, and intended to be sued for, the suit, to be available, if it could be made available at all, ought to have been brought at once. They had been issued to the adverse claimants, whose right was maturing, as the intrinsic difficulties of the controversy were increasing by lapse of time.

The application to this case of the doctrine of courts of equity referred to in 108 the first part of this opinion, is *plain and palpable, and the decree must, therefore, be affirmed on the ground of laches and lapse of time. But while the courts cannot, for reasons before stated, decide the controversy between the conflicting complainants, the proper executive officers in Richmond and Washington may not have the same difficulty, and may be able to decide it as justice may seem to them to require, upon evidence long since laid before them, which they may have the right to read under the discretionary power conferred upon them in such cases, but which the courts cannot. That evidence was taken shortly before or after the time when the claim of George Doggett's heirs was allowed by the executive of Virginia, and is no doubt the best evidence, and indeed all the evidence of which the nature of the case will now admit. But whether the controversy can be settled in that way or not, is a question with which we have nothing to do, and it is only for us to say

that the court cannot settle it or do otherwise than affirm the decree dismissing the bill; which we now do.

Decree affirmed. But this affirmance is to be without prejudice to the claims of the respective parties to the warrants in controversy, before the proper executive officers in Richmond and Washington, and to any right of these officers or any of them to decide upon their conflicting claims, as justice may seem to require, upon such evidence before them, as they may deem to be satisfactory.

109 *Michie & als. v. Michie's Adm'r & als.

October Term, 1866, Richmond.

1. **Sunday—Term of Court.**—Sunday being *dies non juridicus*, is not one of the days of the term of a court.

2. **Appellate Practice—Perfecting an Appeal.**—The parties obtaining an appeal, failing to have it perfected by service of process upon the appellees, or publication, where that is proper, the court will on the motion of an appellee who has appeared, make a rule upon the appellants to speed the cause; and if they fail to perfect the appeal in the time appointed, or show good cause for their failure, the appeal will be dismissed.

In May, 1857, the Circuit court of Albemarle county made a decree in a cause depending therein, in which George Carr, administrator with the will annexed of David Michie deceased, and others were plaintiffs, and Thomas J. Michie and others were defendants. The defendants obtained an appeal from this decree; but the appellees being very numerous, the appellants did not perfect their appeal by service of process upon all of them.

In September, 1866, James M. Michie, one of the appellees who had appeared, by his counsel William Green, gave to the appellants a notice in writing, that on the 10th day of the next October term of the Court of Appeals, he would move that court for a rule upon them, that unless the cause was matured as to the other appellees within such time as the court should prescribe, the same should stand dismissed, or for such other relief in the premises as the court might deem meet. On Thursday the 11th of October the notice, acknowledged by the *parties, was presented to the court, the appellants were called, and the motion was continued until the next day. On Friday the 12th the appellants were again called, and the notice proved. The proceeding was had on both the 11th and 12th days of the month, because of a doubt as to which of the days would be construed to be the 10th day of the term; Sunday having intervened between the first and tenth day of the term.

*It is well settled that Sunday is not one of the days of the term of a court. See principal case cited as authority in Read's Case, 22 Gratt. 954; Bowles v. Brauer, 89 Va. 467, 16 S. E. Rep. 356.

The motion was argued by William Green, Esq., in favor of it.

There was no counsel for the appellants.

MONCURE, P., delivered the opinion of the court.

On the 24th day of September last, the appellee James W. Michie gave to the appellants a written notice, that on the tenth day of the now present term of this court, he would move the court for an order upon them to use due diligence about maturing this appeal for hearing as to the other appellees, and that, unless it be so matured within such time as the court might deem reasonable, and prescribe for that purpose, it should stand and be dismissed; or for such other relief in the premises as to the court might seem meet. On Thursday the 11th instant the appellants were called, the notice proved, and the motion was continued until next day. On Friday the 12th instant the appellants were called and notice proved again, a doubt being expressed whether the 11th or 12th instant was the tenth day of the term. And the motion was made and argued by the counsel of the party in whose behalf it was made.

Before deciding upon the motion, it is deemed to be proper by the court to express an opinion upon the preliminary question, as to which was the tenth day of the term; though the decision of that question was rendered *immaterial to the decision of the motion, by the course of proceeding above mentioned.

Whether the tenth day of the term was the 11th or the 12th instant depends upon whether Sunday, which intervened between the first and tenth days of the term, ought to be counted as one of the days of the term; and the court is of opinion that it ought not. Whether, in estimating and computing the days of a term of a court in the construction of any statute or notice, Sunday is to be numbered as one of them, is a question which depends upon the understanding and intention of the legislature, or the parties. Whatever may be the rule on the subject in England or elsewhere, the understanding in Virginia ever since the foundation of the government, if not the settlement of the colony, has been general, that Sunday, being *dies non juridicus*, is not one of the days of the term of a court. The sense of the legislature on this subject is shown by the statute, which declares, that "where a court is directed to be held, or any other proceeding directed by law to take place, on a particular day of the month, if that day happen to be Sunday, the court shall be held, or the proceeding take place, on the next day. And where a law authorizes a court, or the proceedings of an office, to be adjourned from day to day, an adjournment from Saturday to Monday shall be legal." Code, ch. 16, § 17, p. 115, 8th clause. This statutory construction would be in apparent conflict with the literal terms of such a law, which might be supposed to indicate an intention

to modify the general rule in the particular case; and yet, so general and decided is the understanding in the country that Sunday is not a day of a term, that the legislature, in framing the general statute referred to, presumed that such a law as is therein mentioned was intended to conform to the general understanding, though apparently in conflict therewith.

112 *When the statute speaks of a numbered day of a term, there is not even an apparent conflict, and there can be but little difficulty in so construing the statute as to exclude Sunday in the computation. The difficulty is still less in so construing a notice; which, being the act of the parties, is favorably construed to effectuate their intention, and not strictly construed according to technical rules which might be supposed to govern the legislature in framing a law. The question in construing such a notice is, how did the parties understand the words used in the notice? And the answer is, as they are generally understood in the country.

The fixed conviction and general understanding and practice in Virginia on this subject is plainly shown by the decision of the late General Court in Hill's case, 2 Gratt. 594, 612-13. Sunday being dies non, in the language of the court in that case, was not regarded by the judges in construing a statute as one of the days of a term. Indeed no question seems to have been raised in the case upon that point. There could be no better evidence of the general understanding and practice of the country on this subject. The case was of the highest importance; a conviction of murder in the first degree. The counsel for the prisoner was among the first in the land. The judges were men of great ability and experience, living in all parts of the country, and well acquainted with the general understanding and practice on the subject. And yet, in such a case, with such counsel, before such judges, no question was raised, but the matter was considered as settled. After the decision of that case we can have no difficulty in saying what is the true rule of construction in such cases in Virginia, and that Sunday ought not to be counted as one of the days of a term.

But while we have no difficulty on 113 this question, we do *not mean to imply that the learned counsel of the plaintiff in this motion was wrong in raising the question. On the contrary he properly did so, as it was a question unsettled by any decision of this court; and his great learning and research have developed a mine of authority on the subject, which tends to show that in England such a question might be decided otherwise. But we think it unnecessary to investigate those authorities.

In regard to the merits of the motion, we think the plaintiff is entitled to have, substantially, such a rule as he asks for. It devolves on the plaintiffs in a suit to mature their suit for trial, and if they are negligent in doing so the defendants are entitled

to a rule to speed, and to have the suit dismissed if the rule be disregarded: otherwise litigation might be interminable. We see no reason why this principle should not apply to the Court of Appeals as well as any other court; especially as the appellees have already obtained a judgment or decree in their favor in the court below.

There is nothing in the case of *Raine &c. v. The Bank of Virginia*, 4 Gratt. 150, which is in conflict with this view. There, after the appeal was matured for hearing, one of the appellants died; and then the appellee moved for a rule to compel the appellants to revive the appeal, or that the same should be dismissed. And the court held that in such a case, either party might proceed to have the case revived, and that it was incumbent on the party wishing such revival to take upon himself active measures for that purpose, and that he had no right to impose the obligation on his adversary. The revival of the appeal was as easy an operation as the rule to speed, and as the appellee had a right to revive it, the court thought he ought to have done so instead of moving for a rule. Here the appeal has not been matured, and there is

a great number of appellees who appear not to have *been served with 114 process, or proceeded against by publication. Surely the burden of proceeding against them cannot devolve upon the party who makes this motion. A rule will accordingly be entered in the form which we have prepared for the purpose.

The rule entered was as follows:

This day came the appellee James W. Michie by his counsel, and the court having maturely considered his motion made on the 12th instant, doth order that the appellants use due diligence in maturing the said appeal for hearing; and, if it be not so matured before the 5th day of April next, the court will on that day dismiss the said appeal, unless good cause be then shown to the contrary.

No cause being shown to the contrary at the April term of the court, the appeal was dismissed.

115 *Union Steamship Company v. Nottinghams.*

October Term, 1866, Richmond.

[91 Am. Dec. 378.]

1. Action on Case—Injury to Vessels—Gravamen of Action.—In an action for injury done to a vessel on the water, negligence on the part of the defendant or his agents, in the doing the injury, is the *gravamen* of the action.

*Demurrer to Evidence.—The principal case is cited in *Trout v. Tenn.*, etc., R. R. Co., 23 Gratt. 640; R. & D. R. R. Co. v. Moore, 78 Va. 97; Clark v. R. & D. R. R. Co., 78 Va. 713; R. & D. R. R. Co. v. Williams, 83 Va. 167, 9 S. E. Rep. 990, as laying down the principles upon which a demurrer to evidence is to be considered. See also, *foot-note* to *Trout v. Va. & Tenn. R. R. Co.*, 23 Gratt. 619; monographic *note* on "Demurrer to Evidence."

2. **Same—Same—Collision on Dark Night.**—In such an action for injury by defendant's steamer to plaintiff's schooner, the only proof is of a collision in a dark night; and defendant demurs to plaintiff's evidence without producing any himself. **Held:**

1. **Same—Same—Same—Inference.**—Though, when the collision happens in the daytime, it may reasonably be inferred that the steamer was in fault, yet when it happens on a dark night such an inference cannot be made.

2. **Same—Same—Rules of Navigation—Compliance with—Presumption.**—The owners of a steamer being required, under heavy penalties, to keep certain lights on board, and also a lookout, it is to be presumed that the law was complied with.

3. **Same—Same—Same—Same—Same.**—If defendant had introduced evidence, and had failed to prove that the lights and lookout were kept in their place at the time of the collision, it might reasonably be inferred, that they had not been so kept; yet not having introduced evidence, the inference that he performed his legal duty is to be made.

4. **Same—Same—Contributory Negligence.**—Though where there is mutual fault the court of admiralty will divide the loss, that is not the rule of the common law courts. There, when the negligence of the injured vessel contributes to the damage so that both are in fault, no action can be maintained.

This was an action on the case in the Circuit court of the city of Norfolk, brought by Leonard B. and Victor A. Nottingham, survivors of themselves and John D. Moore deceased, against The Union Steamship Company, *to recover damages for an injury alleged to have been done to their schooner Amazon by the steamer City of Richmond, owned by the defendants. The declaration charged, that the plaintiffs and Moore were the owners of the Amazon, a schooner of the burthen of about thirty tons, and that on the 8th of March, 1855, she was sailing up the James river with a cargo on board, also belonging to them; and the defendants were the owners of and in possession of the steamship "The City of Richmond," coming down said river; and the defendants, by their duly appointed captain, pilots and servants, then and there so negligently, carelessly and unskillfully managed and steered the said steamship that, for want of good and sufficient management and care thereof, she fell foul of, ran down and sunk the said schooner, with the cargo on board of her; by reason whereof the schooner was greatly damaged and the cargo lost. Damages claimed \$2,000. Plea not guilty; and issue.

The cause came on for trial in January, 1855, when the defendants, without introducing any evidence, demurred to that of the plaintiffs; and the jury assessed the plaintiffs' damages at one thousand four hundred and seventy-nine dollars and eighty cents, with interest from the 1st day of April, 1855; subject to the demurrer to evidence.

Jacob Outen, whose deposition was read to the jury, stated that he was on board the

schooner at the time the collision took place, and that John Moore was the master. That they left Northampton county on the 8th of March, and about daylight down they were off Newport's News. At this time they were in a calm, drifting among vessels. The wind then came on to blow a pretty breeze about south-southeast, and it was thick and foggy. We ran under a strong breeze to the first lighthouse on James river.

It was then very cold, and witness 117 came on deck *and took the helm. The captain walked the deck forward. It was perfectly thick, and witness could see but two stars. They bore over Day's point, the course he wanted to go up the river, and he was steering for them. Witness saw a light in that direction besides the stars, and told Captain Moore of it. He said it was the light on the Point of Shoals. Witness continued in the direction of the same light and stars, and kept shutting it in. He called the captain again, and told him it was not the light on the Point of Shoals; that it was a moving light. He said it was not; that it was the Point of Shoals light. The light still approached, until it shut in behind the jib. Witness was steering in the same direction; Captain Moore was still walking the deck, when he called to witness to keep hard off. As soon as witness kept off, he asked the captain if he had not better luff; but the captain would not allow him to do it. As soon as witness kept off, he opened the light immediately. He steered accordingly, and the schooner was struck by the steamer, The City of Richmond, a little forward of the main chain on the larboard side. The last word witness heard Captain Moore say was, "You are going to run into me." He was knocked overboard and drowned.

Witness stated that the light he saw was the light of the steamer; when first seen it looked very dim; he supposed it was then about four hundred yards off. The schooner was going about four knots an hour. The only light on her was in the binnacle, and this a lookout on the steamer could not have seen until it was too late, from the course the schooner was steering. In answer to the question, how long it was after Captain Moore directed you to keep away before the steamer struck you, the witness said, it was a mighty little time.

Witness stated in answer to questions: It was not foggy with them until after 118 night, and when it became *foggy it never was clear afterwards. If there was any moon he did not see it. The only other person on board the schooner was a free negro, who was in the cabin, and was saved.

Another witness, G. C. Thomas, stated: That he saw the Amazon immediately after she was raised and brought to Norfolk. That she was a remarkably well built schooner, and very strong. That she appeared to have been struck nearly amid ships, and nearly at right angles with her length, and was cut through from her waist nearly down to her keelson, within one plank;

and that it must have required great force and speed, or say seven or eight miles an hour, on the part of the steamer to have produced such effects. He knew the captains of both vessels, and considered them competent, experienced masters, and sober men. He proved the damage sustained by the plaintiffs to be \$1,479.80.

On the 4th of February, 1858, the cause came on to be heard upon the demurrer to evidence, when the court held, that the evidence was sufficient in law to maintain the issue joined on the part of the plaintiffs. And thereupon, the court being about to give judgment in favor of the plaintiffs, the defendants moved the court for a new trial, upon the ground that the damages were excessive; and the court intimating the opinion that the case as presented by the evidence, and as recognized by the admiralty law, was one of mixed or mutual fault, which should cause an equal division of the loss, the plaintiffs released to the defendants seven hundred and thirty-nine dollars and ninety cents, being one-half of the damages assessed by the jury; and thereupon the court overruled the motion for a new trial, and gave the plaintiffs a judgment for \$739.90, with interest and their costs. To this judgment The Union Steamship Company obtained a writ of error from this court.

119 *Tazewell Taylor, for the appellant.
Myers Fisher, for the appellees.

JOYNES, J. The gravamen of this action is negligence on the part of the defendants, through their agents and servants, in the management of their steamer, which is alleged to have been the cause of the collision by which the plaintiff's schooner was sunk. Unless such negligence existed and was the cause of the collision, the action cannot be sustained.

There is no direct evidence on this subject. The evidence does not show whether the steamer did or did not keep a proper lookout, or whether she did or did not show proper lights, nor how she was navigated or otherwise managed before or at the moment of the collision. The only witness examined proved nothing as to any of these points, and was not interrogated in respect to them, or any of them.

It was, however, contended in the argument, that while there is no direct proof of negligence on the part of those in charge of the steamer, such negligence ought to be inferred from the evidence.

It is undoubtedly true that the defendants in the court below, by demurring to the evidence, admitted every fact that might fairly be inferred from the evidence of the plaintiffs, as well as all such as were directly proved by it. And, as was said by Judge Stanard in *Ware v. Stephenson*, "in determining the facts inferrible, inferences most favorable to the demurrer will be made, in cases in which there is grave doubt which of two or more inferences shall be deduced. In such cases it would not be sufficient that the mind of the court should

incline to the inference favorable to the demurrant, to justify it in making that inference the ground of its judgment. Unless

there be a decided preponderance of 120 probability or reason *against the inference that might be made in favor of the demurrer, such inference ought to be made." 10 Leigh 155. But while the rule is thus favorable to the party whose evidence has, by the demurrer, been withdrawn from the consideration of the jury, it must be borne in mind that he is not entitled to claim that more shall be inferred from his evidence by the court than the jury might fairly and reasonably have inferred from it, if they had been allowed to pass upon it. *Green v. Judith*, 5 Rand. 1; *Hansbrough's ex'r v. Thom*, 3 Leigh 146; *Tutt v. Slaughter's adm'r*, 5 Gratt. 364.

The question, therefore, is whether it can be fairly and reasonably inferred from the evidence in this cause, that the collision in question was occasioned by negligence and want of care on the part of those who were in charge of the defendant's steamer.

It was argued in the first place, that in every case of a collision between a steamer and a sailing vessel, it is reasonable to presume, in the absence of any proof to the contrary, that it was occasioned by the fault of the steamer. When the collision happens in the day time, and in good weather, such a presumption might not be unreasonable in most cases, in consequence of the facility of controlling the movements of the steamer, and the probability that a collision would not happen, under such circumstances, without some fault on her part. It is held by the Supreme Court of the United States that the "mere fact that one vessel strikes and damages another, does not of itself make her liable for the injury, and that the collision must in some degree be occasioned by her fault." *Brig James Gray v. Ship John Fraser*, 21 How. U. S. R. 184; *Union Steamship Company v. New York and Virginia Steamship Company*, 24 How. U. S. R. 313; *The Morning Light*, 2 Wallace's R. 550. But it is also

held by the same court, that where a 121 collision occurs between *a steamer and a sailing vessel, where the steamer could see the sailing vessel in time, the steamer will be prima facie chargeable with fault for not taking the precautions necessary to avoid the collision. *Steamer Oregon v. Rocca & al.*, 18 How. U. S. R. 570; *New York and Liverpool U. S. Mail Steamship Company v. Rumball*, 21 How. U. S. R. 372; *Propeller Genessee Chief v. Fitzhugh & als.*, 12 How. U. S. R. 443.

But even if the owner of the sailing vessel could recover in such a case merely upon proof of the fact of collision, and without any other evidence of negligence or fault on the part of the steamer, as to which I am not called upon to give an opinion, I think such a rule cannot be applied to the present case. The collision in this case occurred on a dark night, described by the witness as "thick and foggy," and might well have happened without any fault or

want of care on the part of either vessel. The *Morning Light*, 2 Wallace's R. 550. In such a case, the mere fact of collision does not raise a presumption of negligence against the steamer, and is not, therefore, sufficient of itself to make her liable.

Again it is argued, that as the defendants did not prove that the steamer kept the proper look out and showed the proper number and description of lights, it ought to be presumed against them that they could not do so, and that in point of fact she did not have the look out or the lights.

Now every steamer is required by act of congress, under heavy penalties, to show at night lights of prescribed color and in prescribed parts of the vessel. And so by the rules of navigation, which are rigidly enforced by the courts of admiralty, every such vessel is required to keep a look out in the night time, whose sole business it shall be to look for dangers ahead, and so posted as to enable him best to perform that duty. The omission of these precautions not only involves a gross dereliction of duty to the owners of the ship and cargo, but a violation of law and a liability to heavy penalties, and argues an indifference on the part of the master to his own interests and safety. In the absence of all proof on the subject, it must be presumed, in accordance with well established principles, that duties thus enjoined have not been neglected, but have been performed.

If the defendants had gone into evidence, in detail, to repel the imputation of negligence by proving that their vessel was properly managed, the failure to prove that she kept the proper look out, and showed the requisite number and description of lights, would justly have given rise to the inference that she had not done so. These are the precautions specially devised and enjoined by law and usage, to guard against the danger of collision in the night time. And it is hardly to be believed that a party attempting to defend himself by detailed evidence against responsibility for such a collision would fail to prove that he had adopted these common and necessary precautions, if he had really done so. The failure to adduce this evidence, under such circumstances, might well be deemed sufficient to overcome the presumption that the duties enjoined by law and usage had been duly observed. But in the present case the defendants did not go into evidence to prove that their steamer was properly managed. They produced no evidence at all, but believing that the plaintiffs had failed to make out their case, demurred to their evidence as insufficient. The failure of the defendants, under such circumstances, to prove that the steamer kept the look out and showed the lights required by law and usage, cannot give rise to any unfavorable inference, and leaves the presumption in their favor in full force.

Upon the whole I am of opinion that the evidence does not establish that the collision was the result of negligence

123 *or want of due care on the part of

those in charge of the steamer, and that, therefore, the judgment should be reversed, and judgment rendered in favor of the plaintiffs in error.

The case being thus disposed of, it is unnecessary to consider whether there was any negligence on the part of those in charge of the schooner, or to discuss the principles applicable to the case of damage resulting from the mutual and concurrent fault of both parties. It is proper to say, however, that the admiralty rule adopted by the court below, by which the loss in such a case is divided equally between the parties, does not prevail in the courts of common law, and is inconsistent with common law principles. When the negligence or fault of the injured vessel contributes to produce the injury, so that the injury results directly from the negligence or fault of both vessels, the common law does not undertake to say how much of it is due to one and how much to the other, and leaves the loss where it falls. *Dowell v. Steam Navigation Co.*, 85 Eng. C. L. R. 195; *Tuff v. Warman*, 5 Com. B. (N. S.) 573, 94 Eng. C. L.; *Witherley v. Regent's Canal Co.*, 104 Eng. C. L. R. 2; *Rathbun v. Payne*, 19 Wend. R. 399; *Broadwell v. Swigert*, 7 B. Monr. R. 39; *Simpson v. Hand*, 6 Whart. R. 311; *Baker v. Lewis*, 33 Penn. R. 301. The other judges concurred in the opinion of Joynes, J.

Judgment reversed, and entered for the defendants in the court below.

124 *Sangster & als. v. The Commonwealth.*

October Term, 1866, Richmond.

1. Sheriffs—Tort Colore Offici—Liability of Sureties.—

A sheriff who takes the property of A under an attachment against the property of B, thereby not only commits a trespass, but plainly violates the duty of his office, and breaks the condition of his official bond; and his sureties are liable for his act.

2. Official Bonds—Judgment—Action—Case at Bar.—In an attachment in equity against B and A, the property of A is taken as the property of B, and being perishable, it is sold under an order of the court, and afterwards the court decrees that the sheriff pay the proceeds of sale to A. The sheriff failing to pay, A moves against him and his sureties in the county court, and judgment is entered for the

*For monographic note on Official Bonds, see end of case.

†Sheriffs—Torts Colore Offici—Liability of Sureties.

—In *Lucas v. Locke*, 11 W. Va. 80, the court said: "On the common-law principles governing the ordinary relation of principal and agent, the sheriff would not be responsible for an act done by his deputy *colore officii*; but on principles of public policy applying to the relation of the sheriff and his deputy, the former is liable in such a case; on the same principles it would seem that he and his sureties are liable on his official bond. *Sangster et al. v. The Commonwealth*, 17 Gratt. 121. It has been well settled that the sureties of a sheriff are responsible for his trespass in seizing and selling the goods of B. on an execution or attachment against A. 17 Gratt.

penalty of his bond, to be discharged by the payment of &c.; which is paid. Previous to the decision of the court in favor of A, he brought an action on the official bond of the sheriff, against him and his sureties, for the trespass in taking his goods; and the former judgment and its payment was set up in defence. **HOLD:**

1. **Same—Same—Same—Same.**—The action is not thereby barred; but A may recover the difference between the value of the goods at the time they were taken under the attachment, and the amount of the proceeds of sale paid to A.

2. **Same—Same—Same—Same.**—That it was not necessary to proceed by *scire facias* on the former judgment, but an action on the bond might be sustained.

3. **Same—Same—Effect on Subsequent Action.**—Other actions may be maintained on an official bond, though in a previous action judgment has been rendered for the penalty, to be discharged by the payment of the sum assessed in that action, and of such further sums as might be afterwards assessed or be found due, upon *scire facias* assigning a further breach.

125 *4. **Same—Same—Amount.**—In an action on an official bond, the judgment is not entered for the penalty to be discharged &c., but for the sum assessed or agreed as the damages in the case. Where this is by agreement, it is no error; and in any case it is a mere informality in the entry of the judgment by the clerk, and is not ground for staying or reversing the judgment.

This was an action of debt in the Circuit court of Alexandria county, brought in March, 1858, in the name of the commonwealth of Virginia, at the relation of Henry Blondheim, against Edward Sangster, sheriff of Alexandria county, and his sureties in his official bond. The declaration

supra, and cases there cited. And it is just as well settled, if the deputy of the sheriff does such an act, the sheriff is liable therefor."

But in *Lammon v. Feusler*, 111 U. S. 17, 4 Sup. Ct. Rep. 287, the court said: "Upon the analogous question whether the sureties upon the official bond of a sheriff, a coroner, or a constable are responsible for his taking upon a writ, directing him to take the property of one person, the property of another, there has been some difference of opinion in the courts of the several states. The view that the sureties are not liable in such a case has been maintained by decisions of the supreme courts of New York, New Jersey, North Carolina, and Wisconsin, and, perhaps, receives some support from decisions in Alabama, Mississippi, and Indiana. *Ex parte Reed*, 4 Hill 572; *People v. Schuyler*, 5 Barb. 166; *State v. Conover*, 4 Dutch. 224; *State v. Long*, 8 Ired. Law. 415; *State v. Brown*, 11 Ired. Law. 141; *Gerber v. Ackley*, 32 Wis. 233, and 37 Wis. 43; *Governor v. Hancock*, 2 Ala. 728; *McElhane v. Gilleland*, 30 Ala. 183; *Brown v. Mosely*, 11 Smedes & M. 264; *Jenkins v. Lemonds*, 39 Ind. 294; *Carey v. State*, 34 Ind. 106. But in *People v. Schuyler*, 4 N. Y. 173, the judgment in 5 Barb. 166 was reversed, and the case of *Ex parte Reed*, 4 Hill 572, overruled by a majority of the New York court of appeals, with the concurrence of Chief Justice BRONSON, who had taken part in deciding *Reed's Case*. The final decision in *People v. Schuyler* has been since treated by the court of appeals as settling the law upon this point. *Mayor, etc., of New York v. Sibbrens*, 3 Abb. App.

was on the official bond of the sheriff, and the breaches assigned were, that in certain attachment suits, naming them, depending in the Circuit court of Alexandria against Hartz Blondheim, Henry Blondheim and Joseph Breager, attachments were issued which directed the sheriff to attach the effects of Hartz Blondheim in the hands of the other defendants; that these attachments were placed in the hands of the sheriff, who in his official character, and under color of the authority conferred upon him by his office of sheriff, and of the said process and attachments, in violation of law and of the rights of the said Henry Blondheim, seized and removed from the storehouse of Blondheim a large quantity of goods, his sole property, of great value, viz. of the value of \$10,000.

The defendants demurred to the declaration, and the demurrer was sustained; and they demurred to the amended declaration and each count thereof; but the court overruled the demurrer. They then filed three pleas, on which issues were joined. The second plea included the first, and added to it; and the third included both the first and second, and added to them. The defence set up by them was, that in the attachment suits the court had, in November, 1857,

126 ordered the goods to be sold, which had been done by the sheriff, and they had brought \$1,343.62. That in November, 1858, the court had decided that the goods were the property of the relator, and had decreed in his favor against Sangster the sheriff for the said sum of money, the proceeds of the goods. That Blondheim had proceeded by motion in the county

266, and 7 Daly 436; *Cumming v. Brown*, 43 N. Y. 514; *People v. Lucas*, 98 N. Y. 585. And the liability of the sureties in such cases has been affirmed by a great preponderance of authority, including decisions in the highest courts of Pennsylvania, Maine, Massachusetts, Ohio, Virginia, Kentucky, Missouri, Iowa, Nebraska, Texas, and California, and in the supreme court of the District of Columbia. *Carmack v. Com.*, 5 Bin. 184; *Brunott v. McKee*, 6 Watts & S. 518; *Archer v. Noble*, 3 Greenl. 418; *Harris v. Hanson*, 2 Fairf. 241; *Greenfield v. Willson*, 13 Gray 384; *Tracy v. Goodwin*, 5 Allen 409; *State v. Jennings*, 4 Ohio St. 418; *Sangster v. Com.*, 17 Gratt. 124; *Com. v. Stockton*, 5 T. B. Mon. 192; *Jewell v. Mills*, 3 Bush 62; *State v. Moore*, 19 Mo. 339; *State v. Fitzpatrick*, 64 Mo. 185; *Charles v. Haskins*, 11 Iowa 329; *Turner v. Killian*, 12 Neb. 590; *Holliman v. Carroll*, 27 Tex. 23; *Van Pelt v. Littler*, 14 Cal. 194; *U. S. v. Hine*, 3 MacArthur 27."

Same—Unlawful Levy—Evidence.—In *Garrett v. Hutchinson*, 86 Va. 875, 11 S. E. Rep. 406, the principal case was cited, among others, to sustain the proposition that, in an action against the sheriff because of an unlawful levy and seizure of the plaintiff's property under an execution against third person, the plaintiff cannot be required to offer the execution in evidence.

Penal Bond—Suit on.—In the *B. & O. R. R. Co. v. Jameson*, 13 W. Va. 842, the court said: "In a suit on a penal bond the substantial cause of action is the breach of the agreement, contained in the condition. *Sangster et al. v. The Commonwealth*, 17 Gratt. 126."

court against the sheriff and his sureties upon his official bond; and the case having been removed to the circuit court, at the November term of that court for 1859, a judgment was rendered against them in favor of Blondheim for the sum of \$90,000, the penalty of the bond, to be discharged by the payment of \$1,227.60 with interest; and that they had fully paid off and discharged the judgment.

In June, 1860, the cause came on to be tried, when the parties agreed the facts to be argued in lieu of a special verdict; and it was agreed that if, upon the facts agreed and the pleadings in the cause, the court was of opinion that the law was for the plaintiff, judgment might be entered up for \$2,937.98, with interest thereon from the 17th of November, 1858, and costs; and if, on the contrary, the court was of opinion that the law was for the defendants, judgment should be for them for their costs: each party reserving the right of appeal.

The facts agreed were substantially as follows: Sangster as sheriff took and carried away the goods mentioned in the declaration, of the value of \$3,964.45, the property of Henry Blondheim. Blondheim, in the attachment suits, claimed the goods as his property. On the 21st of November, 1857, the court made a decree in these suits for the sale of the property as perishable; and it was sold by Sangster as sheriff, and produced \$1,343.62. By a further decree in said suits this sum was ordered to be paid to Blondheim, and was claimed by him.

Sangster failing to pay over the amount to Blondheim, he *proceeded in November, 1859, by motion on his official bond, against Sangster and his sureties, in pursuance of ch. 167, § 4, of the Code of Virginia, in which motion he recovered the said sum of \$1,343.62, with interest thereon from the 9th of February, 1859, after deducting a credit of \$155.53; which judgment has been paid and satisfied by the defendants in the motion.

Upon the facts as agreed, the court was of opinion that the law was for the plaintiff, and gave him a judgment for \$2,937.98, with legal interest from the 17th of November, 1858, till paid, and his costs. And thereupon the defendants applied to a judge of this court for a writ of error to the judgment, which was awarded.

Brent, for the appellants, insisted:

1st. That the act of the sheriff in taking the goods of Henry Blondheim, under the attachment against the goods of Hartz Blondheim, was a naked trespass, for which the sureties in his official bond were not responsible. He referred to *ex parte Reed*, 4 Hill's N. Y. R. 572; *Commonwealth v. Kennard*, 8 Pick. R. 133; *The Governor v. Hancock*, 2 Alab. R. N. S. 728; *Seeley v. Birdsall*, 15 John. R. 267; *Alcock v. Andrews*, 2 Esp. R. 540 n.; *People v. Spraker & als.*, 18 John. R. 390, 395.

2d. That the judgment against the sheriff and his sureties in November, 1859, on the official bond, operated as a bar to the present

action. That the selection of one remedy precluded him from another for the same cause of action; and he could not divide it, and have two suits. He referred to *Hite v. Long*, 6 Rand. 457; *Buckland v. Johnson*, 80 Eng. C. L. 145. But on another ground, he insisted the action could not be maintained. This is an action of debt for the penalty of the bond; and by statute the judgment is for the penalty, to be

128 *discharged by the payment of the actual damage, and "such further sums as may be afterwards assessed or found due upon a scire facias assigning a further breach. Such scire facias may be sued out from time to time by any person injured, against the defendant" &c. Code ch. 177, § 17, p. 733. Plaintiff having recovered judgment for the penalty, to be discharged &c., should have proceeded by scire facias setting out other breaches. *Bibb v. Cauthorne*, 1 Wash. 91; *Thatcher & al. v. Taylor & als.*, 3 Munf. 249, 250; *Smith v. Cooper*, 6 Id. 401, 405; *Page, governor v. Peyton & als.*, 2 Hen. & Mun. 566, 574; *Eppes' ex'or v. Demoville adm'r*, 2 Call 22, 29; *Allison v. Farmers Bank*, 6 Rand. 204, 235.

3d. That the judgment is erroneous, not being entered for the penalty, to be discharged &c., but for the sum of \$2,937.98. Code ch. 177, § 17, and the authorities cited on the second point.

Francis L. Smith and Claughton, for the appellee, insisted:

1st. That the sheriff acted in his official character in levying the attachment, as was shown by the whole proceeding; and as is fully set out in the declaration; and the case agreed admits that Sangster, as sheriff, took and carried away the goods of the relator; thus sustaining the averments of the declaration. They referred to *Davis v. The Commonwealth*, 13 Gratt. 139, 144.

2d. That if there was anything in the second point made by the appellants' counsel, the proper time to make the objection was on the motion to recover from the sheriff and his sureties the \$1,343.62; because this action had been commenced before that motion, and if the relator was bound to elect, he had already elected his action. But in fact the motion was a mere collateral ancillary proceeding, adopted to compel the sheriff to pay over money in his hands, which he had been decreed to

129 pay in the *attachment suit. The case of *Buckland v. Johnson*, 80 Eng. C. L. R. 149, relied on by the appellants' counsel, has been expressly overruled by the Supreme Court of the United States in *Lovejoy v. Murray*, 3 Wallace's U. S. R. 1, to which they especially invited the attention of the court.

That this action was not governed by ch. 177, § 17, of the Code, but by the 8th and 9th sections of ch. 13. These sections refer to official bonds taken by a court, as was the bond of this sheriff; and upon such bonds suits may from time to time be prosecuted, until the amount of damages recov-

ered for alleged breaches equals the penalty of the bond. In this chapter nothing is said about assigning new breaches by scire facias. The ch. 177, § 17, would seem to refer especially to private penal bonds.

3d. That the judgment in this case was entered by consent, and therefore the appellants are precluded from making an objection to its form; and if the case be against them on the merits, no injury can result to them from the mode of entering the judgment. *Vance v. McLaughlin's adm'r*, 8 Gratt. 289. But if it was wrong, it might have been corrected by the Circuit court, and is therefore no ground for reversal by appeal. Code ch. 181, §§ 3, 5; *Tyree & als. v. Donnally*, 9 Gratt. 64.

MONCURE, P., delivered the opinion of the court:

The first question presented for our decision in this case is, whether an action can be maintained against a sheriff and his sureties on his official bond, for a trespass committed by him in taking the goods of the relator, on an attachment issued against the property of another?

We are of opinion that the action can be maintained. The condition of the bond is, for the faithful discharge of the duties of the office of sheriff, according to law. A sheriff who takes the property of A under an attachment *against the property of B, thereby not only commits a trespass, but plainly violates the duty of his office and breaks the condition of his official bond. His duty is, to levy the attachment, according to its mandate, on the property of B; instead of doing which, he levies it on the property of A. He does this in his character of sheriff, *colore officii*, and not as a naked trespasser without color of authority; and it is consistent alike with sound policy and legal principles that he and his sureties in his official bond should be liable to the party injured for all damages arising from the wrongful act.

This question, it is believed, has never before been directly adjudicated by this court. The affirmative of the question was assumed to be law in the opinion delivered in the case of *Davis v. The Commonwealth*, 13 Gratt. 139, 144, in which all the judges but one concurred; and it does not appear that he differed from the others in this respect. But the question was not material to the decision of that case.

A similar question has been adjudicated in some of the other states, in which the condition of the sheriff's bond is substantially the same as it is here. In *Carmack v. The Commonwealth*, 5 Binn. R. 184, the Supreme Court of Pennsylvania held that the sureties of a sheriff are liable in damages for the sheriff's trespass in seizing and selling the goods of B. under an execution against A. All the learned justices, Tilghman, Yeates and Brackenridge, concurred in the judgment in that case, and delivered seriatim opinions, in which they strongly

vindicated the policy of the law as construed by them. Similar decisions have been made in Maine. *Archer v. Noble*, 3 Greenl. R. 418; *Harris v. Hanson*, 11 Maine R. 241; in Kentucky, *Forsythe v. Ellis*, 4 J. J. Marsh. R. 299; *Commonwealth v. Stockton*, 5 Monr.

R. 192; in Missouri, *State v. Moore*, 19 131 Missouri R. 369; and in *California, 4 Cal. R. 194, *Van Pelt v. Littler*. The Supreme Court of New York decided otherwise in *ex parte Reed*, 4 Hill's R. 572; but that case has been since overruled by the Court of Appeals of the same state, in *The People v. Schuyler*, 4 Comst. R. 173, in which it was held that "where a sheriff having in his hands a process" (which in that case, as in this, was an attachment) "against the property of the defendant therein, seizes by virtue thereof the goods of another person, he is guilty of official misconduct, and he and his sureties thereby become liable upon his official bond." See also *Dennison &c. v. Plumb &c.*, 18 Barb. Sup. Ct. R. 89.

There is no proposition better settled, and especially in this state, than that a sheriff is liable civiliter, though not criminaliter, for all the acts of his deputy *colore officii*, and is liable therefor in the same form of action as if they had been actually committed by himself; and consequently that he is liable in an action of trespass *vi et armis* for the act of his deputy in taking the goods of A under an execution against B. *Mosby's adm'r & als. v. Mosby's adm'r*, 9 Gratt. 589, 602-605; and the cases cited therein. It seems to result, necessarily, from that proposition, that the sheriff is not only personally liable in such a case, but he and his sureties are liable on his official bond.

On common law principles governing the ordinary relation of principal and agent, the sheriff would not be liable in such a case; but on principles of public policy applying to the relation of a sheriff and his deputy, the former is liable in such a case; and on the same principles, it would seem that he and his sureties are liable on his official bond. He is liable for his deputy, because the act of the latter is done under color of the office of sheriff, and is thus a quasi official act. *Van Pelt v. Littler*, supra. Certainly the deputy and his

132 sureties in his bond *to the sheriff for the faithful discharge of the duties of his office of deputy, would be liable in an action on that bond by the sheriff to recover damages sustained by the latter from such an act of the former. Why then are not the sheriff and his sureties liable on his official bond for such an act of his deputy; the condition of the two bonds, *mutatis mutandis*, being substantially the same?

The next question to be considered is, whether the relator has lost his right of action in this case by claiming the property in the attachment cases; and after it was decreed to be sold, and the proceeds of sale were decided to be his and decreed to be paid to him, by recovering the same by a motion against the sheriff and his sure-

ties and receiving the amount of such recovery.

We are of opinion that he has not thus lost his right of action in this case. It is true that where a plaintiff has concurrent remedies for the same demand, and elects one of them, and prosecutes it to a judgment, he cannot then resort to another, but is bound by his election, although it may be a bad one. It is also true that he cannot divide one cause of action into two. The plain reason of these rules of law is, that a defendant will not be suffered to be harassed by two suits when one would answer all the purposes of justice. Therefore, when A wrongfully takes the property of B and sells it, B may bring trespass, trover, detinue or assumpsit for money had and received, against A at his election; but having elected one of these forms of action, and prosecuted it to judgment, he cannot then abandon it and bring another. Trespass comprehends the whole injury, as well the wrongful taking as the wrongful detention or conversion, and the value of the property, unless it be restored. By bringing detinue or trover, the plaintiff waives all claim for the wrongful taking of the property; and by bringing assumpsit he also waives all claim for the wrongful de-
133 tention *and conversion, affirms the sale, and makes the proceeds of it money had and received to his use. It would be inconsistent to permit him, after electing and prosecuting to judgment either of the three last named actions, and especially the last, to resort to the first. The case of *Hite v. Long*, 6 Rand. 457, relied on by the counsel for the plaintiffs in error, involved this principle. But the principle does not apply to this case. The attachment suits were not brought by the relator. The attachments were levied upon his property, and he was made a home defendant to the suits, which were foreign attachments in equity. He was not a debtor of the plaintiffs, nor was his title to the property in question brought in controversy by the bills. The attachments against the debtor defendant were levied on his, the relator's, property; and thus a trespass was committed by the sheriff who made the levy. The relator, being made a defendant in the case, of course asserted therein his claim to the property, as he could, and no doubt would have done, if he had not been made a defendant. The property, being perishable, was in the progress of the suit decreed to be sold. And afterwards, the question of title being decided in favor of the relator, the proceeds of sale were decreed to be paid to him by the sheriff who made it; but not being paid, the amount was recovered by motion against him and his sureties. Now this was altogether a different claim from that of the relator against the sheriff for the trespass. The sheriff was not a defendant to the attachment suits. The main controversy in that case was between the attaching creditors and their debtor; incidental to which was a controversy between he former and the relator, as to whether

the property attached belonged to him or their debtor. That controversy was determined in the relator's favor, and of course the proceeds of the property were decreed to be paid to him. They could not be
134 decreed to *be paid to the creditors, because the property did not belong to their debtor, nor to the sheriff, because not only did not the property belong to him, but it would have been real injustice both to his sureties and to the owner of the property to have made such a decree. The only proper disposition of the money therefore was to decree it to be paid to the owner of the property. But such decree and payment cannot extinguish his claim against the sheriff for the trespass, any more than would the return of the property itself to him, either by the sheriff who took it, or by the order of the court in the attachment suits. The only effect of such return would be to mitigate the damages in the action for the trespass, and the decree and payment aforesaid can have no greater effect. They have had that effect, by the proceeds of sale being credited on the amount due for the value of the property, in the action brought by the relator against the sheriff and his sureties for the trespass. The relator would probably have been willing to have received his property, after it was taken under the attachments, if it had not been impaired in value, and to have asserted no further claim for the trespass. But it seems to have been impaired in value while in the hands of the sheriff, and at all events was sold for less than half of its value at the time it was taken. The relator then, and before the proceeds of sale were decreed to be paid to him or the question of title was decided in his favor in the attachment suits, brought his action for the trespass on the official bond of the sheriff. That action came on to be tried after he recovered and received the amount decreed to him in the attachment suits as aforesaid, and he recovered in the action the value of his property when taken, credited by the amount of the proceeds of the sale of it. We think he was entitled to such a recovery.

The next objection taken to the
135 judgment is, that the *judgment on the motion against the sheriff and his sureties, for the proceeds of the sale made in the attachment suits, was for the penalty of the bond to be discharged by the payment of the said proceeds; and not by that only, but also by the payment of any such further sums as might be afterwards assessed or be found due upon a scire facias assigning a further breach; and if the latter judgment was not in fact rendered in such form as to provide for a further breach as aforesaid, it is contended that it ought to have been so rendered, under the Code, ch. 177, § 17, and must have the same effect as if it had been so rendered; and consequently, that that judgment is a bar to this action, and precludes the relator from any other remedy upon the official bond of the sheriff than by scire facias under the judgment already rendered.

It is true that that statute does require that the judgment shall be entered in the above mentioned form, in actions on bonds conditioned for the payment of an annuity, or of money payable by instalments, where there are further payments of the annuity or further instalments to become due after the commencement of the action, or for the performance of other collateral agreements. But it is at least doubtful whether that statute was intended to apply to actions on official bonds; although, in regard to such bonds, it has been held by this court, that the judgment ought to be so entered, under a statute of like import to that in question, and from which the latter was derived. The source of these statutes is the well known act of 8 and 9 W. 3, ch. 11, § 8, in regard to the assignment of breaches on bonds with collateral conditions. 1 R. C. 1819, p. 509, § 82; 1 Rob. Pr. old ed. 153. In no case has it been decided that even where a judgment on an official bond has been so entered, it is a bar to any other action on the bond, and precludes any other recovery upon it than by *scire facias*.

136 *under the judgment already rendered for the penalty; much less would it be a bar where the judgment is not so entered, but entered in the general form. It would be unreasonable in the last degree to give to the judgment such an effect. The relators may be altogether different, and their causes of action different. They may know nothing of the actions brought by one another, which may be in different and distant courts, and it would be extremely inconvenient to require any party injured by the default of the officer, and about to bring an action on his bond, to ascertain at his peril whether a judgment had already been recovered upon it, under which he might proceed by *scire facias*. It may be convenient enough to require the judgment on the bond to be entered in the form prescribed by the statute; but not to make it a bar to a future action, whether the judgment be entered in that form or not.

But there is another statute, referred to by the counsel for the defendant in error, which seems to put this matter at rest. It will be found in the Code, ch. 13, §§ 8, 9, and relates to bonds taken by courts and officers, in regard to which it is provided, that "suits may be prosecuted from time to time upon" any such bond "in the name of the commonwealth, for the benefit of any person injured by any breach of the condition of such bond, as often as any such breach may be alleged, until damages shall be recovered for such breaches equal to the penalty of the bond." The statute expressly gives the right to bring separate actions for separate causes of action; and it seems to be eminently proper that such should be the case. The breaches are wholly distinct causes of action, in favor, generally, of wholly distinct persons, and there is no reason or propriety of confounding them in one action. The cause of action in such cases is the breach of the agreement contained in the condition, and not the

137 *penalty of the bond, which is so completely nominal that its non-payment to the commonwealth need not be averred in the declaration. 6 Munf. 401.

The last objection taken to the judgment is, that it is not in pursuance of the Code, ch. 177, § 17; that is, for the penalty of the bond to be discharged by payment of the agreed damages and such further sums as may be afterwards assessed as aforesaid, but is simply for the sum of \$2,937.98 (the agreed damages), with interest &c. Besides what has already been said which is pertinent to this objection, a conclusive answer to it is, that by the case agreed the parties expressly consented that the court, if of opinion that the law is for the plaintiff, might enter up a judgment for \$2,937.98, with interest as aforesaid and costs. But in addition to this, the error, if any, is a mere informality in the entry of the judgment by the clerk, in regard to which the Code, ch. 181, § 3, provides that "no judgment or decree shall be stayed or reversed for any informality in the entry of the judgment or decree by the clerk."

We are, therefore, of opinion that the judgment ought to be affirmed.

Judgment affirmed.

OFFICIAL BONDS, INCLUDING BONDS OF GUARDIANS, ADMINISTRATORS AND EXECUTORS, AND SHERIFFS.

I. Official Bonds in General.

- A. Jurisdiction of County Courts.
- B. Necessity for Official Bonds.
- C. Validity of Bonds.
- D. Liability on Official Bonds.
 1. In General.
 2. Who May Maintain Action.
 3. Extent of Liability.

E. Remedy on Official Bonds.

1. Form of Remedy.
2. Notice to Sue.
3. Averments Necessary.

F. Pleas.

1. Statute of Limitations.
2. Release.
3. Transfer of Liability.
4. Bankruptcy.

G. Judgment.

II. Bonds of Guardians.

- A. Necessity for Guardian's Bond.
- B. Validity of Bond.
- C. Remedy on Bond.
 1. Jurisdiction of Equity.
 2. Parties to Suit.
 3. Form of Relief.
- D. Liability on Bond.
 1. In General.
 2. Parties Liable on Bond.
 3. Grounds of Liability.
 4. Extent of Liability.

E. Defences.

1. Release.
2. Statute of Limitations.
3. Transfer of Indebtedness.
4. Discharge in Bankruptcy.

III. Bonds of Administrators and Executors.

- A. Necessity for Bond.
- B. Validity of Bond.
- C. Form of Bond.
- D. Liability on Bonds.
 - 1. In General.
 - 2. Proof of Devastavit.
 - 3. Liability of Executor's Sureties for Proceeds of Land.
 - 4. Liability for Negligence.
 - a. In General.
 - b. Failure to Take Refunding Bonds.
 - c. Receiving Confederate Currency.
 - 5. Duration of Liability.
 - 6. Extent of Liability.
- E. Pleading.
 - 1. Relator.
 - 2. Parties.
 - 3. Necessary Allegations.
 - 4. Plea.
- F. Equitable Relief.
- G. Defences.
 - 1. Statute of Limitations.
 - 2. Transfer of Liability.
- H. Evidence.
- I. Decree.

IV. Bonds of Sheriffs.

- A. Necessity for.
- B. Validity.
- C. Liability on Bond.
 - 1. In General.
 - 2. Accrual of Cause of Action.
 - 3. Continued Liability.
 - 4. Extent of Liability.
- D. Bond of Deputy.
 - 1. Nature of Bond.
 - 2. Form of Remedy.
 - 3. Cause of Action—Time of Accrual.
 - 4. Duration of Liability.
 - 5. Extent of Liability.
 - 6. Evidence against Deputy.
- E. Pleading.
 - 1. Notice.
 - 2. Parties.
 - 3. Relator.
 - 4. Necessary Allegations.
 - 5. Pleas.
- F. Evidence.

Cross References.

In connection with this subject, see monographic notes on the following subjects:

- Bankruptcy and Insolvency, appended to Dillard v. Collins, 25 Gratt. 343.
- Bills of Exception, appended to Stoneman v. Com., 25 Gratt. 887.
- Estoppel, appended to Bower v. McCormick, 23 Gratt. 810.
- Executions, appended to Paine v. Tutwiler, 27 Gratt. 440.
- Executors and Administrators.
- Guardian and Ward.
- Interest, appended to Fred v. Dixon, 27 Gratt. 541.
- Statutory Bonds, appended to Goolsby v. Strother, 21 Gratt. 107.

I. OFFICIAL BONDS IN GENERAL.

A. JURISDICTION OF COUNTY COURTS.

Official Bonds—Motions—Jurisdiction of County Courts.—The authority of the county court under sec. 5, ch. 163, Code 1873, to hear and determine

motions on official bonds was not repealed by sec. 9, ch. 395, Acts of 1872-3. Carr v. Meade, 77 Va. 143 (1883).

B. NECESSITY FOR OFFICIAL BONDS.

Bond of Treasurer—Authority to Require.—The statute of 1792 authorized the executive to demand annual bonds of the treasurer. Baker v. Preston, Gilmer 235.

Receiver—Bond—Necessity for.—A receiver has no power or title until he give the bond required of him. Crumlish v. Shenandoah Val. R. Co., 40 W. Va. 627, 23 S. E. Rep. 90.

Unless a receiver is also the sheriff of the county, he should of course be required to give proper bond and security. Grantham v. Lucas, 15 W. Va. 432.

Trustee—Bond Required—Penalty.—In this case the trustee appointed by the court was required to give bond and security, for the faithful performance of his duty, in a penalty double the amount of the trust estate, payable to the judge of the court and his successors in office. Dunscomb v. Dunscomb, 2 H. & M. 11.

Commissioner—Bond Necessary—Statute.—No special commissioner appointed by a decree or order of court, or of a judge in vacation, to sell or rent any property, shall advertise property for sale or renting, or sell or rent the same, until he shall have given bond before the court or judge, or the clerk of the court in his office, in a penalty, to be prescribed by the court or judge, sufficient to cover at least the probable amount of the purchase money or rent, and shall have obtained from the said clerk a certificate with the bond required by law or by the decree or order has been given, which certificate or a copy thereof shall be appended to the advertisement. Va. Code, § 3398.

Commissioner—Bond Necessary.—The statute requires a bond of the commissioner to make the sale, and it must be given before he receives any money under the decree, whether it be therein directed or not. McAllister v. Bodkin, 76 Va. 809; Donahue v. Fackler, 21 W. Va. 124; Flesher v. Hassler, 29 W. Va. 404, 1 S. E. Rep. 581; Cooper v. Daugherty, 85 Va. 343, 7 S. E. Rep. 387. But see Dixon v. McCue, 21 Gratt. 877.

Commissioner—Failure to Give Bond—Effect.—The commissioner who upon the sale of land received purchase money without having given the proper bond required of a commissioner, is liable to the purchaser for the amount so received; and he may be proceeded against by rule to show cause why a decree should not be rendered against him for the amount aforesaid. Tyler v. Toms, 75 Va. 116.

Where three commissioners were decreed to sell the debtor's real estate, and the decree provided that those giving the bond might sell alone, the sale by two commissioners, one of whom gave bond, was held valid, the third having died before the sale was advertised. Strayer v. Long, 89 Va. 471, 16 S. E. Rep. 357.

The Code, § 1, ch. 132, provides: "A court in a suit properly therein may make a decree or order for the sale of property in any part of the state, and may direct the sale to be for cash, or on such credit and terms as it may deem best; and it may appoint a special commissioner to make such sale. No special commissioner appointed by a court shall receive money under a decree or order, until he give bond before the said court or its clerk." Chapter 142, § 1, Acts of 1883, amending this section, provides among other things, that "No sale shall be made by such commissioner until such bond and security has been

given and approved by the clerks; and every notice of such sale shall have appended to it the certificate of such clerk, that the bond and security have been given by the commissioner as required by law." The law, it will be seen, is much more stringent now than under the Code. The sale in this case was made under the provision of the Code. We cannot say, that the failure to give bond in this case before the sale vitiated it. The provision of the Code does not authorize us to say the sale for this reason was void. *Sommerville v. Sommerville*, 26 W. Va. 483.

Commissioner—Failure to Give Bond—Waiver.—If a commissioner collects money without having given proper bond, and the parties for whose benefit the bond was intended choose to ratify the act, and to look to him alone for payment, no one has the right to complain or to insist that such a proceeding raises up an equity in his favor. *Lee v. Swepson*, 76 Va. 173.

Commissioner—Sale of Land—Failure to Require Bond.—It is error to decree the sale of land for cash, and not to require the special commissioner to give bond with security, conditioned according to law, before making the sale. *Baker v. Oil Tract Co.*, 7 W. Va. 454; *Donahue v. Fackler*, 21 W. Va. 124; *McClaskey v. O'Brien*, 16 W. Va. 791.

A decree for the sale of land, which does not require the commissioner appointed to make the sale to first execute bond, as the statute requires, is erroneous and must be reversed. *Parker v. Valentine*, 27 W. Va. 677; *Neeley v. Ruleys*, 26 W. Va. 666.

Commissioner—Sale of Land—Bond—Waiver.—A plaintiff in a suit to enforce the vendor's lien cannot waive the bond required by statute of the commissioner appointed to make the sale. The decree should require the bond and the bond should be given. The statute is mandatory and no waiver is contemplated by it. *Neeley v. Ruleys*, 26 W. Va. 666.

Commissioner—Sale of Land—Failure to Require Bond in the Decree.—The statute, Acts 1883-4, p. 213, says: "The commissioner shall give bond and personal security, to be approved by the clerk of the court." *Held*, a failure to provide that the commissioner of sale shall give bond and security is not error for which the decree should be reversed. *Cooper v. Daugherty*, 25 Va. 243, 7 S. E. Rep. 387; *McAllister v. Bodkin*, 76 Va. 809.

Commissioner—Bond—Purchaser—Liability.—Where a purchaser, at sale made under decree of court, pays the purchase money to a sale commissioner who has not given the bond required by law, such payment is invalid, unless certificate of clerk that such bond has been given was published with advertisement of sale. Code 1887, §§ 2397, 2399; *Lloyd v. Erwin*, 23 Gratt. 698. See, for very similar cases, *Woods v. Ellis*, 26 Va. 471, 7 S. E. Rep. 862; *Lee v. Swepson*, 76 Va. 173; *Tyler v. Toms*, 75 Va. 126. See also, *Brown v. Taylor*, 32 Gratt. 136; *Hess v. Rader*, 26 Gratt. 747; *Blair v. Core*, 20 W. Va. 265; *Davis v. Snead*, 23 Gratt. 705; *Donahue v. Fackler*, 21 W. Va. 124; *Clarke v. Shanklin*, 24 W. Va. 30.

Bond of Clerk—Non-Execution—Liability.—The clerk of this court being required, by an act of assembly enacted since he came into office, to give bond and security for performance of his official duty, the court considered it not proper to dispense with, or sanction the non-execution of such bond, or to pronounce any opinion as to the consequences of his failing to do so; but left it to him to execute the same, or not, at his own peril, to be adjudged of, in case of failure, by a court having competent jurisdiction of the case. *Dance's Case*, 5 Munf. 249.

Sergeant as Receiver—Official Bond as Security.—If the sergeant of the city in which the property is located, is appointed receiver to take charge of and rent out land, it is not necessary to require him to give security for the faithful performance of his duty, as it is covered by his official bond. *Moran v. Johnston*, 26 Gratt. 108; Code of 1873, p. 1124, ch. 174, § 5.

Treasurer—Qualification—Bond—Evidence.—The qualification of the treasurer, including the execution of his bond, is, by virtue of § 813 of the Code of 1887, made matter of record in the county court, and this record and memorial of the judge imports "such uncontrovertible credit and verity as that they admit of no averment, plea, or proof to the contrary." In the absence of any issue by the pleadings of mistake or fraud, the record proves itself. *Stuart v. Com.*, 91 Va. 152, 21 S. E. Rep. 246.

C. VALIDITY OF BONDS.

Official Bond—Validity—Essentials.—The failure of an officer to obtain an approval of his official bond as required by statute does not affect his liability or that of his sureties, if it was otherwise legally executed and delivered. *State v. Proudfoot*, 23 W. Va. 736, 18 S. E. Rep. 949.

Bond of Treasurer—Approval Necessary.—In the matter of the treasurer's bond the approval of the county court of the officer's securities is necessary to complete the execution and delivery of the bond, and make it obligatory; and this approval must appear on record. *Blanton v. Com.*, 91 Va. 1, 20 S. E. Rep. 884.

A bond of a special commissioner to make a sale in a chancery cause is delivered by the commissioner to the clerk of the court. The bond though perfect on its face, was executed by the sureties upon the condition that it would not be delivered to the clerk until it was also executed by another person as surety, and when the clerk received the bond he was not informed of such condition. *Held*, this was a valid bond; and the sureties cannot set up this condition by way of defence when the bond is sued upon. It is not necessary to the validity of such bond, that it should be either acknowledged or proven before the court. Such a bond however, must, as to the sufficiency of the sureties, be approved by the clerk; but in order to make the bond valid, he need not endorse his approval upon it. *Lyttle v. Cozad*, 21 W. Va. 184.

Clerk—Bond—Time of Execution.—A person appointed clerk of a district court by the judges of the general court in vacation, has the whole of the ensuing term of the district court to give the bond and security required by law. *Dew v. Judges*, 3 H. & M. 1.

Receiver—Bond—Formal Defects.—If a bond in a judicial proceeding bind one to account for money put in his hands by the court, as to which he is in law to be regarded a special receiver or custodian, the bond is good for such money, though it call the party a guardian. *Findley v. Findley*, 42 W. Va. 372, 26 S. E. Rep. 433.

Bond of Treasurer—Formal Defects.—On a motion against the treasurer of a county and his sureties for a fine for his failing to submit his bond to the commissioner of accounts as directed by the acts of 1878-79, ch. 60, § 4, the facts that the sureties are made parties does not constitute error for which the judgment will be reversed. *Wimbish v. Com.*, 75 Va. 839.

Bond of Cashier—Defects—Estoppel.—Where the

official bond of the cashier of a bank was conditioned for the faithful performance of the duties of the said office, "which may be prescribed by the board of directors," it was held that the cashier, by the performance of certain duties in his office of cashier, was estopped to deny that they had been prescribed by the board. *Durkin v. Exchange Bank*, 3 Pat. & H. 277.

Bond Taken without Authority Void.—The hustings court of Williamsburg, without any authority of law for the act, appoints a collector of the public taxes, for the city, and takes his bond with surety for due collection, etc., payable to the governor and his successors. *Held*, such bond is not valid and obligatory on the surety. *Commonwealth v. Jackson*, 1 Leigh 486.

Bond of Commissioner—Material Defect.—It is plain from § 8398 of the Code, that a decree which directs a commissioner to give bond before any other person or tribunal than those named in the statute is erroneous. By the terms of the statute the bond is required to be given before the court or before the judge of the court or before the clerk of the court in his office—and the clerk of that court is required to certify that this has been done. If the decree, which erroneously directs the clerk of any other court to take the bond, be interlocutory the appellate court will correct the error. *So. West. Va. M. Co. v. Chase*, 95 Va. 50, 27 S. E. Rep. 826.

D. LIABILITY ON OFFICIAL BONDS.

1. IN GENERAL.

Inspector's Bond.—One inspector of tobacco, being injured by the misconduct of the other, may bring suit upon the official bond of such delinquent, against him and his securities. *Scott v. Hardaway*, 4 Munf. 263.

2. WHO MAY MAINTAIN ACTION.

Inspector's Bond—Action—Who May Maintain.—An action may be maintained on an inspector's bond in the name of the governor, for the benefit of a person injured by the non-delivery of tobacco, although the law merely directs the original bond to be transmitted to the treasurer, and is silent as to the prosecution of suits thereon. The person injured in such case has his option either to bring such suit, or an action in his own name against the inspectors, for the penalty (imposed by law) of double the value of the tobacco. *Page v. Peyton*, 2 H. & M. 566.

Under § 180, Code 1887, which provides that "suits may be prosecuted from time to time upon any bond mentioned in §§ 177, 178, in the name of the commonwealth for the benefit of the commonwealth, county, or any person injured by any breach of the condition of such bond, as often as any such breach may be alleged, until damages shall be recovered for such breaches equal to the penalty of the bond," if the clerk of the circuit court, in taking an appeal bond, committed a breach of the condition of his bond, and the plaintiff is damaged thereby, he may maintain an action on the clerk's bond. *Chase v. Miller*, 88 Va. 791, 14 S. E. Rep. 545.

3. EXTENT OF LIABILITY.

Bond of Clerk—Unauthorized Payment—Sureties Not Liable.—The payment of money to the clerk in vacation is not equivalent to the payment of money into court, and, if the clerk fails to return such money into court, the sureties on his official bond cannot be held responsible for its loss. *State v. Enslow*, 41 W. Va. 744, 24 S. E. Rep. 679.

Bond of Sergeant—Extent of Liability.—Where the sheriff or sergeant makes a sale under a decree of

a court of equity, the sureties on his bond are responsible for the due administration of the money. *Va. Code, § 8408; W. Va. Code, ch. 132, § 2.*

Official Bond—Ministerial Act—Liability for.—In a case where a public officer is authorized by law to exercise a merely ministerial act within a stated limit, and no discretion is vested in it, he is liable on his official bond for acts illegally done in excess of his authority. *Allen v. Com.*, 83 Va. 94, 1 S. E. Rep. 607.

Bond of Collector—Extent of Liability.—When by virtue of a statute one is collector *de jure* of a city until his successor is elected and qualifies, his sureties are bound to the same extent for his default while thus in office after the end of two years from the day of the election of his predecessor that they are for his default during the two years. *Wheeling v. Black*, 25 W. Va. 266.

Bond of Clerk—Extent of Liability Thereon.—The official bond of a clerk of a county or circuit court, with condition for the faithful execution of the office, required by the statutes of 1792, ch. 66, § 12, and ch. 70, § 3, was not intended to secure the collection of taxes on legal process, etc., though it has been made the duty of the clerk *ex officio* to collect and account for such taxes, nor are the clerk and his sureties liable upon this bond, for his failure to collect, account for, and pay such taxes into the treasury: the bond required by those statutes, extends only to those duties of the office that are properly clerical. *Auditor v. Dryden*, 3 Leigh 703.

Cashier—Bond—Extent of Liability.—The words "which may be prescribed," in the official bond of a cashier of a bank, conditioned for the faithful performance of "the duties of the said office of cashier, which may be prescribed by the Board of Directors," were held, under the circumstances, to mean the same as if the words had been "the duties which have been, are now, or may hereafter be prescribed by the Board of Directors." *Durkin v. Exchange Bank*, 3 P. & H. 277.

Fiduciary—Negligence—Liability.—A fiduciary is bound to see to the collection of claims due the estate committed to him; when these are against the government no question of locality can arise; in such case he may prosecute and collect them anywhere, and his bond wherever given, is accountable if he neglect to collect, or, having collected, failed to disburse an account. *Davis v. Chapman*, 83 Va. 67, 1 S. E. Rep. 473.

Receiver—Bond—Negligence—Liability.—A court receiver is not liable for a debt lost without fault or negligence on his part. Nothing more is required of him than that he should act in good faith, and with the same prudence and discretion that a prudent man is accustomed to exercise in his own affairs. *Reynolds v. Pettyjohn*, 79 Va. 237; *Davis v. Harman*, 21 Gratt. 200, and cases cited; *Tuley v. Barton*, 79 Va. 387.

Fiduciaries—Conversion—Liability of Fiduciary and Purchaser.—The conversion into money by a trustee, of well secured bonds belonging to a trust fund, by a sale thereof, at a large sacrifice, to a purchaser with full notice of the trust, constitutes such an improper dealing with and devastation of the trust subject as will render both trustee and purchaser *prima facie* responsible therefor. And it will be for them to show that the necessities of the trust required the sacrifice. *Cocke v. Minor*, 25 Gratt. 246; *Jones v. Clark*, 25 Gratt. 642; *Utterback v. Cooper*, 28 Gratt. 223, 287; *Brockenbrough v. Turner*, 78 Va. 448; *Mills v. Mills*, 28 Gratt. 442; *Patteson v. Bondur*

rant, 30 Gratt. 94, and *note*; Tosh v. Robertson, 27 Gratt. 270; Taylor v. Lancaster, 23 Gratt. 1, and *note*; Purdie v. Jones, 22 Gratt. 227, and *note*; Crawford v. Shover, 22 Gratt. 69; Myers v. Nelson, 26 Gratt. 729, and *note*.

Statute—Valid Order to Invest in Confederate Money—Three Conditions Must Concur—Liability of Fiduciary.—To authorize the order of a judge in vacation for the investment of confederate money by a fiduciary, under the act of March 5, 1863, Sess. Acts 1862-'63, ch. 44, p. 81, three things are necessary: 1st. The money must be in the hands of the fiduciary; 2d. It must have been received in the due exercise of his trust; 3d. For some cause he must be unable to pay it over to the parties entitled. If they do not all exist, the order of the judge is a nullity, and the fiduciary is responsible for the money. *Campbell v. Campbell*, 22 Gratt. 649; *Crickard v. Crickard*, 26 Gratt. 421; *Kirby v. Goodykoontz*, 26 Gratt. 302; *Ammon v. Wolfe*, 26 Gratt. 626; *Carter v. Dulaney*, 30 Gratt. 197; *Crawford v. Shover*, 22 Gratt. 81; *Frazier v. Frazier*, 77 Va. 775.

In *Kirby v. Goodykoontz*, 26 Gratt. 302, a trustee was held liable for a loss resulting from his investment of good money in confederate bonds, but he was not held liable for interest during the civil war.

Liability of Trustee Receiving Confederate Currency.—C, living in Virginia, trustee of D, a married woman separated from her husband, and residing in Missouri, holds bonds on a solvent debtor, well secured on real estate, which were executed before the war; and in 1863 receives payment in part of said bonds in confederate money, and invests it for D in a confederate bond. The receipt of confederate money at that time was a breach of trust, and C will not be allowed a credit for the amount of the bond. *Coltrane v. Worrell*, 30 Gratt. 424; *Carter v. Dulaney*, 30 Gratt. 192, and *note*.

Commissioners—Receiving Confederate Money.—R, a commissioner selling land in 1860 under a decree, is guilty of a breach of trust in receiving confederate currency from the purchaser in payment of his bonds, in 1863. *Omohundro v. Omohundro*, 27 Gratt. 224; *Crawford v. Shover*, 22 Gratt. 82; *Ammon v. Wolfe*, 26 Gratt. 621; *Tosh v. Robertson*, 27 Gratt. 270.

"There are a number of cases in which it has been held by this court, that although the fiduciary who received depreciated confederate currency in payment of a well secured specie debt was guilty of a *devastavit*, yet the debtor who made the payment was protected, because, as a general rule, the debtor did not know the state of the executorial accounts, and he had the right to presume that the money was needed for the purpose of paying debts or legacies, or for some other object advantageous to the estate. But it is equally well settled that if the debtor is apprised at the time that the money is not needed for any of these purposes; if he is aware that the collection was made merely for investment in confederate bonds, and the safety of the fund thus hazarded upon issues of the war, he is equally guilty with the fiduciary who received the money, and like him is answerable to the parties interested." *Helsley v. Fultz*, 76 Va. 671; *Patteson v. Bondurant*, 30 Gratt. 94.

Public Officers—New Duties—Sureties.—Where new duties are imposed upon a public officer by statute after the execution of his official bond by his surety, the bond should be held good against the surety, to the extent of the duties lawfully covered by it, though it may not be good as to the new duties imposed since its execution. *Com. v. Holmes*, 25 Gratt.

771; *Crawn v. Com.*, 84 Va. 226, 4 S. E. Rep. 721; *Loving v. Auditor of Public Accounts*, 76 Va. 950; *Richmond & P. R. Co. v. Kasey*, 30 Gratt. 230; *Findley v. Findley*, 42 W. Va. 372, 26 S. E. Rep. 433; *Sayre v. King*, 17 W. Va. 562; *Smith v. Com.*, 25 Gratt. 780.

When a statute requires a bond from an officer for the faithful discharge of his duty, and a new duty is attached to the office by statute, such bond given subsequently to the latter statute embraces the new duty and is a security for its performance, unless when the new duty is attached, a bond is required to be given specifically for its performance. *State v. Hill*, 17 W. Va. 452.

Bond of Fiduciary—Extent of Liability—How Determined.—Where the court has authority to take a bond from a fiduciary, the nature and extent of the liability assumed by the parties is ascertained by the bond itself, and not by any mere order of court reciting the fact of its execution. *Caskie v. Harrison*, 76 Va. 96; *Pannill v. Calloway*, 78 Va. 394; *Shelton v. Jones*, 26 Gratt. 261.

E. REMEDY ON OFFICIAL BONDS.

1. FORM OF REMEDY.

Liability of Sheriff on Forthcoming Bond—Remedy.

A judgment cannot be obtained upon a forthcoming bond, bearing date before the 7th of January 1867, against the sheriff to whom the estate of a deceased obligor has been committed, as against an executor or administrator in ordinary cases; but the plaintiff must exhibit his claim before the court, according to the act of 1792. *Jackson v. Ewell*, 4 Munf. 426. See Rev. Code, 1st vol. ch. 9, § 61, pp. 167, 168.

Sureties on the official bond of a receiver are in no just sense parties to a suit against the receiver by reason of their suretyship; and if there be no fund in their hands, or which ought to have gone into their hands, subject to the order of the court, they can not be summarily proceeded against by a rule to show cause. Their liability, if any, grows out of their undertaking as sureties on the bond, and can be ascertained and enforced only by suit on the bond in a common law court, where full opportunity for making defence and the constitutional right of trial by jury can be had. *Thurman v. Morgan*, 79 Va. 267.

Officer—Bond—Action—Motion.—The plaintiff in an execution may by notice and motion under § 26, ch. 19 of the Acts of 1881 recover judgment against an officer in the court to which or to the clerk's office of which the notice is returnable, in any case in which the return would entitle him to recover by action; and this is true though such officer may reside in a county different from that in which the court is held. *Bank v. Horner*, 26 W. Va. 442.

Other actions may be maintained on an official bond, though in a previous action judgment has been rendered for the penalty, to be discharged by the payment of the sum assessed in that action, and of such further sums as might be afterwards assessed or be found due, upon *scire facias* assigning a further breach. *Sangster v. Com.*, 17 Gratt. 124.

2. NOTICE TO SUE.

Commissioner—Whether Creditor—Notice to Sue.—A person appointed by a court of equity in a pending cause, a receiver to collect the purchase money of lands sold by him as commissioner under a previous decree in the cause, and for which he had taken a bond with surety to himself as commissioner, is not a creditor in the sense of the statute, Code of 1873, ch. 142, §§ 4, 5, to whom a surety on the bond may give the notice to bring suit upon it. *Davis v. Snead*, 23 Gratt. 705.

3. AVERMENTS NECESSARY.

Bond of Collector—Action—Averments.—An action against a collector of poor rates, upon his bond to the overseers of the poor, cannot be maintained without an averment in the declaration that the plaintiffs are overseers at the time of the institution of the suit. *Horton v. Haymond*, 6 Munf. 399.

Official Bond—Action—Averments.—In declaring upon a bond given by a public officer to the governor and his successors, conditioned for faithful performance of official duty, it is not necessary to aver the non-payment of the penalty to the obligee, or his successors, by any of the obligors. *Smith v. Cooper*, 6 Munf. 401.

In an action of debt on a bond conditioned for the faithful discharge of the duties of an office, the declaration need not set forth the particular persons from whom money was received, nor the sums received from each, nor the time when the breaches were committed, if it appears that they occurred during the continuance of the defendant in his office; nor is it necessary to state the damages occasioned by the breaches. *Allison v. Bank*, 6 Rand. 204.

Demurrer will not lie to a declaration on an official bond when the means of specific information are destroyed or in the possession of the adverse party and the breaches are assigned with as much exactness as is possible. *Elam v. Commercial Bank*, 86 Va. 62, 9 S. E. Rep. 498; *Allison v. Bank*, 6 Rand. 204.

F. PLEAS.

1. STATUTE OF LIMITATIONS.

Fiduciary Bonds—Statute of Limitations.—The statute of limitations bars an action on a fiduciary bond only after ten years from the cause of an action accrued. *Morrison v. Lavell*, 81 Va. 519; *Lavell v. Gold*, 26 Gratt. 473; *Franklin v. Depriest*, 13 Gratt. 257; *Leake v. Leake*, 75 Va. 792; *Sharpe v. Rockwood*, 78 Va. 24.

Official Bond—Nullum Tempus Occurrit Regi.—The failure of the public officers of the state to assert the right of the government against defaulting a principal in an official bond will not operate to discharge his sureties. Their laches cannot affect the government; and even if the delay be long continued, so that the sureties lose the benefit of remedies which would have been available if the government had acted promptly, it is, so far as they are concerned, *damnum absque injuria*. *Crawn v. Com.*, 84 Va. 282, 4 S. E. Rep. 721.

2. RELEASE.

Officer—Compensation Reduced—Bond—Sureties Not Released.—A valid statute, reducing the compensation of the officer, passed after his appointment and the execution of the official bond, does not release the sureties from their liability on such bond. The power of the legislature to change the compensation of public officers is absolute except so far as it may be limited by fundamental law, and sureties on official bonds must be taken to have contracted with reference to the existence of this power. *Loving v. Auditor*, 76 Va. 942.

3. TRANSFER OF LIABILITY.

Fiduciary Bond—Liability—Transfer Thereof.—A fiduciary cannot transfer his mere indebtedness in one capacity to himself in another capacity, so as to exonerate his securities in the one and throw the burden upon his securities in the other. To make the transfer valid it must consist of something more than a naked liability; it must be substantially assets if made by an insolvent fiduciary. But if the fiduciary is solvent and able to pay over the funds all that is necessary for him, when he is ordered to

pay it over, or when the law would authorize him to pay it over to a third person holding the other fiduciary character, to make his election and manifest it by some act, direction or admission. *Board v. Cain*, 28 W. Va. 758, 770; *Wooddell v. Bruffy*, 25 W. Va. 465; *Smith v. Gregory*, 26 Gratt. 248; *Swope v. Chambers*, 2 Gratt. 319; *Morrow v. Peyton*, 8 Leigh 54.

4. BANKRUPTCY.

Official Bond—Sureties—Bankrupt Law.—The sureties of a public officer are not excluded from the benefit of the bankrupt law of 1841. *Saunders v. Com.*, 10 Gratt. 494.

G. JUDGMENT.

Official Bond—Judgment—Amount.—In an action on an official bond, the judgment is not entered for the penalty to be discharged, etc., but for the sum assessed or agreed as the damages in the case. Where this is by agreement, it is not error; and in any case it is a mere informality in the entry of the judgment by the clerk, and is not ground for staying or reversing the judgment. *Sangster v. Com.*, 17 Gratt. 124.

A judgment against a public officer on his official bond is not even *prima facie* evidence of a defalcation. *Courtney v. Beale*, 84 Va. 602, 5 S. E. Rep. 708.

II. BONDS OF GUARDIANS.

A. NECESSITY FOR GUARDIAN'S BOND.—Not a guardian by nature, but only a guardian appointed, who has given bond as and when required by law, is entitled to the possession, care, and management of his ward's estate. *McDodrill v. Pardee & Curtin Lumber Co.*, 41 W. Va. 564, 21 S. E. Rep. 578.

The Taking of Guardian's Bond—A Judicial Act.—The taking of a guardian's bond is a judicial, not a ministerial act, and must be done in open court, the sufficiency of guardian's bond being a question for the court to decide. The clerk's duty is merely to prepare the bond and insert the penalty directed by the court and to see that the bond is duly filed and preserved, and for these only is he answerable. *Page v. Taylor*, 2 Munf. 402.

One Bond Sufficient for Two Wards—Equity Will Adjust Their Claim.—One guardian's bond may be taken for two infants, and where one gets judgment against the surety and it is feared the penalty of the bond will not satisfy the claims of both infants, judgment will be given for the whole amount of his claim in favor of the first infant, and if what is left is not sufficient to satisfy the second infant's claims, their rights will be adjusted in a court of equity which will relieve the security from any excess over the penalty and proportion the penalty between the infants. *Call v. Ruffin*, 1 Call 333. See also, *Reed v. Hedges*, 16 W. Va. 167.

B. VALIDITY OF BOND.

Variations from Statutory Form Do Not Invalidate the Whole Bond.—Where a guardian's bond contains a covenant to indemnify the justices constituting the court at the time it was taken, although this is not required by the statute, it does not avoid the bond; and although the condition in the guardian's bond is not as extensive as the statute requires, it binds the obligors as far as it goes. *Pratt v. Wright*, 13 Gratt. 175. See also, *Reed v. Hedges*, 16 W. Va. 167; *Barnum v. Frost*, 17 Gratt. 398.

Guardian's Bond—Necessary Recitals.—It is not necessary that the conditions of a guardian's bond state that the guardian was appointed. *Call v. Ruffin*, 1 Call 333; *Pratt v. Wright*, 13 Gratt. 175; *Reed v. Hedges*, 16 W. Va. 167.

Estoppel to Deny Guardianship.—Where a guardian's bond recites the principal to be guardian and that the money is to go to him as such, the obligors are estopped from either saying he was not guardian or was not receiving the money in that character. *Findley v. Findley*, 42 W. Va. 372, 26 S. E. Rep. 433.

C. REMEDY ON BOND.

1. JURISDICTION OF EQUITY.—Courts of equity have jurisdiction of suits to hold guardians and their sureties to account, and the non-residence of the guardian will not oust them of their jurisdiction. *Pratt v. Wright*, 13 Gratt. 175.

2. PARTIES TO SUIT.

Proper Parties to Suit on Bond.—In a suit by wards against the heirs of their guardian and the sureties on her bond and their representatives, process must be served on all the parties. *Bland v. Wyatt*, 1 H. & M. 543.

A guardian may come into court with his sureties and execute a new bond; said bond relates back to the time of the qualification of the guardian, and the sureties in the former bond, upon the execution of a new bond, are discharged and it is not necessary nor proper that they should be made parties to a suit for the settlement of the guardian's account. *Sayers v. Cassell*, 23 Gratt. 535.

Suit may be brought against a surety on a guardian's bond, without first bringing suit against the principal. See also, *Spottswood v. Dandridge*, 4 Munf. 239; *Reed v. Hedges*, 16 W. Va. 167.

There is no good reason why a person having a valid claim against a guardian and his surety for a breach of the condition of the bond of the principal, for which principal and surety are alike expressly bound, should be required to exhaust his remedy against the principal before going against the surety. In such case a decree may at once be rendered against them both according to the condition of the bond. *Barnes v. Trafton*, 80 Va. 524; *Franklin v. Depriest*, 13 Gratt. 257.

To avoid multiplicity of suits, the ward has the right to join his sureties in his suit in equity on his guardian's bond. *Magruder v. Goodwyn*, 2 P. & H. 561; *Call v. Ruffin*, 1 Call 333.

And a joint decree may be taken against the principal and sureties without first going against the principal. *Barnes v. Trafton*, 80 Va. 524.

3. FORM OF RELIEF.—A ward has concurrent remedies against the sureties of a guardian and a fraudulent purchaser from the guardian, and may pursue them at the same time. If he recovers from the sureties, they will be subrogated to ward's rights against the purchaser. *Asberry v. Asberry*, 23 Gratt. 403.

The condition of the guardian's bond is to pay and deliver to the ward her estate, when thereto required by the justices. A creditor for necessities furnished to the ward, may be substituted to the rights of the ward, upon the bond, against the guardian and his sureties, for the payment of her debt. *Barnum v. Frost*, 17 Gratt. 298.

Sureties, who, by the exercise of a little diligence, could have protected themselves from loss, and who have been guilty of laches in not seeing that their principal exercised his trust faithfully and in allowing him to retain possession of his ward's estate for eight years after the ward came of age without an account, though during nearly all this period their principal was perfectly solvent, cannot claim to be subrogated to the ward's rights against third parties, on indemnifying the ward. *Hunter v. Lawrence*, 11 Gratt. 111.

Generally a surety is subrogated in equity to securities of his principal's creditor, whom he has paid; but a bond on which guardian and surety are both bound, once paid by surety in the lifetime of the principal without assignment or agreement to assign, is dead in equity as well as in law. *Cromer v. Cromer*, 29 Gratt. 280.

D. LIABILITY ON BOND.

1. IN GENERAL.—The courts demand of a guardian, in relation to the estate committed to his care, the utmost good faith and the exercise of a fair discretion. When these appear, the courts show a manifest disinclination to hold such fiduciaries personally responsible for such losses as may occur. *Ergenbright v. Ammon*, 26 Gratt. 490; *Southall v. Taylor*, 14 Gratt. 273; *Chapman v. Shepherd*, 24 Gratt. 377; *McClure v. Johnson*, 14 W. Va. 433; *Douglass v. Stephenson*, 75 Va. 747; *Lovett v. Thomas*, 81 Va. 245; *Lacy v. Stamper*, 27 Gratt. 43; *Sterling v. Wilkinson*, 83 Va. 791, 33 S. E. Rep. 533; *Burwell v. Burwell*, 78 Va. 574.

When Account Necessary.—No decree should be rendered against the surety on the guardian's bond, before an account is taken of the administration of the guardian's estate. *Roberts v. Colvin*, 3 Gratt. 358.

2. PARTIES LIABLE ON BOND.—The bonds given in accordance with the statute on the sale of infant's lands are primarily liable for the proceeds, and the general guardian's bond, if liable at all, is only secondarily so. *Findley v. Findley*, 43 W. Va. 372, 26 S. E. Rep. 433. But see *Reed v. Hedges*, 16 W. Va. 167.

In *Kester v. Hill*, 43 W. Va. 611, 26 S. E. Rep. 376, the court went further and held the sureties on the bond given on the sale of the land exclusively liable, to the complete exoneration of those on the regular guardian's bond. See ch. 83, W. Va. Code 1891.

The sureties on the guardian's bond and not those on that of the administratrix are responsible, where, after the settlement of the accounts of the administratrix, a balance is found due to the intestate's estate and she then qualifies as guardian of the intestate's infant children and receives their distributive shares. *Myers v. Wade*, 6 Rand. 444.

3. GROUNDS OF LIABILITY.—A guardian, who, in the absence of overruling necessity, receives confederate currency in discharge of an ante-war debt well secured on land, is liable on his official bond for the loss so incurred; nor, in such case, will the order of a judge obtained in vacation which directs the investment of the money so received in confederate bonds, release him from liability. *Crawford v. Shover*, 29 Gratt. 69, 77 et seq.; *Jennings v. Jennings*, 23 Gratt. 313; *Campbell v. Campbell*, 22 Gratt. 649; *Bennett v. Claiborne*, 23 Gratt. 366; *Moss v. Moorman*, 24 Gratt. 97; *Crickard v. Crickard*, 25 Gratt. 410; *Kirby v. Goodykoontz*, 26 Gratt. 298; *Ammon v. Wolfe*, 26 Gratt. 621; *Tosh v. Robertson*, 27 Gratt. 270.

Liability of Guardian's Bond for Receipts by Guardian.

—A guardian's bond of office binds him in his lifetime and his estate after his death, for the interest, etc., on his ward's property, whether received before or after the expiration of his authority as guardian. *Armstrong v. Walkup*, 12 Gratt. 608.

Guardian and Ward—Misapplication of Funds—Liability.—The conversion by a guardian to his own use of a bond of his ward makes such bond the property of the guardian, and irrevocably so, in the option of his ward, and renders him liable for the amount

thereof. *Burwell v. Burwell*, 78 Va. 574; *Asberry v. Asberry*, 33 Gratt. 463.

The administrator with the will annexed is guardian of testator's four sisters; he sells the land under power given by testator's will; and takes bonds for the proceeds payable to himself as guardian. *Held*, he is chargeable in his character of guardian, and his sureties for the guardianship are also responsible. *Broadus v. Rosson*, 3 Leigh 12.

4. **EXTENT OF LIABILITY.**—The scale of depreciation is applied to guardian's bonds, and the surety is only liable for the scaled amount. *Call v. Ruffin*, 1 Call 333.

E. DEFENCES.

1. **RELEASE.**—Where the surety of a guardian is compelled to pay a certain amount to one of the wards, he is entitled to recover only that amount of the guardian's estate, and where he compromises with two other wards for a less sum than is due them and takes an assignment of all their claims against the estate and a release from responsibility as surety, *held*, that such release of one obligor is a release of his co-obligor, the principal, and the bond is discharged and the surety is only entitled to indemnification for the amount he paid. *Blow v. Maynard*, 7 Leigh 29.

Where the justices of a county court take a bond from a guardian and his sureties which is defective from the omission of the penalty, the sureties are discharged, and the justices are made liable for any losses which the guardian cannot pay. Code 1819, ch. 108, § 5; 1887, § 2001. But the remedy is at law by trespass on the case and equity has no jurisdiction to enforce this liability, whether they are sued alone or along with the guardian, and where, on an appeal, the court of appeals entered an order directing the clerk who took the bond to be made a party, such decree is not to be taken as confirming the jurisdiction of a court of equity in such a suit. *Austin v. Richardson*, 1 Gratt. 310.

The acceptance of the ward after age of a bond from the guardian individually is no discharge of the security on the guardian's bond proper, and it cannot be given in evidence under the plea of "conditions performed," though it is *prima facie* evidence of the amount due by the guardian. *Hamlin v. Atkinson*, 6 Rand. 574.

A and B are co-sureties on a guardian's bond. The guardian fails to settle his accounts, and on coming of age, the wards, for valuable consideration release A from all liability, with a proviso that it shall not be understood to operate a discharge to B. The principal is insolvent. *Held*, the release does not enure to B's benefit, but B is only liable for the proportion he would have been if A had not been discharged. *Hewitt v. Adams*, 1 P. & H. 34.

2. **STATUTE OF LIMITATIONS.**—The cause of action on a guardian's bond accrues on the ward's arriving at age. Va. Code 1887, § 2921, and the statute of limitations begins to run from that time. *Magruder v. Goodwyn*, 2 P. & H. 561; *Morrison v. Householder*, 79 Va. 637.

In a dictum, in *Magruder v. Goodwyn*, 2 P. & H. 561, *TYLER, J.*, was of opinion that a suit against the guardian alone, as a fiduciary might be maintained even after the lapse of the ten years of the statute. All concurred except *NASH, J.*

An alleged fraudulent settlement of a guardian's account by the infant, while under age, will not prevent the statute of limitations from running against a suit on the guardian's bond. *Magruder v. Goodwyn*, 2 P. & H. 561.

Stay Law.—The period of the stay law is not to be computed in the period of the statute of limitations to suits on guardian's bonds. *Morrison v. Householder*, 79 Va. 637.

The lapse of time during which the ward was prosecuting his claim against the representative of the guardian, furnishes no ground for the exoneration of the surety under the statute of limitations. *Roberts v. Colvin*, 3 Gratt. 358.

3. TRANSFER OF INDEBTEDNESS.

Executor—Guardian—Transferring Indebtedness.—An executor cannot transfer his indebtedness as executor to himself as guardian, so as to exonerate his sureties as executor from liability to the legatee for the amount. *Smith v. Gregory*, 25 Gratt. 343.

Where the same party is executor and also guardian, until a legacy is payable, he cannot elect to hold said legacy as guardian instead of executor and so relieve his sureties on his bond as executor and charge those on his guardian's bond, though after the legacy becomes payable very slight acts or declarations may suffice to transfer the liability. *Swope v. Chambers*, 2 Gratt. 319.

4. **DISCHARGE IN BANKRUPTCY.**—A debt owed by a guardian to his surety who has made payments for him is not a fiduciary debt within the meaning of the Bankrupt Act of 1867. *Cromer v. Cromer*, 29 Gratt. 280.

III. BONDS OF ADMINISTRATORS AND EXECUTORS.

A. **NECESSITY FOR BOND.**—A decree against executors for a legacy, though made upon confession of assets, and without their expressly demanding bond and security from the plaintiff, is yet erroneous, if it do not require such bond and security to be given before the defendants be compelled to pay the legacy. *McRae v. Brooks*, 6 Munf. 157; *Stovall v. Woodson*, 2 Munf. 303; *Rootes v. Webb*, 4 Munf. 77.

Executor—Qualification—Bond Necessary.—A testator appointed his wife and son executrix and executor of his will; and expressing his confidence in them, directed that they should be permitted to qualify without giving security. Some years afterwards, he added a codicil, by which he says: I further appoint J. H. executor to the within will, with my wife and son. *Held*, J. H. is not entitled to qualify without giving security. *Fairfax v. Fairfax*, 7 Gratt. 36.

Trustee—When Bond Required—Statute.—Act of 1885-86, p. 478, ch. 490, which provides that where trustee or assignee to whom property exceeding \$200 in value is conveyed or assigned in trust for the benefit of creditors, sureties or other persons shall, if required by any of said beneficiaries, give bond with one or more good and sufficient sureties, is equally applicable to existing and future deed of trust. Nor does the fact that the said statute is retroactive, affect its validity. It is merely and plainly remedial, and does not alter or take away any vested rights. *Lackland v. Davenport*, 84 Va. 638, 5 S. E. Rep. 540.

Court of Equity—Power to Require Bond—When Discretionary.—Where an executor, who had been permitted to qualify without security, brings a suit in chancery to reduce into possession the funds of his testator, the court may, in its discretion, require security, before it will lend him its aid. *Bryce v. Stevenson*, 2 Rand. 438.

Where a testator directs that the executrix of his will shall be permitted to qualify without executing bond, the court will not at the instance of a remainderman of personal property, require the

executrix to give such bond, unless it appears that she is wasting or attempting to waste the personal property. *Amiss v. Williamson*, 17 W. Va. 673.

By the 31st and 35th sections of the act, 1 Rev. Code, ch. 104, it was intended that the court granting administration on an estate, or admitting an executor to qualify as such, should have discretion in regard to the amount of the security. And the general practice of requiring the security in double the estimated value of the estate, is a proper exercise of that discretion. *Atkinson v. Christian*, 3 Gratt. 448.

Executor—Failure to Give Bond—Effect.—A sale of a slave belonging to the estate of a testator, by a person named as one of the executors, but who, at the time of such sale, had not qualified, and afterwards died, without having qualified, by giving bond and security, is void against the executor who did qualify; notwithstanding such sale was made for valuable consideration, and at a time when there was no qualified executor. *Monroe v. James*, 4 Munf. 194.

New Bonds—Order of Appellate Court—Form of Order.—The order of an appellate court requiring new security from an executor or administrator, should be directory only, to the court that originally granted the probate or administration; the latter court alone having authority to receive the additional bond and security. *Atkinson v. Christian*, 3 Gratt. 448.

Executor—Appeal—No Appeal—Bond Necessary.—An executor or administrator who, on his qualification, gives bond and security according to law, for the faithful performance of the duties of his office, is allowed to prosecute an appeal without giving an appeal bond, and in all cases where the object of the appeal is to assert the rights, or protect the interests of the estate which he represents. *M'Cauley v. Griffin*, 4 Gratt. 9.

Executors and administrators, having given security for their administration, are not to be required to give security, on obtaining injunctions, appeals, writs of error or supersedeas. *Wilson v. Wilson*, 1 H. & M. 15.

An executor can appeal without giving bond and security. *Linney v. Holliday*, 3 Rand. 1.

B. VALIDITY OF BOND.

Form of Bond—Presumption.—In the absence of direct evidence to the contrary the bonds of an executor and his sureties must be presumed to have been in the usual form with condition "for the faithful discharge by him of the duties of his trust." *Reherd v. Long*, 77 Va. 389.

Administrators—Obligations under New Bond.—A new bond executed in August, 1860, by the administrators by the express provisions of the statute, relates back to the time of the qualification of the said administrators, and binds the obligors therein for the faithful discharge of the duties of the office of said administrators from that time as effectually as if the said bond had then been executed. *Lingle v. Cook*, 22 Gratt. 262.

Bond—Recitals—Estoppel.—Where the bond of an executor is made payable to four parties named, one of whom was not a member of the court at the time, yet, as the justices had declared and acknowledged that the four justices named were justices then sitting, they were estopped to deny the fact, although it was in direct contradiction of the record. *Franklin v. Depriest*, 13 Gratt. 267; *Caskie v. Harrison*, 76 Va. 95; *Chapman v. Com.*, 26 Gratt. 721; *Pannill v. Calloway*, 75 Va. 894; *Andrews v. Avory*, 14 Gratt. 229; *Lancaster v. Wilson*, 27 Gratt. 624; *Blankenship v.*

Ely, 98 Va. 359, 36 S. E. Rep. 484; *Monteith v. Com.*, 15 Gratt. 172.

Bond—Form—Material Defect.—Bond with surety taken from an administrator with will annexed, with condition, not in form prescribed by law for official bond of administrator with will annexed, but in form prescribed for an administrator, and not exactly conforming even to that, *held*, this is not a good statutory bond, and no suit, either at law or in equity, can be maintained against the surety, for the benefit or at the relation of a legatee. *Frazier v. Frazier*, 2 Leigh 642.

An administration bond not conforming to the requirements of the statute, and containing no provision for the benefit of creditors, no decree can be rendered in their favor against the sureties therein. *Roberts v. Colvin*, 3 Gratt. 358.

After the death of an executor who had qualified as such, the court grants administration of the testator's unadministered estate, but the bond taken from the administrator is in the form of a bond for administration *de bonis non* of an intestate, not in the form of a bond for administration *de bonis non* with the will annexed of a testator. *Held*, the bond is void. *Morrow v. Peyton*, 8 Leigh 54.

The official bond of an executor, in the penalty of which the names of the obligees are not inserted, and in the condition of which the name of the executor, and of the court to which he was to return the account of his transactions are blank, is materially defective, and no judgment can be rendered on it at law. *Cowling v. Justices*, 6 Rand. 349.

C. FORM OF BOND.—A bond, note, or an account may on its face appear to be the personal debt of the executor or of some other person and may yet, in truth and in fact, be the debt of the estate. If such be the case, the executor, upon its payment, should have credit for it. The presumption is that all accounts made and all notices given are, in the absence of evidence to the contrary, to be considered as the debts of those who, upon the face of the notice or account, appear as the debtors. *Breckinridge v. Breckinridge*, 98 Va. 561, 31 S. E. Rep. 892.

Execution of Joint Bond—Effect.—When two executors execute a joint bond they thereby become each a surety for the other. *Yates v. Wilson*, 86 Va. 625, 10 S. E. Rep. 976; *Barton's Ch. Pr.* (2d Ed.) 674.

It may be considered as settled that where two or more executors or administrators executed a joint bond they are to be considered as standing in the relation to each other of principal and surety, each being considered principal as to his own acts, and surety as to the transactions of his companion. *Caskie v. Harrison*, 76 Va. 94.

When two administrators execute a joint administration bond, each is a surety for the other; and if one commit a *devastavit*, the other is chargeable, but only as surety, and *pari passu* with the other sureties in the bond. *Morrow v. Peyton*, 8 Leigh 54.

Where executors execute a joint bond, they stand to each other in the relation of principal and surety; each as principal *quoad* his own acts, and as surety *quoad* the acts of his co-executors. *Hooper v. Hooper*, 20 W. Va. 276, 1 S. E. Rep. 280.

D. LIABILITY ON BONDS.

1. **IN GENERAL.**—An action against the sureties in an administration bond cannot be sustained on the ground that, after a verdict, judgment, execution, and return of "no effects," against the executor or administrator, as such (the verdict being "that he had not fully administered, but had assets to satisfy the debt"), the defendant died, and his estate hav-

ing been committed to the sheriff, the county court allowed the judgment as a lawful claim against his estate, and directed the sheriff to pay it if assets should be in his hands, and it appeared by the sheriff's return that no such assets existed. Catlett v. Carter, 2 Munf. 24.

Administrator—Sale of Bank Stock—Liability.—C as administrator of B, sells ten shares of bank stock to M, upon which B had borrowed money from the bank, and had given his notes; and M pays the full price of the stock to C, on C's undertaking, as administrator of B, to pay the notes. C pays one note but does not pay the other, and the bank retains the amount out of the dividends on the shares. *Held*, neither the estate of B, nor the official sureties of C as administrator, are responsible for the failure of C to perform his undertaking. Childress v. Morris, 23 Gratt. 803.

Administrators—Appointing Order—Devastavit—Liability of Sureties on Bond.—During the same term of a court the orders of the court remain in its breast, and may be revoked, annulled or amended at its pleasure, if the act be not done or obtained by fraudulent means. The court, therefore, had the power to rescind an order appointing R the administrator of C, and the office then being vacant, to appoint R, C and A administrators. And the sureties of R in the first bond are not responsible for the devastavit of the administrators. Lingle v. Cook, 23 Gratt. 202.

When Sureties in Executorial Bond Not Liable for Specific Legacies.—A testator, by his will, after directing that in the first place all his just debts shall be paid, devises and bequeaths to his wife, during her life, his plantation, all his stock and furniture, and six slaves by name; and then, after various specific devises and legacies to his children, directs as follows: "I desire that my wife will, as soon as convenient after my decease, purchase and deliver to my granddaughter C. C., a negro girl of about £50 price, which I give to my said granddaughter and her heirs." The wife is also named executrix. She qualifies as such, giving a bond with sureties; and the whole personal estate, other than specific legacies, is exhausted in payment of the debts. The widow having accepted the property given her by the will, and taken possession of the whole of it, *held*, she is liable personally as legatee, not as executrix, for the payment of the legacy to the granddaughter, and the sureties in her executorial bond are nowise responsible for the same. Arrington v. Cheatham, 2 Rob. 492.

2. PROOF OF DEVASTAVIT.

Suit by Creditor on Administration Bond—Previous Judgment.—A creditor of a decedent, who has obtained a decree *de bonis testatoris* against the executor, on which an execution has issued, and has been returned *nulla bona*, may maintain an action against the executor, and his sureties, on the executorial bond. Bush v. Beale, 1 Gratt. 229.

Action on Administrator's Bond—Previous Judgment.—To sustain an action on the bond of administrators against them and their sureties, it is necessary to have previously obtained a judgment against them as such, on which execution issued, and was returned unsatisfied; and these facts must be proved to the jury by proper evidence. State v. Hudkins, 34 W. Va. 370, 12 S. E. Rep. 495.

A judgment against the executor is necessary, before a suit can be brought upon his administration bond. Taylor v. Stewart, 5 Call 520.

It is necessary, after a judgment against an

executor or administrator, as such, to establish a *devastavit*, by means of a second suit, before an account can be maintained on the administration bond. Gordon v. Justices, 1 Munf. 1.

It seems, that the executor or administrator must be convicted of a *devastavit*, by a verdict in a second suit, finding "he has wasted the assets," or "has eloiigned, disposed of, and converted the same to his own use," before an action can be sustained against the sureties. Catlett v. Carter, 2 Munf. 24.

The administration bond may be put in suit by creditors, as well as legatees. But it is necessary to obtain judgment, in a prior suit against the executor, before an action upon the administration bond, can be sustained. Braxton v. Winslow, 4 Call 308.

An action may be maintained by a creditor of a deceased person upon the bond given by the executor for performing the duties of his office; but the plaintiff must first fix a *devastavit* against the executor, before he can resort to this remedy against the sureties. Braxton v. Winslow, 1 Wash. 40 [31].

The securities for an executor or administrator cannot be sued in equity until a *devastavit* is fixed upon the principal, in a previous suit against him, except in cases where, from some inevitable necessity, a creditor is obliged to come into equity, in the first instance, against the principal; and then to prevent a circuitry of actions, the securities should be made parties. Bachelder v. Elliott, 1 H. & M. 10.

A judgment against an executor or administrator as such, with a return on the execution "that he has removed out of the state," is not sufficient evidence of a *devastavit*, to ground an action on the bond given for the performance of his duty. Turner v. Chinn, 1 H. & M. 52.

Before the act of February 7th, 1814, "concerning executors and administrators" (Sess. Acts of 1813, ch. 18, p. 40), a decree in chancery against an executor or administrator, directing him to pay a debt of his testator, or intestate, out of the assets in his hands to be administered, (with a *ieri facias* and return of *nulla bona*), was not sufficient evidence of a *devastavit* to authorize an action against the securities in the administration bond; but it was necessary to bring a previous suit against the executor or administrator, suggesting the *devastavit*. Hairston v. Hughes, 3 Munf. 508.

A sale of bonds of the estate by an executor, at a discount of eighteen per cent., when the circumstances of the estate does not require it, is a *devastavit*. Pinckard v. Woods, 8 Gratt. 140.

Suit by Legatee on Administration Bond—No Previous Judgment Necessary.—Although in the case of a creditor, the demand must be established against the executor before a suit can be brought on the administration bond, yet in the case of a legatee, a suit in equity may be brought upon it in the first instance, because the decree can be made so as to operate against the executor in the first instance, and an account of the assets can be taken at once. Talliaferro v. Thornton, 6 Call 21; Braxton v. Winslow, 1 Wash. 81; Call v. Ruffin, 1 Call 333; Taylor v. Stewart, 5 Call 520.

After a judgment against an executor or administrator as such, a *ieri facias* and return of *nulla bona*, an action against him alone, on his administration bond could always be maintained, without any previous suit suggesting a *devastavit*. Meade v. Brooking, 3 Munf. 548.

3. LIABILITY OF EXECUTOR'S SURETIES FOR PROCEEDS OF LAND.

Proceeds of Land in Hands of Executor—Liability of Sureties Therefor.—The sureties of an executor are not responsible for the proceeds of land sold by him, under the will. *Jones v. Hobson*, 2 Rand. 483.

The official bond of an executrix only binding the obligors for the due administration of the personal estate, the sureties are to no extent responsible for the rents and profits of the real estate. *Hutcherson v. Pigg*, 8 Gratt. 220.

Sureties, on a bond for the faithful administration of the personal estate, are not responsible for the administration as to the realty. *Strother v. Hull*, 23 Gratt. 668. See *Burnett v. Harwell*, 3 Leigh 89; *Hutcherson v. Pigg*, 8 Gratt. 220; *Murphy v. Carter*, 23 Gratt. 477.

Testator dies in 1836. By his will he gives certain specific and general legacies, and then directs that certain land, and his personal property shall be sold, which with debts shall be a fund for the payment of his debts. An administrator c. t. a. qualifies and executes a bond with sureties, the condition of which only binds them for the faithful administration of the personal estate, and that he shall "deliver all the legacies contained and specified in said will." He sells the land, and out of the general fund pays debts; but upon a settlement of his accounts is largely in arrear. *Held*, the sureties are not liable for the due administration of the land. *Murphy v. Carter*, 23 Gratt. 477.

Administrator—Sale of Land—Commissioner—Liability.—Prior to January 1st, 1861, land left to two of the sons, who were to account for the same in the division, was sold under a decree of the court, by S as commissioner, and he was decreed to hold the proceeds as part of the assets of his testator's estate. His official bond, in fact, covered only the personal assets. *Held*: 1. The proceeds of the sale of the land were not in his hands as administrator c. t. a., and should not be brought into his administration account. 2. But in no case are the sureties responsible for them, as their bond did not cover the real estate. *Strother v. Hull*, 23 Gratt. 668.

Under the former provisions of the statute concerning executors' bonds, 1 Rev. Code, ch. 104, § 21, the sureties of an executor are not responsible for the proceeds of land sold by him under a power in the testator's will. *Burnett v. Harwell*, 3 Leigh 95 [99].

Administrator c. t. a.—Proceeds of Land—Liability for.—The law formerly exempted the sureties of an executor or administrator with the will annexed from responsibility for the proceeds of real estate directed by the will to be sold by the representative and appropriated to the payment of debts and legacies. (It is otherwise now. See Code, ch. 181, § 2, p. 545.) *Toler v. Toler*, 2 P. & H. 71.

A delinquent personal representative has in his hands a balance, arising from the sales of personal property, for which his sureties are liable jointly with him, and several other balances arising from successive sales of real estate, made under the will of the testator, for which they are not liable; his estate is to be subjected, at the suit of those entitled to the estate of the testator, first to the payment of the fund for which his sureties are responsible, and next to the payment of the other balances in the order in which the sales of the realty were made. *Toler v. Toler*, 2 P. & H. 71.

4. LIABILITY FOR NEGLIGENCE.

a. In General.—Executors who fall by their negligence to collect a debt due to their testator by bond under a penalty, the debtor being good for the

money at the death of the testator and continuing good for it for fourteen years, when he fails, are chargeable with the principal and the interest thereon up to the time of the failure of the debtor; but they are not chargeable with interest since that time. But see now Code of 1849, ch. 182, § 6. See *Davis v. Morriss*, 76 Va. 21; *Tanner v. Bennett*, 33 Gratt. 251, and *note*; *Rowland v. Rowland*, 11 W. Va. 262; *Estill v. McClintic*, 11 W. Va. 418; *McGuire v. Wright*, 18 W. Va. 512; *Varner v. Core*, 20 W. Va. 479; *Seabright v. Seabright*, 28 W. Va. 487; *Chapman v. Shepherd*, 24 Gratt. 377.

An executor takes bonds for purchases made at a sale by himself of testator's personal property, and it does not appear when these bonds are paid off; he will be charged with the principal of the bonds in the year when they fell due, but with interest thereon only from the end of that year. *Rosser v. Depriest*, 5 Gratt. 6.

Testator directs all his property, real and personal, except his slaves, to be sold, and the proceeds of the sales, together with what money might be due to him, to be put and kept at interest for the benefit of his wife and children, until the children should arrive at the age of twenty-one years or be married. He had in his lifetime taken the bond of two men who were partners, for a partnership debt, and it was unpaid at his death. They were reputed to be wealthy men, and the executor permitted the debt to remain uncollected until one of them died, and the firm as well as its members proved to be insolvent. The executor is bound to account for the debt. *Southall v. Taylor*, 14 Gratt. 269.

b. Failure to Take Refunding Bonds.—The law of Virginia is that all debts or liabilities of the testator must be paid before any bequests can be effectual; and an executor who without taking proper refunding bonds delivers legacies directed by a will, is guilty of a *devastavit* for which he and his sureties are liable to creditors of the estate. *Edmunds v. Scott*, 78 Va. 720.

Where the assets in the hands of an executor are sufficient to pay all the debts of the estate and he makes distribution of the estate without requiring refunding bonds from the legatees he is personally liable to creditors for the fund so improperly distributed. *Beverly v. Rhodes*, 86 Va. 415, 10 S. E. Rep. 572; *Lewis v. Overby*, 31 Gratt. 601; *Edmunds v. Scott*, 78 Va. 720; *Cookus v. Peyton*, 1 Gratt. 442; *Morrison v. Lavell*, 81 Va. 523; *Lewis v. Mason*, 84 Va. 781, 10 S. E. Rep. 529; *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 27 S. E. Rep. 378.

An executor who exhausts the personal estate of his testator in paying specific legacies, without taking a refunding bond, will, as to the creditors of said testator, be considered as having committed a *devastavit*, whether he had notice of the debts due such creditors at the time he paid such legacies or not. *McGlaughlin v. McGlaughlin*, 43 W. Va. 226, 27 S. E. Rep. 378.

Bond of Executor—Suit by Creditor—Notice of Claim.—An executor cannot defend himself against the suit of a creditor, by shewing that, before he had notice of the plaintiff's demand, he paid over the assets to the legatees of the testator. See *Burnley v. Lambert*, 1 Wash. 312; *Klippen v. Carr*, 4 Munf. 1190.

It is error though the bill be taken for confessed, to decree against an administrator *de bonis non*, that he shall pay a legacy, without requiring the legatee to give bond and security for refunding his "due proportion of any debts, or demands, which may afterwards appear against the estate of the testator

and the costs attending the recovery thereof." *Rootes v. Webb*, 4 Munf. 77. See Rev. Code, 1st vol. ch. 92, § 51, p. 166; *Clay v. Williams*, 3 Munf. 129; *Stovall v. Woodson*, 3 Munf. 303.

Though an executor may have assented to a specific legacy, he does not thereby dispense with a refunding bond. *Nelson v. Cornwell*, 11 Gratt. 724.

In *Handly v. Snodgrass*, 9 Leigh 484, the former decisions, that a decree in favor of a legatee against an executor, who omitted to require a refunding bond, would be considered erroneous, and for such error would be reversed with costs was reviewed by the court, and a different rule established when there is a mere omission to require such bond.

Executors and Administrators—Failure to Take Refunding Bond—Presumption.—The rule which refuses to an executor the right to recover back from a legatee an excess of advancements beyond his ratable proportion, which he may have paid him, is not inflexible, even when the deficiency in the assets was not created by the subsequent appearance of debts. But after such voluntary payment, under such circumstances, the executor will have to make out a very strong case to rebut the almost conclusive presumption that he had a sufficiency of assets to justify the payment of the legacy which arises from the mere fact that he has paid it without taking a refunding bond. It will not be sufficient, in such case, in order to rebut such presumption, for the executor to show that he acted *bona fide* and with honest intentions; but he must show further that he acted in paying the legacy with prudence and caution, under existing circumstances. *Hurst v. Morgan*, 31 W. Va. 521, 8 S. E. Rep. 285.

In *Young v. Vass*, 1 P. & H. 167, it was held that, under the circumstances, considering the admission of assets by the executor, and the character of the legacy and of the legatees, it should be submitted to the discretion of the court below whether any refunding bond should be required of the legatees.

When slaves emancipated by will, are set free by the executor, he is not entitled to a refunding bond to indemnify him against the claims of the testator's creditors, though the manumitted slaves are, notwithstanding manumission, subject to debts. *Elder v. Elder*, 4 Leigh 271 [252].

Executor—Failure to Take Forthcoming Bond—Liability.—In the case of *Ferguson v. Epes*, 77 Va. 499, an executor was held liable for failure to take from a life tenant a forthcoming bond conditioned to return the fund intrusted to him in the event of his dying before marriage and without heirs of his body.

c. *Receiving Confederate Currency.*

Personal Representatives—Receiving Confederate Currency—Liability.—A personal representative is not warranted in receiving a specie debt due to the decedent's estate in a greatly depreciated currency, such as was confederate currency in May and July 1863, unless there be something in the condition of the debt, or in the state of the demands of creditors or legatees of the estate, or otherwise, which makes it to the interest of the estate that the debt should be so received. *Moss v. Moorman*, 24 Gratt. 97; *Peters v. Neville*, 26 Gratt. 557; *Hannah v. Boyd*, 26 Gratt. 602; *Mills v. Mills*, 28 Gratt. 500; *Williams v. Skinker*, 26 Gratt. 507; *Kirby v. Goodykoontz*, 26 Gratt. 298, and *note*; *Campbell v. Shover*, 29 Gratt. 81; *Crickard v. Crickard*, 25 Gratt. 410; *Patteson v. Bondurant*, 30 Gratt. 94, and *foot-note*; *Sharpe v. Rockwood*, 78 Va. 24; *Leake v. Leake*, 75 Va. 801; *Carter v. Dulaney*, 30 Gratt. 192, and *note*; *Cole v. Cole*, 28 Gratt. 365; *Purdie*

v. Jones, 32 Gratt. 387; *Ferguson v. Epes*, 77 Va. 499; *McClure v. Johnson*, 14 W. Va. 483; *Omohundro v. Omohundro*, 27 Gratt. 824, and *note*; *Bedinger v. Wharton*, 27 Gratt. 857, and *note*; *Taylor v. Lancaster*, 33 Gratt. 1; *Staples v. Staples*, 24 Gratt. 225; *Myers v. Zetelle*, 21 Gratt. 733; *Williams v. Skinker*, 25 Gratt. 507; *Lingle v. Cook*, 32 Gratt. 202; *Walker v. Page*, 21 Gratt. 636; *Walker v. Beauchler*, 27 Gratt. 511; *Coltrane v. Worrell*, 30 Gratt. 434; *Siron v. Ruleman*, 32 Gratt. 215.

Executors—Investing in Confederate Bonds.—Executors who are empowered by the will under which they act, to sell real estate and collect debts, and invest the proceeds for the purposes of the trusts declared in the will, in December, 1863, sell real estate, and in January, March, and April, 1863, collect ante-war debts well secured on real estate, taking payment in Confederate money, which they immediately invest in Confederate eight per cent. bonds for the purposes of the trusts of the will. *Held*, that having acted in good faith, and in the exercise of their best judgments, under the circumstances surrounding them, they are not liable for the losses which occurred from such sales, collections and investments. *Mills v. Mills*, 28 Gratt. 443; *Lingle v. Cook*, 32 Gratt. 202; *Staples v. Staples*, 24 Gratt. 225; *Jones v. Clark*, 25 Gratt. 642; *Carter v. Dulaney*, 30 Gratt. 192, and *note*; 3 Min. Inst. (2d Ed.) 646; *Barton's Ch. Pr.* (2d Ed.) 727, 729.

Where an estate is being administered by the court, and the administrator has contracted to make certain investments in confederate bonds, by order of court he is not responsible for any loss resulting from such investment. *Fauber v. Gentry*, 30 Va. 312, 15 S. E. Rep. 899.

5. DURATION OF LIABILITY.—Administration of a decedent's estate *cum testamento annexo* was committed to a sheriff under the statute of 1792, 1 Old Rev. Code, ch. 92, § 61, and the administration was conducted by his deputy, and, for the most part, after the sheriff's term of office expired. *Held*, the administration did not devolve on sheriff's successor, but he was bound to complete it, and he and his official sureties are answerable for his deputy's administration after as well as before the expiration of his office. *Dabney v. Smith*, 5 Leigh 13.

6. EXTENT OF LIABILITY.—An administrator appointed in Virginia, whose intestate lived and died in North Carolina, and left no estate in Virginia, goes to North Carolina, and without qualifying there, takes possession of the assets, and brings them to Virginia. His sureties in Virginia are liable for his faithful administration of these assets. *Andrews v. Ivory*, 14 Gratt. 229.

The sureties on the official bond of an administrator, who acts by virtue of a *voidable* grant of administration, are liable for assets actually paid to him by the representatives of a previous administrator and of an administrator *de bonis non*. *Burnley v. Duke*, 2 Rob. 102.

Administrator—Sureties—Bond—Extent of Liability.—The liability of the sureties of an administrator *c. t. a.* does not extend merely to the balance of the personal fund actually in his hands as trustee, but extends to the whole amount of that fund for which he is liable upon a proper settlement of his accounts; including what he may have wasted as trustee. *Harvey v. Steptoe*, 17 Gratt. 290.

Sureties are liable on their official bonds for the wrongful act of an administrator who receives property in payment of debts due the estate under his control and who fails to account for the same as

money received. *Harman v. McMullin*, 85 Va. 187, 7 S. E. Rep. 349; *McCall v. Peachy*, 8 Munf. 238.

Testator by his will gives certain property to his wife during her life; and directs that at her death, his executors should sell it and divide the proceeds among his children. The executor does after the death of the widow, take possession of the property and sell it, but does not pay over the proceeds. *Held*, his official sureties are responsible for his failure to pay it over. *Almond v. Mason*, 9 Gratt. 700.

An executor dies indebted to his testator's estate, but leaving assets sufficient to discharge the debt, which are received by his executor, who, instead of making payment to the legatees of the first testator, distributes the assets among the legatees of his own testator. *Held*, the surety of the first executor is responsible for the amount due to the first testator's legatees. *Aylett v. King*, 11 Leigh 496.

Two partners are engaged in business in another state,—one living in this state, one in the other,—and the one living in this state dies, and the other becomes one of his executors, under a qualification, in this state. At his death the business is closed up, and partnership debts are to be collected and paid, and the effects sold. If, when this is accomplished, the survivor is insolvent, the sureties in the executorial bond are not liable for the interest of the deceased in the partnership; but, if said survivor is then solvent, they are liable. *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. Rep. 937.

Executors—Sureties—Extent of Liability—How Determined.—Liability of sureties in the bond of an executor or administrator is limited by the terms of the covenant of the bond, and cannot be extended by implication. *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. Rep. 937.

E. PLEADING.

1. RELATOR.

Executor—Action on Bond—Relator.—Under the former provision of the statute concerning executor's bonds, 1 Rev. Code, ch. 104, § 21, an action cannot be maintained on an executor's bond, at the relation of an assignee of a legatee of a decree for a legacy; such action can only be maintained at the relation of the person who has the legal right to the debt. *Burnett v. Harwell*, 3 Leigh 95 [89].

In an action on the official bond of an executor against one of his sureties to recover the amount of a decree against the executor rendered in favor of the trustee of a woman, the trustee is the proper relator in the action. *Calahan v. Depriest*, 13 Gratt. 274.

If the obligor of a bond take out administration to the obligee, and dies, the administrator *de bonis non* of the obligee may maintain an action for such debt against the executor of the obligor. And so if the debtor administrator is removed from his office the action may be maintained against him by the administrator *de bonis non* of the obligee. *Uterback v. Cooper*, 28 Gratt. 233.

2. PARTIES.

Bond of Executor—Action—Parties.—All the sureties in the official bond of an executrix should be parties to a suit by legatees for distribution, or a sufficient reason should be shown for failing to make them parties, before a decree is made against one of them. *Hutcherson v. Pigg*, 8 Gratt. 220.

All the sureties in the official bond of an executrix should be parties to a suit by legatees for distribution, or a sufficient reason should be shown for failing to make them parties, before a decree

is made against one of them. *Hedrick v. Hopkins*, 8 W. Va. 167; *Hutcherson v. Pigg*, 8 Gratt. 220.

After a judgment against an executor, and a return of "no effects," on an execution against the goods and chattels of his testator, a suit in equity may be brought for a discovery of the assets, to which suit the securities of the executor and all other persons (however remotely concerned in interest), against whom a decree can be rendered, ought to be made defendants. *Clarke v. Webb*, 3 H. & M. 8.

3. NECESSARY ALLEGATIONS.

Suit on Administration Bond—Necessary Allegations—Assignment of Breach.—In a suit on an administration bond, if no breach of the condition of the bond be stated in the declaration, or by an assignment of breaches in some other part of the record, a judgment upon it is erroneous, and must be reversed. *Ward v. Fairfax*, 4 Munf. 404.

Action against Joint Obligors—Survivor—Allegations.—In an action against the representatives of one of two joint obligors in a bond, dated in 1783, it is essential to state in the declaration that the obligor survived his companion. *Braxton v. Hilyard*, 3 Munf. 49.

In an action against the representatives of a person deceased, on a joint covenant entered into before the act "concerning partitions and joint rights and obligations" (1 Rev. Code 31) if it appear from the declaration that one of the joint covenantors survived, it is a radical defect. *Atwell v. Milton*, 4 H. & M. 253.

C executes a bond to H, executor of E, and commissioner under a decree of the circuit court of H, in the case of H and R, with conditions reciting that C has borrowed of H, executor and commissioner as aforesaid, the sum of, etc., of the money of his testator's estate, which, by the decree aforesaid, he is authorized to put out at interest, etc. In an action on this bond by H against C, not averring any order of the court authorizing H to collect the money upon demurrer, *held*, the declaration is sufficient. *Cabell v. Cox*, 27 Gratt. 182; *Wells v. Hughes*, 89 Va. 547, 16 S. E. Rep. 660.

Declaration on Bond of Executor—Formal Defects.—Upon an obligation to A. by the name of executor of B. the action should be brought by A. in his individual character, and he ought regularly to declare in the *debet* and *detinet*; but though the declaration be in the *detinet* only, it will not be held bad for this cause. The allegation of the *debet* is such mere matter of form, that the omission will be disregarded even on special demurrer. *Bailey v. Beckwith*, 7 Leigh 604.

Bond of Executor—Action—Execution—Formal Defects.—In an action upon the official bond of an executor against himself and his sureties for devastation, upon the plea of conditions performed, the execution which issued on the decree *de bonis testatoris*, directed the sheriff to levy the debt of goods and chattels of B, executor of L, instead of the goods and chattels of L in the hands of B to be administered. This is an error of form and not of substance, and the execution having been returned, "no assets in the executor's hands," and no motion having been made to quash it, it must be regarded in this suit as an execution against the executor as such, and not in his own right. *Beale v. Botetourt*, 10 Gratt. 278.

Where two obligors are sued, and both die pending the proceedings, though it is not expressed

which of them died first, on a *sci. fa.* against the administrator of one of them, who does not demur to the *sci. fa.* nor plead a variance between it and the proceedings on which it issued, but pleads to issue, it must be understood that the other obligor died first, and that the action survived against the obligor, against whose representative the *sci. fa.* was sued out. *Hamlin v. Atkinson*, 6 Rand. 574.

Administration Bond—Material Defects.—In a suit upon an administration bond, if the declaration does not show that the plaintiffs sue as justices of the court, it is a fatal defect, and the administration bond cannot be given in evidence. *Cabell v. Hardwick*, 1 Call 301 [845].

Declaration on Bond of Executor—Variance.—A declaration on an executorial bond which alleges the recovery of a judgment *de bonis testatoris* against an executor and an execution issued thereon, with return of *nulla bona*, is not sustained by the introduction of a judgment against the executor *de bonis propriis*. *State v. Seabright*, 15 W. Va. 590.

4. PLEA.

Bond of Administrator—Action—Plea.—Debt on bond by C. S. against W.'s administrator; defendant takes over on the bond, which was a bond executed by H. and four others, of whom W. was one, and then pleads in bar, that W. and three of the other obligors were sureties for H. the first obligor, and that those three other sureties required plaintiff to bring suit on the bond promptly, according to statute, 1 Rev. Code, ch. 116, sec. 6, 7, 8, but plaintiff did not bring suit, as required, within a reasonable time, and when she did bring suit, those three other sureties pleaded plaintiff's failure to bring suit promptly, in bar of her action against them, and on that plea, judgment was given for those three sureties; upon general demurrer to this plea. *Held*, the matter pleaded is a bar to plaintiff's action against W.'s administrator. *Wright v. Stockton*, 5 Leigh 164 [158].

F. EQUITABLE RELIEF.

Bond of Personal Representative—Relief in Equity.—If a decree be pronounced, by a superior court of chancery, against an executor, in a suit brought against him and his securities; but without charging, or exonerating them by such decree; and the executor remove out of the commonwealth, without satisfying the same; a second suit may be brought against him and them, in the superior court of chancery of any other district, in which the securities reside, to get satisfaction from them. *Crutcher v. Crutcher*, 4 Munf. 457; *Turner v. Chinn*, 1 H. & M. 58; *Gordon v. Justices*, 1 Munf. 1; *Catlett v. Carter*, 2 Munf. 24; *Meade v. Brooking*, 3 Munf. 548; *Hairston v. Hughes*, 3 Munf. 568.

Where a suit is brought against an executor and his sureties, and the executor confesses assets, it is competent for a court of equity to decree immediately against the executor; and that liberty should be reserved to the creditor to proceed against the sureties by motion, if it should become necessary. *Jones v. Hobson*, 2 Rand. 483.

Where an executor dies without any personal representative, a court of equity may, at the suit of a legatee, and without any previous suit having been brought against the executor to convict him of a *devastavit*, convene the securities of the executor, or their representatives, and the persons who would be interested in any estate which the executor may have left, and make the securities liable for any misapplication or wasting of the assets which shall

be established in the progress of such suit in chancery. *Spottswood v. Dandridge*, 4 Munf. 269.

In a suit upon an administration bond for the benefit of distributees (two of whom were the administrators), judgment was rendered against the executors of the security only, for the amount of the inventory. On a bill in equity to enjoin this judgment, it appearing by an *ex parte* settlement in a county court, that a considerable part of the estate had been *bona fide* disbursed by that administrator; and partly, to some of the distributees, relief was given, though no defence had been made at law. *Wall v. Gressom*, 4 Munf. 110.

When an administrator sells personal property of his intestate, and takes bonds therefor, this is a conversion of the assets of the estate, and he becomes liable as administrator to account for the amount of the sales; the bonds become his individual property, and pass to his administrator at his death. *Estill v. McClintic*, 11 W. Va. 399; *Bowden v. Taggart*, 3 Munf. 518; *Wernick v. McMurdo*, 5 Rand. 51. Yet under some circumstances, where it appears that the administrator acted in good faith and with prudence, a court of equity may grant him relief. *Hoke v. Hoke*, 12 W. Va. 427.

"Bonds taken by an executor or administrator for property belonging to the estate of his decedent and lawfully sold by him and remaining uncollected at the time of the death of such executor or administrator, may be claimed in equity by the administrator *de bonis non*." And his right to recover will depend, as we have seen, upon the circumstances of the case. *Hinton v. Bland*, 81 Va. 588; *Tyler v. Nelson*, 14 Gratt. 214; *Clarke v. Wells*, 6 Gratt. 475; *Heffernan v. Grymes*, 2 Leigh 512.

In a suit in chancery by the purchaser of land for the purpose of compelling the execution to himself of a deed by a trustee for land sold under a deed of trust, and to have a decree over against the administrator of the first assignor of the bond secured by the said deed of trust for the unpaid balance due on said bond, the bill, in order to authorize a decree against the administrator, must allege and the proof must show that assignee used due diligence to collect the debt from the original debtor. He must either show that he has diligently pursued his remedy against the original debtor, without avail, or a reason, good and sufficient, why he has not done so. *Atherton v. Hull*, 12 W. Va. 170; *Thompson v. Govan*, 9 Gratt. 605.

W, administrator of G, assigns the bond of T to the executors of H, in discharge of a debt due from G to H. The executors of H sue T, and recover a judgment upon the bond; and he thereupon enjoins it on the ground that G was indebted to him for a legacy left by R, of whom G had been executor. *Held*, that the executors of H are entitled to be substituted to the rights of T against G's estate; and are not confined to their remedy upon the assignment of W. *Braxton v. Harrison*, 11 Gratt. 30.

G. DEFENCES.

1. STATUTE OF LIMITATIONS.

Bond of Administrator—Defence—Statute of Limitations.—In a suit on an administrator's bond to recover against the principal and sureties therein, the limitation is ten years from the return day of the execution on the plaintiff's claim, if judgment has been obtained on his claim; and if not, then, it is ten years from the time the administrator shall have been ordered by the court, acting upon his account, to pay the claim of the plaintiff. *Hoge v. Vintroux*, 21 W. Va. 1; W. Va. Code, ch. 104, §§ 6, 7.

The statute itself prescribes the time within which an action may be brought against the sureties on an executor's bond, which is ten years after the right to bring the same shall have first accrued. And it further provides, that the right of a person obtained by execution against the executor, or to whom payment or delivery of estate in the hands of the executor shall be ordered by a court acting upon his account, shall be deemed to have first accrued from the return day of such execution, or from the time of the right to require payment or delivery upon such order, whichever shall happen first. Code 1873, ch. 146, §§ 8, 9; *Sharpe v. Rockwood*, 78 Va. 24; *McCormick v. Wright*, 79 Va. 524; *Leake v. Leake*, 75 Va. 792.

In an action on the official bond of an administrator, the statute of limitations does not begin to run in favor of the sureties of the administrator until the return day of an execution against him, or from the time of the right to require payment under an order of court acting on the accounts of such personal representative. *Robertson v. Gillenwaters*, 85 Va. 116, 7 S. E. Rep. 371; *McCormick v. Wright*, 79 Va. 525; *Sharpe v. Rockwood*, 78 Va. 24.

2. TRANSFER OF LIABILITY.

Bond of Fiduciary—Defence—Transfer of Indebtedness.—A fiduciary cannot transfer his mere indebtedness in one capacity to himself in another capacity so as to exonerate his sureties in the one and throw the burden upon his sureties in the other. To make the transfer valid it must consist of something more than a naked liability; it must be substantial assets if made by an insolvent fiduciary. *Gilmer v. Baker*, 24 W. Va. 92.

Executor—Guardian—Transferring Indebtedness.—An executor cannot transfer his indebtedness as executor to himself as guardian, so as to exonerate his sureties as executor from liability to the legatee for the amount. *Smith v. Gregory*, 26 Gratt. 248; *Utterback v. Cooper*, 28 Gratt. 271; *Barton's Ch. Pr.* (2d Ed.) 712, 748, 846; *Caskie v. Harrison*, 76 Va. 91; *Gilmer v. Baker*, 24 W. Va. 92; *Board v. Cain*, 28 W. Va. 770.

Bond of Administrator—Action—Defence—Transfer of Assets.—If a decree of court takes property out of the hands of an administrator and places it in his hands as commissioner of the court, the sureties of the administrator are thereby as completely discharged from liability as they would be if the administrator and commissioner were different persons, and the former had delivered the property to the latter under the said decree. *Odell v. Howle*, 77 Va. 361; *Andrews v. Avory*, 14 Gratt. 229.

If an administratrix settles her accounts as such, in which a balance is found due to the estate of the intestate, and then she qualifies as guardian of the infant children of the intestate, and receives their distributive shares into her hands, the sureties in the administration bond are absolved from the claim of the distributees, and the sureties in the guardian's bond are bound to them. *Myers v. Wade*, 6 Rand. 444.

H. EVIDENCE.

Judgment against Executor Not Evidence against Surety.—A verdict and judgment against an executor or administrator are not conclusive evidence against his surety; nor are they conclusive even against the party against whom they are rendered, unless they are pleaded as an estoppel; per *TUCKER*, P. *Craddock v. Turner*, 6 Leigh 116.

Bond of Executor—Declaration—Evidence—Variance.—A declaration on an executorial bond which alleges

the recovery of a judgment *de bonis testatoris* against an executor and an execution issued thereon, with return of *nulla bona*, is not sustained by the introduction of a judgment against the executor *de bonis propriis*. *State v. Seabright*, 15 W. Va. 590.

Action for Devastavit—When Parol Evidence Inadmissible.—In an action for a *devastavit* by a creditor of a testator against the executor and his sureties, the settled account of the executor was introduced, which showed a credit to the executor of money paid a legatee. The executor proposed to show by parol proof, that the legatee paid was not the legatee of his testator, but of a person of whom his testator was executor, and had received sufficient assets to pay the legacy, but had not done it. *Held*, the fact of such a legacy, and that the executor's testator was the executor, should be proved by the will and the record of his qualification; and parol evidence was inadmissible for that purpose. *Millers v. Catlett*, 10 Gratt. 477.

Action on Joint Bond—Witness—Competency.—In an action on a joint bond against the personal representative of a deceased obligor, a surviving obligor is an incompetent witness for the defendant. *Brown v. Johnson*, 18 Gratt. 644.

In an action of debt by W for the use of G, against the executor of M, upon two bonds purporting to be executed by M and R, the executor pleads *non est factum*, and payment. The only proof of the execution of the bonds by M, is proof of an acknowledgment by M to an agent of G, made after the assignment to G; and the proof as to the payments made by R to G in the lifetime of M. *Held*, G is not a competent witness under the statute to testify in his own behalf. *Morris v. Grubb*, 30 Gratt. 286.

I. DECREE.

Administrator—Bond—Decree—Effect.—An administrator with the will annexed is substantially the same as the executor named in the will; and he has the same powers and is subject to the same duties and liabilities; and a decree against a domiciliary executor binds every executor of the same will in every jurisdiction, rendering him liable on his official bond for failure to comply with the terms of the decree. *Garland v. Garland*, 84 Va. 181, 4 S. E. Rep. 334.

Administrator—Bond—Insufficient Verdict.—Debt on bond against administrator; issues joined on pleas of payment and fully administered; verdict for plaintiff on first issue, and on the last, "that assets more than sufficient to pay the debt, etc., came to defendant's hands to be administered." *Held*, verdict on last issue insufficient to found judgment *de bonis testatoris*. *Sturdivant v. Raines*, 1 Leigh 527 [481].

Debt on bond against administratrix; plea, fully administered; verdict, in general terms, that defendant has not fully administered; and judgment thereupon for the debt demanded, to be levied *de bonis testatoris*. *Held*, the verdict is insufficient to warrant the judgment. *Brizendine v. Tisdale*, 5 Leigh 54 [51].

IV. BONDS OF SHERIFFS.

A. NECESSITY FOR.

Sheriff—General and Special Bonds—Extent of Liability Thereon.—It was the duty of the county court, under section 46, ch. 77, Acts 1877, to require the sheriff elect, in 1880, before entering upon the discharge of the duties of his office, to give, in addition to his bond as collector of the state and county taxes, a special bond, with approved security, in a penalty equal to double the amount of school money

which might probably come into his hands for school purposes during his term of office, and such special bond was for the purpose of completely securing the school funds; and the sureties on the former general bond cannot be held liable for any default committed by such sheriff under such special school bond. *Board of Education v. Rader*, 42 W. Va. 178, 24 S. E. Rep. 680; *Board of Education v. Rader*, 42 W. Va. 182, 24 S. E. Rep. 682.

Sheriff—Failure to Give Bond—Effect.—If two of the persons nominated to the governor by a county court, have successively been commissioned to execute the office of the sheriff in such county, and each has failed to give bond within the time prescribed by law, the governor, with advice of council, cannot thereupon commission the person who was commissioned in the first instance. *Bowers v. Millar*, 8 Munf. 492.

Sheriff—New Bond—Notice of Requirement.—Where a sheriff has been regularly elected, and, having qualified and given bond as required by law, has assumed the duties of his office, such office cannot be declared vacant by the county court, under section 20 of chapter 10 of the Code, for failure to give a new or additional bond to that already given, when so required by said court, until he is notified of such requirement. *State v. Shank*, 36 W. Va. 223, 14 S. E. Rep. 1001.

Sheriff—Failure to Give New Bond—Effect.—Where the office of sheriff is declared vacant for failure on the part of the sheriff to give a new or additional bond when so required by the county court, and another person is appointed by said court to fill the vacancy so declared, and proceedings in the nature of a writ of *quo warranto*, are instituted by the sheriff so deprived of the office against the person appointed to fill the vacancy so declared, and the latter declines to make any defence to said proceeding, the circuit court cannot admit the county court as a defendant against said proceeding. *State v. Shank*, 36 W. Va. 223, 14 S. E. Rep. 1001.

Sergeant as Receiver—Official Bond as Security.—If the sergeant of the city in which the property is located, is appointed the receiver, it is not necessary to require him to give security for the faithful performance of his duty, as it is covered by his official bond. Code of 1873, p. 1124, ch. 174, § 5. *Moran v. Johnston*, 26 Gratt. 108.

B. VALIDITY.

Sheriff's Bond—Validity—Essentials.—In the obligatory part of the sheriff's bond, the obligors acknowledged themselves to be held and firmly bound to the Commonwealth of Virginia, in a certain sum, for the payment of which, to the treasurer of the said Commonwealth, they bound themselves, etc., the condition was, that, if the said sheriff should well and truly collect and account for certain taxes, etc., and pay the same to the treasurer of this Commonwealth, for the use of the said Commonwealth, then, etc.; this was held to be a good bond, and a judgment in an action of debt thereon was sustained. *Winslow v. Com.*, 2 Hen. & M. 459.

Bond of Deputy—Validity—Essentials.—The bond of a deputy is not avoided by the fact, that the county court did not enter of record that he was a man of honesty, probity and good demeanor; and that he did not take the several oaths required by law to be taken by the deputy sheriffs. *Cecil v. Early*, 10 Gratt. 108.

Sheriff—Bond—Formal Defects.—An official bond of a sheriff conditioned for the faithful discharge of

the duties of his office binds the sureties to answer for moneys collected by the said sheriff which he failed to pay over; and this is true although such bonds omitted the condition to account and pay over as required by law all moneys which may come into his hand by virtue of his office, such condition being required by § 6, ch. 10 of the W. Va. Code, p. 72. *State v. Hill*, 17 W. Va. 452.

Bond of Sheriff—Estoppel.—If a bond recite a fact, though the fact recited be a matter, which ought regularly to appear of record, the parties, obligors in the bond, will be estopped from denying the truth of such recital. Thus if the bond recites that a certain person was sheriff and a certain other person his deputy, though these facts appear of record, yet they need not be proven in a suit on such bond otherwise than by the production of the bond; for the obligors in it are estopped from denying the truth of the recital. *Cox v. Thomas*, 9 Gratt. 320; *Bank v. Fleschman*, 23 W. Va. 317.

M. was elected sheriff of S. in 1854 and gave bond as such. In July, 1856, he gave bond under the act of March 15, 1856, extending the time for which sheriffs should hold office to Jan. 1, 1857. In May, 1856, he was re-elected sheriff for a regular term of two years commencing Jan. 1, 1857, but he did not give his official bond under that election within 60 days after his election, nor until Jan. 12, 1857, when it was executed by himself and his sureties. This bond, reciting his election for two years from Jan. 1, 1857, was acknowledged and recorded, and he was permitted by the court to qualify and act as sheriff. *Held*, that the sureties of M., in his last bond were estopped by its recitals from denying that M. was sheriff, and that the bond was binding on them. *Monteith v. Com.*, 15 Gratt. 172.

Bond of Deputy—Estoppel.—The sureties of a deputy in his bond to the high sheriff for the faithful discharge of his duties, are estopped thereby from denying that their principal was deputy, unless the bond is invalid. *Cecil v. Early*, 10 Gratt. 108. See monographic note on "Estoppel" appended to *Bower v. McCormick*, 23 Gratt. 310.

When the court has cognizance of the subject-matter, or capacity to take a bond, and takes a bond which on its face is valid, but contains a recital of facts necessary to its validity, as in the cases of the election and induction into office of a sheriff, the presence of the justices named as obligees, and the like, the obligors shall be estopped from denying the truth of such recitals. *Gibson v. Beckham*, 16 Gratt. 331.

Sheriff—Motion against—Defence—Estoppel.—A county court having laid the county levy, and directed the sheriff to pay certain claims upon the county out of it, and the sheriff having received the commissioner's book and proceeded to collect the levy as far as it could be collected, and returned a list of insolvents; upon a motion by one of the creditors of the county, whose claim was directed to be paid out of the levy, against the sheriff and his sureties on his official bond to recover the amount, it is not competent for the defendants to object that the county court was not legally constituted to be authorized to lay the levy when it was done; nor can they object that the commissioner's book was irregularly made out and not properly authenticated. *Cook v. Hays*, 9 Gratt. 142.

Sheriff—Qualification—Record Conclusive.—Upon the qualification of a sheriff the record of the county court after reciting his election, states, "that he appeared in court and took the several oaths pre-

scribed by law, and entered into and acknowledged a bond in the penalty of \$50,000 with (naming ten persons) his securities, conditioned, etc. In the absence of fraud the record is conclusive that the bond was properly executed by the parties whose names are to it. *Calwell v. Com.*, 17 Gratt. 391.

The record of the county court states that F, a sheriff who had been required to give a new bond, "this day appeared in court and executed and acknowledged such new bond, and the security thereto being considered sufficient by the court, the same is ordered to be certified." In the absence of fraud, this record is conclusive that the bond was properly executed; and evidence will not be admitted to contradict it. *Vaughn v. Com.*, 17 Gratt. 393.

Sheriff—Defective Bond—Remedy in Equity.—A bond given by a sheriff, through mistake, for the taxes imposed under an expired law will not bind the sureties, for those of the true year; the commonwealth's remedy is by action against the sheriff. *Branch v. Com.*, 2 Call 428 [510].

If an official bond, given by a sheriff and his sureties, before the act of 1786, be so worded as not to be joint and several, but joint only; a court of chancery is the proper tribunal to give the sureties relief against the estate of the sheriff after his death; upon their being compelled to pay a sum of money for a delinquency of such sheriff in his lifetime. *Mountjoy v. Banks*, 6 Munf. 387.

C. LIABILITY ON BOND.

1. **IN GENERAL.**—A sheriff is liable on his official bond for all acts done *colore officii*; he is also liable *civilitur* though not *criminaliter*, for all the acts of his deputies *colore officii*, and is liable therefor in the same form of action as if they had been actually committed by himself. *Lucas v. Locke*, 11 W. Va. 81; *Sangster v. Com.*, 17 Gratt. 124; W. Va. Code, p. 542, § 4; *Mosby v. Mosby*, 9 Gratt. 584; *James v. McCubbin*, 2 Call [274] 281; *County Justices v. Fulkerson*, 21 Gratt. 182.

Sheriff—General Bond—Liability.—The general bond of a sheriff is liable for all state and county taxes levied for any purpose by state and county authority. *State v. Poling*, 44 W. Va. 312, 28 S. E. Rep. 930.

Sheriff De Facto—Liability for Taxes Collected.—He who is *de facto* sheriff, and as such collects the taxes, and performs the other duties of his office, is liable on his official bond for the amount of those taxes, and all other moneys collected by him by virtue of his office, and for all breaches of his duty as sheriff. *Douglas v. Stumps*, 5 Leigh [397] 433.

Sheriff—Special Bond—Liability.—The additional bond required of the sheriff under section 46, ch. 45, Code, covers all school funds which may be collected by him, or come to his hands to be disbursed for school purposes, including district levies and the distributive share of the general fund. *State v. Poling*, 44 W. Va. 312, 28 S. E. Rep. 930.

Sheriff—County Levy—Liability for.—The sheriff and his sureties in office when the county levy is laid, are responsible, at the end of six months from the date of the levy, to all of the creditors of the county provided for by it, though the sheriff has not collected the money, or any part of it. *Ballard v. Thomas*, 19 Gratt. 14.

Sheriff—Bond—Poor-Rates—Liability.—The sheriff was bound, formerly, to collect the poor-rates, if appointed by the overseers of the poor, but not otherwise; and the sureties to his official bond were responsible for them. The law, as it now stands, makes it the official duty of the sheriff to collect the

poor-rates in all cases. *Munford v. Nottoway County*, 2 Rand. 313.

In an action on the official bond of a sheriff for failure to levy an attachment, the declaration should aver that judgment was obtained and the amount thereof; also that the property to be levied on was of some value and that the plaintiff, by reason of the failure to make the levy, suffered damage. *Com. v. Fry*, 4 W. Va. 731.

Executions—Presumption as to.—When an execution is placed in the hands of a sheriff, the presumption of law is that he has levied it and made the money; and in the absence of evidence that he did not levy it, he and his sureties will be liable for the debt to the creditor. *O'Bannon v. Saunders*, 24 Gratt. 138; *Paine v. Tutwiler*, 27 Gratt. 440.

Executions—Failure to Levy—Liability of Sheriff.—When a deputy, in the exercise of his statutory right, demands an indemnifying bond and his demand is refused, he is excusable for not making the levy, and the creditor in such case cannot recover against the sheriff and his sureties, on his official bond, the debt thus lost by the failure to levy. *Huffman v. Leffell*, 32 Gratt. 41.

Sheriff—Refusal of Forthcoming Bond—Liability.—A fair purchase under a sheriff's sale, without knowledge of any improper conduct on the part of the officer, acquires a valid title to the property purchased, and the remedy of the party injured is, by action at law, for damages, against the sheriff. The same remedy applies, where a sheriff has improperly refused a forthcoming bond, when he ought to have received it. *Hamilton v. Shrewsbury*, 4 Rand. 427.

Deputy—Failure to Take Bail Bond.—The law requires the deputy sheriff to add the name of his principal, as well as his own, to the return of all mesne process executed by him. But if he fails to do so, it does not authorize the entering of a judgment against him for failing to take a bail bond, though, individually, he is liable to a penalty for the omission. *White v. Johnson*, 1 Wash. 201 [159].

Sheriff—Failure to Return Appearance Bail.—Appearance bail is not required in actions of debt on bonds with collateral conditions; and in such cases, it is error to enter a judgment by default against the sheriff, for not returning appearance bail. *Ruffin v. Call*, 2 Wash. 233 [181].

Sheriff—Unlawful Attachment—Liability of Sureties.—A sheriff who takes the property of A under an attachment against the property of B, thereby not only commits a trespass, but plainly violates the duty of his office, and breaks the condition of his official bond; and his sureties are liable for his act. *Sangster v. Com.*, 17 Gratt. 124.

In a suit on the official bond of a sheriff to recover for the improper levy of an execution the sureties at the time of the said levy are liable though a new bond may have been given before the money was collected or lost by his negligence. *Wooddell v. Bruffy*, 25 W. Va. 465.

Sheriffs—Execution—Action on Official Bond—Levy after Return Day—Liability on Official Bond.—A sheriff or other officer has no authority to receive payment under an execution after the return day thereof, unless the execution has been previously levied. Such payment would not bind the creditor; nor would it impose any liability upon the sureties of the sheriff in his official bond. Although the sheriff may be responsible in his private capacity for money so received, no responsibility would attach to him in his official character, on that account. *Grandstaff v.*

Ridgely, 30 Gratt. 1; 4 Min. Inst. (2d Ed.) 987; O'Bannon v. Saunders, 24 Gratt. 138; Chapman v. Harrison, 4 Rand. 336; Cockerell v. Nichols, 8 W. Va. 159.

Sheriff—Surrender of Property Subject to Levy—Liability.—A sheriff, who by his act or the act of his deputy, in violation of his official duty, has suffered property, liable to levy and which has been levied on by him or his deputy, to be converted by the debtor to his own use, cannot be allowed, as against and to the prejudice of creditors holding liens on the debtor's remaining property, to have indemnity thereout to the use of another by substitution (if substitution be admissible in any case), for what he has been compelled to pay on account of official delinquency or misconduct. *Sherman v. Shaver*, 75 Va. 1.

When an officer surrenders property he has seized under execution he does it at his peril, and the burden of establishing that it is not liable to levy is on him. If he fail to establish this, he and his sureties are liable on his official bond. *Sage v. Dickinson*, 33 Gratt. 361.

Sheriff—Surrender of Property Levied on—Liability—Waiver—Limitations.—The plaintiff in the judgment after the sheriff's return on the execution filed his bill in equity to subject the land of his debtor to satisfy his debt and having in 1875 exhausted this fund, he then in 1876 instituted his action against the sheriff and his sureties to recover the balance, basing his action upon the improper surrender by the sheriff of the goods levied on. *Held*: 1st, the delay in bringing the action is not a waiver of the action against the sheriff; 2d, the liability of the sheriff and his sureties being fixed, cannot be affected by any delay short of the statutory period of limitation. *Sage v. Dickinson*, 33 Gratt. 361.

Sheriff—Failure to Return Execution—Action—Motion.—An action of debt will not lie against the surety of a sheriff, on his official bond, to recover the penalty imposed by law, for failing to return an execution. Such penalty can only be recovered by motion; and an action of debt will only lie for the damage actually sustained by the sheriff's failure to return the execution. *M'Dowell v. Burwell*, 4 Rand. 317.

Sheriff—False Return—Extent of Liability.—In debt upon a sheriff's official bond to recover damages sustained by the relator by reason of a false return of *nulla bona* on a *n. fa.* sued out by the relator, the measure of recovery is the amount which was due on the execution at the return day; which ought to be found in damages, and no continuing interest ought to be allowed on such damages. *Gibson v. Stewart*, 11 Leigh 600.

Sheriff—Notice of Motion—Amendment of Return.—A sheriff may have leave to amend his return upon an execution, after notice of a motion against him founded on the original return. And the amended return may be made by the deputy who did not make the first return. *Stone v. Wilson*, 10 Gratt. 529; *Shen. Val. R. Co. v. Ashby*, 86 Va. 232, 9 S. E. Rep. 1003; *Stotz v. Collins*, 83 Va. 423, 2 S. E. Rep. 737.

Sheriff—Escape—Liability for.—Under the act, 1 Rev. Code of 1819, ch. 136, § 3, an action of debt may be maintained against a sheriff for either a willful or negligent escape. *Stone v. Wilson*, 10 Gratt. 529.

In debt on official bond of sheriff, assigning for breach the escape of a debtor in custody, no judgment can be entered against defendant, unless it be expressly found (as prescribed by the statute 1 Rev. Code, ch. 136, § 3), that the debtor escaped with the consent or through the negligence of the sheriff, or

that he might have been retaken and the sheriff neglected to make immediate pursuit. *Vanmeter v. Giles*, 1 Rob. 523.

Sheriff—Escape—Liability for—General Verdict.—In an action against the sheriff for an escape, a verdict in general terms, for the plaintiff, is not sufficient to authorize a judgment; notwithstanding the charge in the declaration be, that the sheriff took a defective prison-bonds bond, and thereupon voluntarily permitted the prisoner to escape; and issue be joined on the plea of not guilty. An express finding by the jury according to the act of 1792 concerning escapes, is absolutely necessary. *Hooe v. Tebbs*, 1 Munf. 501.

2. ACCRUAL OF CAUSE OF ACTION.

Sheriff—Action against—Time of Accrual.—A sheriff whose term of office has expired, having in his hands moneys belonging to the county court of his county, is not liable to be sued therefor, until such county court, by some order entered of record, or draft made in pursuance thereof, directing him to pay the same to his successor in office, or to some other person, has been presented to him for payment, and payment thereof has been refused. *State v. Hays*, 30 W. Va. 107, 8 S. E. Rep. 177.

3. CONTINUED LIABILITY.

Sheriff—End of Term—Continued Liability.—The sheriff elected in May 1864, executed his official bond and entered upon his office and continued to act until January 1867, but did not execute a bond under the act of March 15, 1866. His successor, elected in May 1866, executed his official bond in June following, but did not enter upon his office until January 1867. If the said act was unconstitutional, still the first sheriff held over after the 1st of July under the constitution, art. 6, § 23; and having collected the state taxes of 1866, his sureties in the bond of 1864 are liable for them. *Com. v. Drewry*, 15 Gratt. 1.

Statute—To Appoint Collector—Permissive.—The act of 1851, Code, Ed. of 1860, ch. 49, § 18, which authorizes the county court, where there is a vacancy in the office of sheriff, from other causes than his death, to appoint a collector of the taxes, levies, etc., is permissive only, not mandatory; and if not acted on, a sheriff removed from office must proceed to collect them, and his sureties are liable for his defaults. *Ballard v. Thomas*, 19 Gratt. 14.

Sheriff—End of Term—Sureties—Continued Liability.—The true construction of the law, concerning the appointment and duties of sheriffs, requires that they should be annually nominated, and commissioned, and should annually give bond for the faithful collection of the taxes, etc., therefore, in this case, the high sheriff having been nominated and commissioned for one year only, and having acted the second year, without a new nomination and commission, and not having renewed his bond, *held*, that the sureties for the first year were not liable for the taxes collected by the high sheriff for the second. *Com. v. Fairfax*, 4 H. & M. 208.

Sheriff—End of Term—Continued Liability.—Where the statute makes no provision for transferring an estate, committed to a sheriff for administration, to his successor in office, he must proceed with the administration till completed, whether his official term has ended or not, and for an abuse of the trust, his sureties, as well as himself, will be liable. This is well settled. *Tunstall v. Withers*, 86 Va. 392, 11 S. E. Rep. 565; *Dabney v. Smith*, 5 Leigh 13; *Tyler v. Nelson*, 14 Gratt. 214.

Administration of a decedent's estate *cum testamento annexo* was committed to a sheriff under the

statute of 1792, 1 old Rev. Code, ch. 92, sec. 61, and the administration was conducted by his deputy, and, for the most part, after the sheriff's term of office expired. *Held*, the administration did not devolve on sheriff's successor, but he was bound to complete it, and he and his official sureties are answerable for his deputy's administration *after* as well as *before* the expiration of his office. *Dabney v. Smith*, 5 Leigh 13.

In the first year of V's term of office as high sheriff, an execution goes into the hands of T, one of his deputies, who returns it, levied on personal property and not sold for want of bidders. V qualified the second year as high sheriff, and gave different securities, and T again qualifies as his deputy; and there was no other displacing him. At the end of the second year another person qualified as high sheriff, and then the plaintiff in the execution caused a *venditioni exponas* to issue, directed to V, late high sheriff, which came into the hands of T, and was returned by him, "satisfied." *Held*: 1st. T was the deputy of V for the purposes of this execution, when he made the return of "satisfied," and the high sheriff and his sureties are responsible for his acts. 2d. The levy having been made during the first year of the high sheriff's term of office, the sureties of that year are responsible. *Tyree v. Wilson*, 9 Gratt. 59, 58 Am. Dec. 218.

If, to an execution against a former sheriff, the new sheriff returns that he has taken lands, which were claimed by another person; that he has summoned two juries on the title, who had disagreed, and, therefore, rendered no verdict; that he had proceeded no further, not having any direction from the agent; and that he could find no other property; this is not sufficient to prove the sheriff's inability, so as to ground a judgment against the old sheriff's security. [But his inability may be proved by evidence other than the return of an execution; therefore, it not appearing on the record, that satisfactory proof of the sheriff's ability was adduced to the court who adjudged his estate insufficient, the appellate court confirmed the judgment.] *Preston v. The Auditor*, 1 Call 407 [671].

Sheriff—Official Bond—Sureties—Duration of Liability.—Sureties in a sheriff's bond for the *first* year, are not liable for the taxes collected by the sheriff in the second year. The reason is, that sureties are only bound according to the tenor of their obligation, which was, according to its legal effect, for the good conduct of the sheriff for one year. *Com. v. Fairfax*, 4 Hen. & M. 208; *Tyree v. Wilson*, 9 Gratt. 59; *Tyler v. Nelson*, 14 Gratt. 214; *Munford v. Rice*, 6 Munf. 81.

4. EXTENT OF LIABILITY.

Sheriff—Bond—Action—Extent of Liability.—In an action against a sheriff and his sureties, upon the official bond of the sheriff, the recovery can only be of such damages as the relator may have sustained by reason of the breach of the condition of the bond. *Perkins v. Giles*, 9 Leigh 397.

Sheriff—Action—Judgment—Amount.—In an action upon a sheriff's bond in the name of the Commonwealth, for the benefit of a person aggrieved by the misconduct of the sheriff, the judgment should be entered for the penalty, to be discharged by the payment of the damages assessed and costs, "and such other damages as may be hereafter assessed upon suing out a *scire facias*, and assigning new breaches, by the said [Cauthorne] or any other

person or persons injured." *Bibb v. Cauthorne*, 1 Wash. 118 [91]; *Sangster v. Com.*, 17 Gratt. 124.

Upon a motion under section 5, ch. 121 of the Code, the court may give judgment against the sheriff and his sureties for so much as the plaintiff is entitled to recover in any form of action by virtue of the sheriff's official bond, though the demand be not of a fixed sum, or one capable of being fixed by arithmetical calculation, but be for an unascertained amount, which, if the sheriff had been sued for a tort, would have sounded in damages. *Shepherd v. Brown*, 30 W. Va. 13, 3 S. E. Rep. 186.

Sheriff—New Bond—Sureties—Liability.—A breach of duty by a sheriff cannot take place till the time the law requires him to pay over the money he has collected has arrived, and if, after the collection and before the time he is required to pay over the money, he executes a new bond, the sureties in the new bond, and not those in the old bond, are responsible if he fails to pay over the money so collected. *The State v. Wade*, 15 W. Va. 532.

Sergeant—Official Bond—New Bond.—In June 1854 H was elected sergeant of the City of Norfolk for three years, and in the same month he executed his official bond with sureties in the penalty of \$30,000; that being the amount fixed by the court. The condition was that he should faithfully discharge the duties of his office. In December 1855 the justices of the city having been regularly summoned and a majority present, for the purpose of examining the bond of H, an order was made directing him to give at the next term of the court, a new bond, in the penalty of \$30,000, with security; and this he does; the condition in both being the same. Upon an estate committed to him he receives money before the order for the second bond; and in November 1856 his account settled showed a balance against him. *Held*, the court had authority to take the second bond, and therefore, it is valid and binding on the sureties in it. The sureties in both bonds are equally liable for the money H failed to pay over. *Corprew v. Boyle*, 24 Gratt. 284; *Chapman v. Com.*, 25 Gratt. 741; *Lingle v. Cook*, 33 Gratt. 262; *Reed v. Hedges*, 16 W. Va. 167; *Harrison v. Lane*, 5 Leigh 414; *Rosenbaum v. Goodman*, 78 Va. 121.

New Bond of Deputy—Sureties—Liability.—W. deputy of L., sheriff of F. county, gives a bond to his principal with five sureties, for the faithful discharge of the office of deputy sheriff; but L. not being satisfied with this security, W. and three other persons, as his sureties, give a second bond to L. with like condition, a memorandum being indorsed on this second bond, at the time of its execution, in conformity with a previous agreement, that L. should not resort to the second bond for indemnity for the misconduct of the deputy in office, so long as the sureties in the first bond should be resident in the state, and it should appear that he could be indemnified without recourse to the sureties in the second bond; L. the sheriff, recovers judgment on the first bond against the sureties therein bound, for the amount of damages sustained by him by reason of the deputy sheriff's misconduct in office. *Held*, the sureties in the first bond have no right to contribution from the sureties in the second. *Harrison v. Lane*, 5 Leigh 450 [414].

D. BOND OF DEPUTY.

1. NATURE OF BOND.—Bond is given by deputy to a sheriff, with condition to faithfully discharge all duties of such deputy, and to account for and pay over to the sheriff all money which might come to

the deputy's hands by virtue of his office. This is a private bond or contract between the parties to it, not a public one. On it the sheriff may maintain an action to recover taxes collected by the deputy as such, without first paying such taxes to the public treasury. *Poling v. Maddox*, 41 W. Va. 779, 24 S. E. Rep. 999.

In an action of debt upon a bond executed by a deputy sheriff to his principal, which bond, on its face, as a part of the condition, recites that said deputy sheriff's office, which bond is accepted by such sheriff, and such deputy proceeds to perform the duties of his office under said bond, and continues to perform said duties during the entire term of said sheriff's office, said bond must be considered as a contract between said sheriff and his deputy. *Davis v. Baker*, 45 W. Va. 455, 32 S. E. Rep. 239.

2. FORM OF REMEDY.

Bond of Deputy—Death of Surety—Effect.—A deputy sheriff gives bond with eight sureties to the sheriff; one of the sureties dies. *Held*, a motion lies on the bond against the deputy and the surviving sureties. *Jacobs v. Hill*, 2 Leigh 393.

The remedy by motion on a bond of a deputy sheriff to his principal, under sections 36 and 37 of chapter 41 of the Code of 1891, is a further remedy, and does not take away the proper common-law action on such bond. *Poling v. Maddox*, 41 W. Va. 779, 24 S. E. Rep. 999.

3. CAUSE OF ACTION—TIME OF ACCRUAL.

Sheriff—Action against Deputy—Time of Accrual.—Under § 46, ch. 49, Code of 1873, whenever a sheriff becomes liable on account of the default of his deputy, whether a judgment has or has not been recovered against the sheriff, and although he has paid nothing to the creditor, he is entitled to recover against the deputy and his securities the amount for which he may be so liable. The reason for such provision is well stated by TUCKER, J., in the case of *McDaniel v. Brown*, 8 Leigh 231, in which he says: "As a payment by the sheriff would often be ruinous, a provision was made to enable him to recover from his deputy before he was pressed himself, or to make one payment meet the other by proceeding against the deputy *pari passu* with the creditor's proceeding against himself." *Allebaugh v. Coakley*, 75 Va. 628.

At common law the sheriff, upon paying the debt accruing from the default of his deputy, might at once bring an action against such deputy and his securities for reimbursement. But until such payment no right of action could accrue upon the bond of the deputy. *Allebaugh v. Coakley*, 75 Va. 628.

Default of Deputy—Motion against Sheriff—Limitation.—A motion may be made against a sheriff, and his securities for the failure of his deputy to pay to the plaintiff money levied by the said deputy on execution. Such motion need not be made at the next succeeding court after the return day of the execution, but may be made at a subsequent court. *Hogue v. Cottle*, 2 Va. Cas. 229.

4. DURATION OF LIABILITY.

Bond of Deputy—Duration of Liability.—A bond from the deputy to the high sheriff, conditioned for the faithful performance of his duty, during his continuance in the office of deputy sheriff, is binding upon him and his sureties, for the second year as well as the first, and until the winding up of the business lawfully committed to him as deputy. *Royster v. Leake*, 2 Munf. 380.

A bond is executed to a sheriff, during the first year of his shrievalty, by a deputy sheriff and his sureties, the condition whereof recites, that the

sheriff has been commissioned sheriff of N and that the deputy has undertaken the duties of the said office for and during the time the sheriff may continue in office, etc. *Held*, that the contract here recited is a deputation of the office not only for the first but for the second year also of the shrievalty, and the sureties are bound for the conduct of the deputy during both years. *Jacobs v. Hill*, 2 Leigh 426 (393).

A bond from the deputy to the high sheriff, conditioned for the faithful performance of his duty as deputy, "during his continuance in office," without specifying the length of time, is binding on him and his sureties for the transactions of one year only. *Munford v. Rice*, 6 Munf. 81.

5. EXTENT OF LIABILITY.

Liability of Deputy—Extent.—It is provided in the Code of Virginia, chapter 49, section 42, "when any judgment or decree shall be obtained against a sheriff, sergeant, coroner or collector, or his sureties, or their personal representatives for or on account of the default or misconduct of any such deputy, and shall be paid in whole or in part by any defendant therein, he or his personal representatives may on motion obtain a judgment or decree against such deputy and his sureties and their personal representatives for the amount so paid, with interest thereon from the time of such payment, and five per centum damages on said amount." *Nebergall v. Tyree*, 2 W. Va. 474.

Liability of Sheriff for Act of Deputy—Liability of Deputy—Extent.—A high sheriff, against whom a judgment is rendered for the default or misconduct of his deputy, is entitled to recover of such deputy, not only the amount of the original judgment, but all additions thereto from coroner's commissions included in a forthcoming bond, costs of a judgment on that bond, and costs and damages on appeal, or writ of supersedeas, until its final affirmance by the court of appeals. *Stowers v. Smith*, 5 Munf. 401.

In the case of *Mosby v. Mosby*, 9 Gratt. 584, it was held, since it was the duty of the high sheriff to receive the rents and profits of an estate committed to him, if his deputy who had farmed the office from the high sheriff received the rents *colore officii*, though without lawful authority, the sureties of the deputy in his bond are bound thereby to the high sheriff for the rents for which he is so liable to the devisees.

Judgment having been rendered against a sheriff, on account of the deputy's default, for a sum of money, with damages at the rate of 15 per centum per annum from a specified day till payment, a motion is made, under the statute, by the sheriff against the deputy and his sureties, for the amount of that judgment. *Held*, on such motion the judgment against the deputy and sureties, like that against the sheriff, may be for damages continuing till payment. *McDaniel v. Brown*, 8 Leigh 218.

Indemnifying Bond—Extent of Liability.—Arbitrators in the estimation of damages, upon a bond given by the deputy to indemnify and save harmless the high sheriff, may consider all elements of damage within the terms of the submission. *Holcomb v. Flournoy*, 3 Call 365.

Bond of Deputy—Extent of Liability—How Determined.—Deputy sheriffs have no joint interest in or entire authority over the whole office; and, therefore, one not being responsible for the other merely by virtue of the office, they can only be held liable for the acts of each other in consequence of an express undertaking. As therefore they do not and

cannot be made to stand as principals in respect to the acts of others, and as the bond makes them by its terms responsible for each other, each one must be regarded as principal, so far as his own acts are involved, and the remaining obligors as his sureties. *Cox v. Thomas*, 9 Gratt. 312.

6. EVIDENCE AGAINST DEPUTY.

Bond—Action against Sureties—Judgment against Sheriff—Evidence.—In an action against the sureties of a sheriff, for breach of duty, judgments obtained against the latter, are not evidence against the former. *M'Dowell v. Burwell*, 4 Rand. 317.

Judgment against Sheriff—Evidence against Deputy.

—In an action by an execution creditor against a high sheriff, for the failure of his deputy to pay over money made on the execution, the deputy is present at the trial and examined as a witness, but there is a verdict and judgment for the plaintiff. In a subsequent action by the high sheriff against the deputy and his sureties, on their bond with condition to indemnify the high sheriff from all loss and damages from the conduct of the deputy in said office, the judgment against the high sheriff, in the absence of fraud and collusion, is conclusive evidence of the default of the deputy against not only the deputy, but also his sureties. *Crawford v. Turk*, 24 Gratt. 176; *Poling v. Maddox*, 41 W. Va. 779, 24 S. E. Rep. 999; *Carr v. Mead*, 77 Va. 160; *McDaniel v. Brown*, 8 Leigh 218; *Weaver v. Skinner*, 4 Gratt. 160; *Scott v. Tankersley*, 10 Leigh 561; *Allebaugh v. Coakley*, 75 Va. 628; *Lancaster v. Wilson*, 27 Gratt. 624, and *note*.

Sheriff—Motion against Deputy—Judgment by Confession—Evidence.—A motion is made against a sheriff for default of his deputy, upon which the sheriff, with assent of the deputy, but without the knowledge of his sureties, confesses judgment. *Held*, the record of this judgment, is admissible evidence against the deputy's sureties, upon a motion by the sheriff against the deputy and his sureties. *Jacobs v. Hill*, 2 Leigh 303.

E. PLEADING.

1. NOTICE.

Sheriff—Failure to Pay Taxes—Motion—Form of Notice.—On a motion against a sheriff and his sureties for his failure to pay the taxes due to the commonwealth, it is not necessary that the notice should state on what bond of the sheriff the motion will be made. *Monteith v. Com.*, 15 Gratt. 173.

A notice of a motion against a sheriff and his sureties for judgment in favor of a county for moneys due from the sheriff for collection of county levy and road levies is not bad because of its joining those kinds of levy as grounds for the motion. *County Court v. Miller*, 24 W. Va. 791, 12 S. E. Rep. 1073.

Notice of Motion—Variance.—A notice is addressed by B to R, late sheriff, and his surviving sureties by name, survivors of themselves and James Sims. On the trial B introduces the bond which is signed by R and all the surviving sureties; but it is objected to as evidence because the name described in the address of the notice as James Sims is written Jos. Sim. This is not a material variance, and the bond should be admitted as evidence. *Beasley v. Robinson*, 24 Gratt. 325.

Motion against Sheriff—Defective Notice—Waiver.—By appearance to a motion against a sheriff and his sureties, under sec. 5 of ch. 121 of the Code, and repeated continuance of the case generally, by consent of parties, the defendants waive any objection to the notice, because not served in time, but they

do not thereby preclude themselves from moving to quash the notice, because fatally defective on its face. *Shepherd v. Brown*, 30 W. Va. 13, 3 S. E. Rep. 186.

See monographic note on "Continuances," appended to *Harman v. Howe*, 27 Gratt. 676.

2. PARTIES.

Sheriff—Sureties—Joint Motion against.—The act of Dec. 11th 1793 (Rev. Code 1st vol. p. 314), authorizes a motion in a summary way against the deputy sheriff and his securities jointly; but not against one or more of those securities separately. And this, it seems, whether the bond be joint only, or joint and several. *Harrison v. Lane*, 4 Munf. 238.

Sheriff—Default—Motion—Parties.—Where a sheriff makes return on an execution that he has received the money, and makes default in paying the same to the creditor, it is lawful for the creditor, upon a motion under the statute, 1 Rev. Code, ch. 134, § 48, to obtain judgment against the sheriff and such of his sureties as are alive, without including the representatives of a surety who is dead. *Chapman v. Chevis*, 9 Leigh 297.

3. RELATOR.

Sheriff—Bond—Action—Who May Maintain.—An action may be maintained on the official bond of a sheriff, in the name of the person who was governor at the time the bond was executed; and it is not necessary to sue in the name of his successor in office. *Governor v. McCulloch*, 2 Gratt. 175.

Misconduct of Deputy—Liability of Sheriff—Relator.

—The action against a high sheriff and his sureties, upon his official bond, for the misconduct of his deputy in his proceedings on an execution in his hands, must be at the relation of the plaintiff in the execution; and cannot be sustained, at the relation of the parties for whose benefit the execution is issued. *Governor v. Hinchman*, 1 Gratt. 156.

Sheriff's Bond—Relator—Board of Education.—A motion may be made in the name of the board of education against a sheriff and his sureties on his official bond for moneys belonging to said board which the said sheriff improperly refuses to pay on their demand. *Board, etc., v. Parsons*, 22 W. Va. 306; *Board, etc., v. Parsons*, 22 W. Va. 314.

4. NECESSARY ALLEGATIONS.

Sheriff—Bond—Action—Averments Necessary.—A declaration in an action upon a sheriff's official bond, for the use of the county court of his county, for failing to pay over moneys received by him in his official capacity for the use of such county, which fails to aver that, before such action was commenced, the county court had, by its order entered of record, or by a draft made in pursuance thereof, ordered him to pay such moneys to his successor in office, or to some other person, and that said sheriff had notice thereof, is, upon general demurrer, fatally defective. *State v. Hays*, 30 W. Va. 107, 3 S. E. Rep. 177.

Constable's Bond—Proper Assessment of Breach.—In an action on a constable's official bond, the assignment of the breach did not set out specifically the claims put into the constable's hands, but stated that the relator had placed divers claims in his hands for collection which were particularly set out in a receipt given by him as constable and which was thereto annexed, marked A; and then proceeded to aver the collection of the moneys by the constable, and his failure and refusal to pay over to the relator. *Held*, on demurrer to the breach, that it was well assigned. *Davis v. Roach*, 9 Gratt. 13.

Upon a sheriff's bond for collection of taxes, a general assignment of breaches in the words of the bond, is sufficient after a writ of an enquiry executed. *Branch v. Randolph*, 5 Call 546.

It is not necessary in a declaration against a sheriff and his sureties for failing to pay money collected upon a levy to allege, that a majority of the justices were present, when the levy was made, or that they had been summoned to attend the court, at which the levy was to be made. If in the particular case the fact that a majority of the acting justices were not present, when the levy was laid, can be relied on by the defendant he must do so in his defence. *State v. Phares*, 24 W. Va. 657.

Sheriff's—Execution—Action on Official Bond—Defective Declaration.—A count in a declaration in an action by an execution creditor against the sheriff and his sureties, avers that the execution went into the hands of a deputy of the sheriff, and became a lien on all the personal property of the debtor, and that the deputy collected the whole amount of the execution; but does not aver that the execution was levied, or that the money was paid before the return day of the writ. The count is fatally defective. *Grandstaff v. Ridgely*, 30 Gratt. 1.

In debt on a sheriff's bond, the declaration charging that he failed to pay the taxes *on demand*, instead of *at the time appointed by law*, was held sufficient after verdict. *Winslow v. Com.*, 2 Hen. & M. 459.

Sheriff—Bond—Breach—Defective Assignment.—In debt on a sheriff's official bond, the breach assigned is that the sheriff's deputy acknowledged, after he ceased to be deputy, that he had received money on an execution, not that the deputy had in fact received it. *Held*, the breach is not well assigned. *Bennett v. Giles*, 6 Leigh 316.

In charging a breach of the condition of a sheriff's bond, if it was alleged that he failed to return, to the office of the clerk of the county, a forthcoming bond taken upon an execution from the superior court of law, such assignment of a breach was so defective that judgment for the plaintiff could not be rendered upon it in a case occurring before the 1st of January 1820. But see R. Code of 1819, ch. 128, § 103, 1st vol. p. 512; *Lane v. Harrison*, 6 Munf. 573.

Marshal's Bond—Defective Assignment of Breach.—In debt in the circuit court upon the official bond of the marshal of the late superior court of chancery for the district, the breach assigned in the declaration is, that the chancery court having, in a suit therein pending in which the relator was defendant, made an order directing the marshal to take possession of certain slaves (averred to be the property of the relator) and hire them out until the further order of the court, the marshal accordingly took possession of the slaves, hired them out, and collected the hires, but failed to pay them over to the relator, "to whom they belonged, and who was entitled to receive them from the marshal, as would appear by reference to the record and proceedings in the said suit, remaining in the office of the circuit court." On general demurrer to the declaration, *held*, the assignment of the breach is defective in substance; the title of the relator to demand and receive the hires from the marshal not being sufficiently set forth. *Tazewell v. M'Candlish*, 10 Leigh 116.

5. PLEAS.

Bond of Deputy—Motion—Non Est Factum.—Upon a motion against a deputy sheriff and his sureties upon a joint bond, if the principal plead *non est factum*, this must be first tried, and decided against the plea, be-

fore judgment can be rendered against the sureties. *Asberry v. Calloway*, 1 Wash. 94 [73].

Sheriff—Bond—Motions on—Pleas.—On a notice of a motion against a sheriff and his sureties on his official bond, the pleas of "*non damnificatus*" and "*nil debet*" are not proper pleas. Board of Supervisors v. Dunn, 37 Gratt. 606; *Bunch v. Fluvanna Co.*, 86 Va. 454, 10 S. E. Rep. 532; *Hall v. Ratliff*, 93 Va. 328, 24 S. E. Rep. 1011; *Poling v. Maddox*, 41 W. Va. 784, 24 S. E. Rep. 1001; *State v. Hays*, 30 W. Va. 107, 3 S. E. Rep. 177; *Archer v. Archer*, 8 Gratt. 539.

Sheriff's Bond—Action—Plea of Conditions Performed.—In an action of debt upon a sheriff's official bond, the plea of conditions performed, properly pleaded is an answer to the whole cause of action in the declaration mentioned, and controverts the plaintiff's right to any recovery whatever. *State v. Hays*, 30 W. Va. 107, 3 S. E. Rep. 177.

Sheriff—Action on Bond—Plea.—In debt on sheriff's official bond in name of G, successor of T, governor of Virginia, to whom the bond was given; plea, that G. was not, and that M. was, the successor of T, and demurrer to the plea, *held*, though the plea was obviously designed to entrap, the demurrer must be overruled. *Bennett v. Giles*, 6 Leigh 316.

F. EVIDENCE.

Motion against Sheriff—Evidence of Indebtedness.—On a motion against a sheriff and his sureties for the county levies he had failed to account for, the report of the clerk, who had been directed by an order of the county court to settle the sheriff's account, though made with the sheriff without notice to the sureties, is competent evidence against them to show the amount for which the sheriff is indebted. If they had notice, as the statute provides, the report would be conclusive upon them; without notice, it is *prima facie* evidence of the amount of the sheriff's indebtedness. Board of Supervisors v. Dunn, 37 Gratt. 606; *Carr v. Meade*, 77 Va. 160; *Munford v. Overseers*, 3 Rand. 313; *Jacobs v. Hill*, 2 Leigh 363; *Cox v. Thomas*, 9 Gratt. 323; *Crawford v. Turk*, 24 Gratt. 176.

Constable—Action on Bond of—Evidence.—In an action against a constable and the sureties in his official bond, for failing to pay over debts entrusted to the constable and received by him from the debtors, the receipt of the constable for the debts, signed in his official character, is, according to the true construction of the act passed March 8, 1826, concerning constables and their securities, *prima facie* evidence, as well against the sureties as against the constable, of the receipt of the money; provided six months have elapsed between the date of the receipt and the commencement of the action. Per ALLEN and BALDWIN, J. But the fact that the receipt of the constable was signed in his official character, must appear in some way on the face of the paper itself: if it do not, the party claiming under the receipt cannot obtain the benefit of the act by oral testimony of the character in which the receipt was signed. *Per totam curiam*. *Smith v. Governor*, 3 Rob. 229.

138 *The Merchants Insurance Company v. Edmond, Davenport & Co.

October Term, 1866, Richmond.

1. Insurance Contracts—How Construed.—Contracts of insurance are to be construed accurately, and

*See principal case cited and approved in the *Manhattan L. Ins. Co. v. Warwick*, 20 Gratt. 645; and

neither liberally nor severely, and without favor to either party.

2. *Same-Same*.—Policies of insurance are to be considered and construed as a whole; and particular clauses or passages are not to be wrested from their context so as to destroy the unity of the contract and create conflict where there should be agreement; but one part is to be elucidated by the other, so as to reconcile them, if practicable, to one common intent or design, present to the minds of the contracting parties.

3. *Marine Insurance—Capture of Insured Goods—Liability of Insurer*.—The M. Co. issues to E. a policy of insurance in the usual form and at the usual rates, dated December 24, 1860, on a cargo of coffee to be shipped on board the S. from Rio to Richmond or some other Atlantic port in the U. S. The cargo is shipped on the 10th of May, and in July is seized or captured some miles outside the capes of Virginia by a U. S. vessel. The owners of the ship, the insurers and insured are all citizens of Virginia. The policy is unaffected by the public events that had occurred; the capture and condemnation was as of enemy's property; and the insurer is liable upon the property.

This was an action on the case, brought in February, 1863, in the Circuit court of the city of Richmond, by Edmond, Davenport & Co. against the Merchants Insurance Company upon a policy of insurance. The defendants pleaded the general issue; and the parties agreed the facts, and submitted the case to the decision of the court. The facts as agreed are substantially as follows:

For many years previous to the 139 20th of December, *1860, there had existed an active trade in coffee between Rio de Janeiro and the city of Richmond, and other Atlantic ports of the United States. In this trade the plaintiffs had for several years been engaged, and had effected insurances on their shipments of coffee with the defendants, in policies of the form used in this case, at one and one-fourth per cent. premium; that having been the usual rate and usage of trade on such shipments. On the 24th of December, 1860, the defendant issued to the plaintiffs, in the accustomed course of business, a policy in the usual form to the amount of \$15,000, upon a cargo of coffee, to be shipped from Rio de Janeiro to Richmond in Virginia, or some other Atlantic port of the United States, on board the Sally Magee. The insurance was to commence from the loading of the coffee on board the vessel, and continue until it was safely landed as aforesaid.

The perils insured against were "of the seas, men of war, fires, enemies, pirates, rovers, assailing thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detentions of all kings, princes, or people, of what nation, condition or quality soever, bar-

see also, *foot-note* to same case as to the effect of war on insurance contracts.

See generally, monographic note on "Fire & Marine Insurance" appended to *Mutual, etc., Co. v. Holt*, 29 Gratt. 612.

ratry of the master, unless the assured be the owner of the vessel, and mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandise or any part thereof."

The warranty of the assured was, among other things, against damage or loss arising from any illicit or prohibited trade or any trade in articles contraband of war; and that insured was not to abandon, in case of capture, seizure or detention, until after condemnation of the property insured, &c. nor in case of blockade; and free from any expense in consequence of capture, seizure, detention or blockade; but in 140 the event of blockade, to be *at liberty to proceed to an open port, and there end the voyage.

The barque Sally Magee was owned by citizens of Virginia, who were also citizens of the United States, and was regularly registered in the United States custom house for the port of Richmond, Virginia. The plaintiffs, at the date of the policy, were also citizens of Virginia and of the United States, and were merchants engaged in the coffee trade between Rio de Janeiro and Richmond, and other Atlantic ports of the United States. The defendants were and still are a corporation chartered by the general assembly of Virginia, and the president, directors and stockholders were, at the date of the policy, citizens of Virginia and the United States.

On the 10th of May, 1861, the Sally Magee, having on board coffee in which the plaintiffs were interested to the amount of six thousand nine hundred and nine dollars and forty-two cents, cleared from Rio de Janeiro, with United States papers, and under the United States flag, for Richmond, Virginia, or some other Atlantic port of the United States, and while proceeding on her voyage, and before her arrival at Richmond or at any other ports aforesaid, the said ship with her cargo was seized or captured by the United States about the 1st of July, 1861, on the high seas, a few miles outside the capes of Virginia, and was subsequently condemned by a prize court of the United States. The loss of the plaintiffs was total, and due notice of condemnation and abandonment was given to the defendants. Before and at the time of the seizure or capture aforesaid, all the parties were citizens of Virginia and of the Confederate States.

It was a part of the case agreed, that either party might refer to the constitution, laws, and public acts of the government of the United States, in the same manner as if they were incorporated in the state- 141 ment of the case, *and also to any facts or circumstances of a general and historical character, touching the United States, of which the court could take judicial cognizance if Virginia had not dissolved its political connection with the United States. And, like reference might be made to the public acts of the Confederate States and the several states compos-

ing the Confederacy, and to the historical facts in relation to its formation and establishment, and that of the government of the Confederate States.

On the 4th of February, 1863, the Court rendered a judgment on this state of facts, in favor of the plaintiffs, for the sum of \$6,909.42, with interest from the 1st of December, 1861, until paid, and their costs. Whereupon the Merchants Insurance Company applied to this court for a writ of error to the judgment, which was awarded.

John Howard and Grattan, for the appellants.

J. Alfred Jones, Crump and Conway Robinson, for the appellees.

RIVES, J. This action was brought upon a policy of marine insurance, whereby the appellees procured of the appellants an insurance of fifteen thousand dollars upon a certain cargo of the Sally Magee, at a premium of one and a quarter per cent. The policy bears date on the 24th of December, 1860, when the underwriters and insured were alike citizens of Virginia and of the United States. The barque Sally Magee was owned by citizens of Virginia, and as such also citizens of the United States, and was duly registered in the United States custom house for the port of Richmond. On the 10th day of May, 1861, she cleared from Rio de Janeiro, having on board, for the insured, coffee to the amount of six thousand nine hundred and nine dollars and forty-two cents, with United States papers and under the United States flag, for

142 Richmond, *Virginia, or some other Atlantic port of the United States, and while proceeding on her voyage was captured by the United States on the 27th of June, 1861, on the high seas, outside of the capes of Virginia, and was subsequently condemned and confiscated by a prize court of the United States. The loss of the appellees was total, and due notice of condemnation and abandonment was given to the underwriters.

In the agreed case upon which the judgment of the court below was rendered, reference was specially made and allowed to the constitution, laws and public acts of the government of the United States; to any facts or circumstances of a general and historical character touching the United States, of which the court would take judicial cognizance if Virginia had not dissolved its political connection with the United States; to the public acts of the Confederate States, and the several states composing the Confederate States; and to the historical facts touching the formation and establishment of the Confederacy and government of the Confederate States. The case was submitted as "set out in this agreement, and in the declaration, to which a plea of the general issue was pleaded, and issue thereupon joined." The case was heard and decided by the court below on the 4th day of February, 1863, and judgment given for the \$6,909.42, the value of the coffee condemned and lost.

The review of this judgment presents for consideration several questions of interest and importance. The distinguishing feature of the cause is new, and it is not surprising that it invited the counsel on both sides to a latitude of discussion beyond the actual necessities of the occasion. But I shall cautiously abstain from following counsel into inquiries, however interesting not strictly pertinent and necessary; nor shall I be tempted to intimate any opinion

whatsoever upon certain questions 143 that have *been made in this cause, and which I deem out of its legitimate pale. The examination I propose shall be confined to the distinct issues of the cause, and shall preclude, as beyond the proprieties of my place, the intimation or expression of opinion upon irrelevant matters. The great and controlling controversy in this cause is whether any, and, if any, what effect the great change in the political relations and governments of these parties, supervening upon their contract of insurance of 24th December, 1860, should have upon the construction or validity of that contract. When they contracted, they were citizens of the United States; when the cause of action arose, they found themselves in fact, whatever they may have been in theory, the subjects of another government, and, as such, enemies of the United States, and in arms against them. How far the terms of their contract and the intendment of law shall bind or discharge the underwriters under the actual circumstances of this loss, depends in a great degree upon the legal character and incidents of this policy. For this reason it is fit that certain general principles of law upon this subject should be advanced, before attempting to solve the main question which I have just stated.

Marine insurances are of vast benefit to commerce. By distributing losses, they fortify the merchants of small capital, and encourage in a variety of ways commercial enterprise and adventure. They are therefore entitled to the favor of courts, and should be so construed as to sustain the fair intent of the parties, neither enhancing on the one hand the risks of the insurer, nor on the other impairing the indemnities of the insured. It is well observed by Parsons, in his treatise on Maritime Law, vol. 2, p. 49, that if by construction "the insured are always favored, either the practice of insurance must cease, or the premiums must be enlarged to cover the risks of the

144 *law as well as the perils of the sea, until insurance becomes so costly that the best men will give it up, because it will be more profitable for prudent and honest merchants to stand their own insurers." In *Pelly v. Royal Exchange Assurance Company*, 1 Burr. 344-349, it was said by Lee, C. J., that "in the construction of policies the strictum jus or apex juris is not to be laid hold on, but they are to be construed largely for the benefit of trade and for the insured;" and in *Wolff v. Horn-castle*, 1 Bos. & Pull. 316, Buller, J., speaks

of a policy of insurance as "a contract uberrimæ fidei, in which we must avoid bearing harder upon the plaintiffs than is absolutely necessary."

Where words of doubtful or ambiguous import are used in the policy, it has been decided in the case of *Dole & another v. New England Mutual Marine Insurance Company*, 6 Allen 373, that "that interpretation is to be adopted which is most favorable to the claims of the assured under the policy. This is the ordinary and familiar rule applicable to the construction of all policies of insurance. It is founded on the consideration that the contract being one of indemnity to the assured, it is most consonant to the intent of the parties to construe it so that the extent of the indemnity shall be as great as a just interpretation of its terms will fairly admit; but that this salutary and well-established rule of interpretation can have no application to a case where the terms of the policy are clear and unambiguous." Alluding to this principle of favor to the insured, Parker, J., in *Hood v. Manhattan Fire Insurance Company*, 1 Kern. R. 532, says: "Where the words are not ambiguous, and the expression of the intent of the parties is full, I know of no reason why they should be excepted from the general rules of law applicable to the construction of all contracts." Lord

145 **Ellenborough* in *Robertson v. French*, 4 East's R. 130, 135, uses the following explicit language: "In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance, which are not equally applicable to the terms of other instruments, and in all other cases; it is therefore proper to state that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, namely, that it to be construed according to its sense and meaning as collected in the first place from the terms used in it; which terms are themselves to be understood in their plain, ordinary and popular sense, unless they have generally, in respect to the subject matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intentions of the parties to that contract, be understood in some other special and peculiar sense."

From this collation and comparison of authorities, therefore, I am content, for all the purposes of this case, with Parsons' practical conclusion, "that contracts of insurance are to be construed accurately, and neither liberally nor severely, and without favor to either party." 2 Parsons' M. L. 49.

Another familiar rule of interpretation attaches to policies as well as other written instruments, namely, that they are to be considered and construed as a whole; and particular clauses or passages are not to be

wrested from their context so as to destroy the unity of the contract, and create conflict where there should be agreement. On the contrary, a desire to effectuate the intentions of the parties creates the necessity of looking to *all the constituent elements of the contract, elucidating one by the other, and reconciling them, if practicable, to one common intent or design present to the minds of the contracting parties.

To ascertain the nature and extent of an agreement, we must necessarily contemplate all the attending circumstances and contemporaneous events likely to operate upon the minds and influence the acts of the parties. In this particular case, we are specially invited and required to do so, in consequence of the extraordinary political troubles which are now relied on for the defeat or abrogation of this insurance, and to which reference is made, as has already been seen, by the agreed case now submitted to us. When these parties came together on the 24th December, 1860, the field of speculation was open alike to both. They were equally interested in the future events, natural and political, that might attend or affect their contract; and more especially will a knowledge of the probable course of trade, the state of the country, and all other causes bearing on the risks to be assumed, be imputed to the underwriters.

Their risks were ascertained and fixed by their signature to the policy, and could not be lessened, augmented nor in any respect varied by subsequent transactions or events. It was their province to look narrowly to the risks to be enumerated, and to see that their liabilities were not greater than they were content to bear amid all the uncertainties of the natural and political world during the existence of their policy. I feel well assured, that in an undertaking of this kind, they must have felt the justice and acted in the spirit of the ancient rule laid down in *Paradine v. Jane*, Aleyn's R. 260, namely, where one by his own act assumes a duty or a charge, he will not be relieved from it by any accident proceeding from inevitable necessity; 147 for the manifest reason that, *being a matter of contract, he might have provided against it. The insurers were not restricted to their printed forms; they might on this occasion have guarded themselves against the actual contingency, if, with a forecast and discernment, which, I admit, were then rare, they had properly noted the signs of the times. To them the policy before signature was a tabula rasa, on which they might have inscribed only such risks as comported with the threatened troubles of the country, and have so restricted their liabilities as to avoid the complications of the then imminent war. It was for them to limit or extend the terms of their policy. If they choose to assume the usual risks and demand the usual premiums, they cannot escape the former by reason of necessity, nor plead the latter as an argument against the true extent of

their obligation. These may tend to stamp it as a most improvident bargain, but cannot weaken or impair its legal sanctions.

Having premised these general considerations, let us consider the warning which these parties had of impending war. The appellees may have profited by it, and been specially induced by it to seek this indemnity for their commercial adventure; nor could it have been expected of them sua sponte to advance the premiums. But if the appellants neglected the fearful portents of war, let us see if they can impute it to anything save to themselves, and the prevalent indifference of the public. This transaction speaks as of its date. Some days before that, to wit, on the 20th of December, 1860, South Carolina took the lead by the passage of her ordinance of secession. The general assembly of Virginia had also, by joint resolution of both houses, pledged her co-operation to South Carolina, against any attempt of the federal government to coerce her into obedience to the union and laws

of the United States, which she had renounced. *All the southern states were then preparing and organizing revolution throughout their borders. Conventions were called to withdraw their respective states from the Union; and so rapid and contagious was the political ferment in these states, that the example of South Carolina was followed by Mississippi on the 9th of January following, by Florida and Alabama on the 11th, Georgia on the 19th, and Louisiana on the 26th of the same month; and the Montgomery convention that formed the Confederacy, met on the 6th of February, 1861. In view of these historical facts, it is fair to conclude that, at the date of this policy, the underwriters might well have contemplated the probabilities of armed collisions on land and sea between the authorities of the United States, and those states that were openly meditating withdrawal from the Union and resistance to its laws. It is by no means necessary that the insurers should have contemplated such a contingency; nor am I to be understood as ascribing such foresight to them. On the contrary, I suspect that they did not, in fact, entertain such an idea. I know too well the supineness and incredulity with which many slept upon this volcano, unaware of its pent-up fires, till they burst forth to consume their fortunes and awaken them to a sense of their unexpected ruin. But it is surely not too much to say that enough of the omens and threats of war existed on the 24th December, 1860, to render it probable that the most serious perils of this policy would proceed from acts of the United States—the common government, at that time, of the insured and insurers.

The gist of this inquiry, then, is to fix the responsibility of the appellants by the just meaning and scope of the terms they have employed in their policy. The enumeration of risks is taken from the English forms. (Marshall, vol. 1, p. 217.) They are, “of the seas, men of war, 149 *fires, enemies, pirates, rovers, assail-

ing thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detentions of all kings, princes or people, of what nation, condition or quality soever, barratry of the master (unless the assured should be the master of the vessel) and mariners, and all other perils, losses and misfortunes that had or should come to the hurt, detriment or damage of the said goods and merchandise or any part thereof.” It will be seen that the word ‘capture’ is not used in this part of the policy; it is, however, sufficiently expressed by equipollent terms, ‘men of war,’ ‘enemies,’ ‘takings at sea,’ ‘arrests,’ &c. To render this plainer, I crave reference to a correlative warranty or exception of the policy, where the assured warranted “not to abandon in case of capture, seizure or detention until,” &c. I take it, therefore, that capture is one of the perils insured against by this policy. How is this term to be defined? It has two senses: first, that of a lawful belligerent act of government; and secondly, of a taking by violence from without, as that of an ordinary enemy or pirate. And in a case heretofore cited of Dole &c. v. New England Mutual Marine Insurance Company, 6 Allen’s R. 373, it is said: “Where a word or phrase is inserted in a contract, which may be properly said to have two or more meanings, each of which is appropriate and suitable to describe results or events which may in certain contingencies occur or arise in the practical operation of the contract, and which must therefore be presumed to have been in the contemplation of the parties, the true rule of exposition, in the absence of any contrary intent, is to interpret it as having been used by the parties in its fullest and most comprehensive sense.” It seems to me, therefore, that this term is apt and broad enough to embrace and describe the actual loss, for which 150 the abandonment was made in *this cause, namely, a capture as prize by the United States.

By reference to the case of *The Sally Magee*, reported in 3 Wallace’s R. 451, it will be seen, that the condemnation of its cargo, which led to the abandonment in this case, was based solely upon the ground that it was enemy’s property, and that no reference could be had to the individual character, or sentiments, or conduct of the owner. It was sufficient that a civil territorial war existed, to make enemy’s property on the high seas lawful prize. Thus, it was observed by Judge Sprague (Upton on Mar. Warfare and Prize, p. 97), that “in prize law, condemnation is not the infliction of personal punishment on proof of personal guilt, but it is a matter of belligerent policy, to destroy the commerce of the enemy and diminish his resources.” The same reasoning is employed in *The Prize cases*, 2 Black’s U. S. R. 635, 670; and tends to prove that whatever may be the individual responsibilities of citizens of the Confederate States for their personal acts, they are to be regarded, so far as the belligerent rights and relations of the United

States are concerned, simply as enemies according to the law of nations. Judge Grier, who delivered the opinion of the court in these cases, said: "A civil war is never solemnly declared; it becomes such by its accidents—the number, power and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and they contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign state; while the sovereign party treats them as insurgents and rebels,

151 *who owe allegiance, and who should be punished with death for their treason." These adjudications seem to settle with great clearness the character of this act as a belligerent capture, and the political status of the insured and insurers in reference to this transaction, as construed by the Supreme Court of the United States, simply as 'enemies.' It surely does not become this court, upon the invitation of counsel, to go into other collateral and irrelevant inquiries as to personal consequences growing out of the late war. When such questions legitimately arise, it will be time enough to consider and decide them. Now, it is sufficient to concede, that by the course of political events, and the fortunes of war, which they could not control, the parties to this contract, between its date and the happening of the loss, had become enemies of the United States. Does not that contract and its obligations still follow and bind them in his altered relation? They were subjects of the same government de facto, with a right to resort to its courts to assert their rights and pursue their remedies; and if now remitted to their government de jure, I perceive no reason why the same rights and redress should not, in like manner, follow them to this court. Any other view, it seems to me, would make it impossible, during the existence of civil war, to guard, protect and enforce private rights and uphold the sanctity of contracts, under the mutations of shifting governments or dynasties. Capture of any kind, a fortiori belligerent capture, its primary sense, is a peril insured against; and it gives rightful cause of action under this policy to the appellees as against the appellants, in whatever court had or now has jurisdiction of their cause.

If this term, however, is not descriptive of the actual contingency on which this action rests, this is precisely one of those occasions when recourse may be 152 rightfully *had to the sweeping clause of the policy. These general words, "all other perils, losses and misfortunes," are by no means meaningless, immaterial or inoperative. In *Cullen v. Butler*, 5 Maule & Sel. 461, 464, *Ld. Ellenborough* says: "The extent and meaning of the gen-

eral words have not yet been the immediate subject of any judicial construction in our courts of law. As they must, however, be considered as introduced in the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have due effect assigned to them in the construction of this instrument; and which will be done by allowing them to comprehend and cover other cases of marine damage, of the like kind with those which are specially enumerated, and occasioned by similar causes." To the same effect is the language of *Best, J.*, in *Butler v. Wildman*, 5 Eng. C. L. R. 324, 328: "The use of these words is to enlarge the construction of the terms by which particular losses are before mentioned, and to extend them to cases coming very near, but not precisely within, the specified losses." If, therefore, the character of this case be unprecedented, and difficulty exist as to the inferences or deductions to be made from the changed political relations and capacities of the parties, I am unable to resist the conclusion that the damage complained of, in the actual contingency, was truly a risk within the special and general enumeration of both this policy.

Another theory is propounded for ascertaining the obligations of this contract, and the rights and duties of the parties in reference to it. It is contended, that the existence of the Confederate government, and the war waged by it, did not affect nor 153 suspend the allegiance of these *parties to the United States, nor impair their duties to that government. How far this pretension is rightful or applicable to this case, I do not think it proper or necessary now to decide. Assuming the position to be true, I do not discern the legitimacy of the conclusions that are drawn from it by the counsel for the appellants. These, as I understand them, are, first, that it is not competent to insure against the act of one's own government; and secondly, that though the contract was originally lawful, it afterwards became unlawful and incapable of performance, because it involved a breach of public duty. I will now succinctly examine these two points, and the leading cases that have been cited in support of them.

I. As to the capacity of American citizens to insure against American capture. Under this head we have been furnished with a great variety of authorities. The most of these are inapplicable, especially the first class of cases to which we have been referred. *Ld. Mansfield*, in his time, had sustained insurances of enemy's property against British capture, on fancied grounds of advantage to his countrymen; but *Ld. Alvanley* first took ground against this principle, and decided "that when a British subject insures against captures, the law infers that the contract contains an excep-

tion of captures made by the government of his own country; and that, if he had expressly insured against British capture, such a contract would be abrogated by the law of England." The same course of adjudication was followed by *Ld. Kenyon*, in *Brandon v. Nesbitt*, and *Bristow v. Towers*, 6 T. R. 23, 35. *Ld. Ellenborough* still more directly condemned these assurances, and pronounced them to be "not only illegal and void, but repugnant to every principle of public policy." Whether the loss in respect of which the assured sought to recover were a loss by British capture (as in *Kellner v. Le Mesurier*, 4 East's *R. 396), or by a co-belligerent (as in *Brandon v. Curling*, 4 East's R. 410); whether the insurance were effected before or after the breaking out of hostilities (as in *Furtado v. Rodgers*, 3 Bos. & Pull. R. 191, or *Brandon v. Curling*, 4 East's R. 410), or whether the action were brought during the war or after the restoration of peace (as in *Gamba v. Le Mesurier*, 4 East's R. 407), his lordship's decision was uniformly the same; he declared that every insurance on alien property by a British subject must be understood with this limitation, that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the underwriters. 1 Arnould, p. 90. But it is very plain these cases are very different from the case we are now examining; and the principle on which they were decided points to this discrimination. Here the insured and insurers belong to one common country; and there can be no question of public policy involved. But a case like the present was noticed in *Lubbock v. Potts*, 7 East's R. 447, where the attempt was made to extend the principle of the foregoing cases further, to wit, that an insurance against British capture was void on a British ship; but the point was not decided, though the court intimated a pretty clear opinion that it would only be illegal in the case of a foreign ship. 1 Arnould, p. 86, 90. A somewhat analogous principle has been settled where American citizens sued British underwriters upon abandonments on account of the American embargo. *Conway v. Gray*, *Conway v. Forbes*, and *Maury v. Shedden*, 10 East's R. 536, 539, 540. *Ld. Ellenborough* said: "In all questions arising between the subjects of different states, each is a party to the public authoritative acts of his own government, and on that account a foreign subject is as much incapacitated from making the consequences of an act of his own state the foundation of a claim to indemnity upon a British subject in a British court of justice, as he would be if such act had been done immediately and individually by such foreign subject himself." But this proposition was afterwards materially modified, if not retracted, by him in a later case of *Simeon v. Bazett*, 2 Maule & Sel. 94, 99; where he said, that "the exclusion of risk occasioned by act of the assured's own government is only an implied exclu-

sion from the reason and fitness of the thing; which, however, may be rebutted by circumstances." The whole doctrine was exploded in the *Exchequer* chamber, where it was held that the insured was entitled to recover, notwithstanding the loss happened by the act of the government of his country, and though he and the insurer were subjects of different states. *Bazett v. Meyer*, 5 Taunt. R. 824. This latter rule, upon a full review of the cases, has been adopted in our American courts, and the contrary doctrine disclaimed as the offspring of a fanciful and unreasonable theory. *Francis v. Ocean Insurance Company*, 6 Cow. R. 404, and 2 Wend. R. 64. But even when taking this questionable position, *Ld. Ellenborough* adds: "Where the insured and insurer are both subjects of the same state, the case will stand upon very different grounds of consideration." The same eminent judge ruled at *Nisi Prius* this very point, by declaring, that "where the assured was a British subject, he might recover against a British underwriter for a loss sustained by an act of their own government; that being totally different from the case of a foreigner assured; for amongst our own subjects, whether the plaintiff or defendant sustain the loss, it cannot prejudice the interests of the country." Page *v. Thompson*, *Park on Ins.* 130 n. and 1 *Phill. Ins.* p. 511.

In this country, however, this particular point has been settled, and the validity of insurances against loss *happening by the act of one's own government been fully sustained. *Odlin v. Ins. Co. of Penn.* 2 Wash. C. C. 312; *McBride v. Marine Ins. Co.*, 5 Johns. R. 299; *Lorent v. S. Carolina Ins. Co.*, 1 Nott & McC. R. 505. Our great American commentator, *Ch. Kent*, lays down the principle broadly, thus: "An insurance against loss by reason of the act of one's own government, as an arrest or embargo, is valid." *Parsons* also treats the policy as covering captures, detentions or arrests "by the government, of which the assured is himself a subject, if not for a breach of law." 2 *Parsons' Mar. L.* ch. vii. § vii.

Conceding, therefore, that the parties to this policy were citizens of the United States, and their duties of allegiance as such in full force at the time of the capture. I do not perceive, in the light of these decisions, anything to invalidate the claims of the appellees to their stipulated indemnity under this insurance. Is there any true ground of distinction between this case and that of any other capture in an unexpected war? I can respond to the argument of the appellants' counsel in the words of the court in *Wood v. New England Mar. Ins. Co.* 14 Mass. R. 31, 38. "It is thought hard, that the defendants should be made liable for a loss happening from means which neither party calculated upon when the contract was made. But it does not differ from the case of the breaking out of a war, which occasions a capture; when, at the making of a policy, the most profound

peace existed, and there were no symptoms of approaching war. In such a case, the underwriter loses, because he did not guard himself in the policy." And again: "For any loss occasioned by capture, whether lawful or unlawful, and whether by friends or enemies, the insurer is liable." Lee v. Boardman, 3 Mass. R. 238.

157 *II. Let us now examine, whether this policy became unlawful in consequence of hostilities, and its performance forbidden by considerations of public duty. The law upon this subject is expounded with great clearness and precision by *Ld. Ellenborough in Atkinson v. Ritchie*, 10 East's R. 530. That was a contract of affreightment; and the excuse of the failure to load, was the rumor and apprehension of an embargo by Russia. The chief justice declared that "no contract can be properly carried into effect which was originally made contrary to the provisions of law; or which, being made consistently with the rules of law at the time, has become illegal in consequence of some subsequent law, are propositions which admit of no doubt. Neither can it be questioned that if, from a change in the political relations and circumstances of this country with reference to any other contracts, which were fairly and lawfully made at the time, they have become incapable of being any longer carried into effect, without derogating from the clear public duty which a British subject owes to his sovereign and the state of which he is a member; the non-performance of a contract, in a state so circumstanced, is not only excusable, but a matter of peremptory duty and obligation on the part of the subject. But in order to found this new public duty, which is to supersede the performance of his former private one, it is necessary that an actual change in the political relations of the two countries should have taken place; and that the danger to result to the public interests of his own country from the observance of the contract should be clear, immediate and certain. In short, such a state of circumstances must be shown to exist, as that the contract is no longer capable of being performed without a criminal compromise of his public duty." Accepting this as the strongest authority on which the appellants could rely, let us see to what

158 *state of facts it is now sought to apply it. This commercial adventure, when begun, was entitled to the favor of the United States government. Nothing afterwards occurred to make it unlawful. It is true, that a blockade of the ports of Virginia had been proclaimed by the president of the United States, as commander-in-chief of the army and navy of the United States, and that the legality and obligation of that proclamation have been vindicated and sustained by many decisions of the Supreme Court. It thus became unlawful for the master of the *Sally Magee* to violate that blockade; and any voyage with the purpose to do so would have been unlawful, and might have defeated the insurance or any

other necessary incident of that interdicted voyage. Nevertheless, an actual notice of the blockade, and attempt or design to run it, would have been necessary to taint this policy with unlawfulness, and to convict the parties to it of a breach of their public duties. But it is adequately shown by the agreement in this cause, and the case of *The Sally Magee*, 3 Wallace 457, that the master of the vessel never had notice of either the war or the blockade previously to his capture, and entertained no design whatsoever of disobeying the president's proclamation. The voyage then was not unlawful; the vessel "cleared from Rio de Janeiro, with United States papers and under the United States flag, for Richmond, Virginia, or some other Atlantic port of the United States." These parties, then, were not implicated by this policy in any violation of law: no new duty had arisen on their part to supersede their contract, nor could "any clear, immediate and certain danger" to their country ensue from its performance. I am at a loss to conjecture how an indemnification of the appellees, for the marine damage sustained by them, could be imputed to them or the insurers, in the language of

this authority, as "a criminal compromise of public *duty." Counsel were pleased to denounce with great vehemence such an insurance, in the supposed circumstances, against the acts of the United States government, as a solecism in terms, and a legal offence not to be countenanced upon the restoration of federal authority, or in any courts organized under its protection. I can only say, for my part, that I do not contemplate it in such a light; but, on the contrary, hold the recovery in this case to be justified by the decisions of the Supreme Court, as well as by the principles of municipal law which govern this court.

It only remains to say that, inasmuch as the reported case of *The Sally Magee* discloses the fact that it was a capture, as prize of war, of enemy's property, and no pretext for alleging it to be "a seizure or detention for or on account of any illicit or prohibited trade, or any trade in articles contraband of war," the appellants can rest no defence upon this particular warranty or exception of the policy.

The judgment therefore, in my opinion, should be affirmed.

The other judges concurred in the opinion of Rives, J.

Judgment affirmed.

160 *Tabb's Curator v. Cabell & als.

January Term, 1867. Richmond.

Absent. RIVES, J.*

1. Evidence—Answer in Another Suit—Weight of—Case at Bar.—In a suit against parties claiming

*He was related to some of the parties.

†Evidence—Depositions in Another Suit.—In *Hatcher v. Crews*, 78 Va. 466, the court said: "Whilst, as a

under C, plaintiffs rely on statements in the answer of C in another case. The parties claiming under C are not estopped by these statements; but they have only the effect of admissions or declarations, not made in the pleadings in the cause, and their weight is to be ascertained by the circumstances connected with them.

2. **Same—Same—Same—Same.**—In such a case the parties claiming under C are not concluded by the admissions of C of the legal rights of the plaintiffs in the subject in controversy.

3. **Answer—Averment of Facts—Conclusiveness.**—Though there is no replication to an answer, yet the averment of a fact of which the defendant could have had no personal knowledge, will not be held conclusive of it.

4. **Evidence—Answer in Another Suit—Weight of—Case at Bar.**—C, under whom defendant claims, having stated in her answer in another case, that a certain arrangement was made by the consent of the parties interested, the defendant must be bound by this admission, unless he can clearly establish that it was made under a mistake.

5. **Slaves—Sale by Life Tenant—Substitution.**—C, tenant for life of slaves, remainder to her children who are of full age, sells one of them, and declares that she substitutes two of her own slaves, which are of greater value, in place of the one sold, with the consent of the children. **Held:**

1. **Same—Same—Same—Effect.**—If the substitution was with the consent of the children, both she and they are concluded.

2. **Same—Same—Same—Same.**—If the substitution was made without the consent of the children, C is concluded by it, and the children may enforce it in equity.

general rule. It is true that the deposition of a witness taken in one suit cannot be read against him when a party to another suit; that rule can have no application here, since that was a suit in regard to this very debt, and was admissible as an admission on the part of the appellant, *E. M. Hatcher*, 2 Whart. Ev., § 1180; *Tabb's Curator v. Cabell and al.*, 17 Gratt. 160; *Brown and al. v. Molineaux, Duffield & Co.*, 21 Gratt. 539."

In *Wilson v. Phoenix, etc., Co.*, 40 W. Va. 420, 21 S. E. Rep. 1037, the court said: "An answer in chancery may be used as evidence of an admission of a fact or facts. *Hunter v. Jones*, 6 Rand. (Va.) 541; *Tabb v. Cabell*, 17 Gratt. 160; 1 Greenl. Ev., § 537 a; 1 Whart. Ev., §§ 836, 838."

See generally, monographic note on "Answers, in Equity Pleading," appended to *Tate v. Vance*, 27 Gratt. 571.

Estoppel—Inconsistent Statements—Judicial Admissions in Another Suit.—See *Bargamin v. Clarke*, 20 Gratt. 544, and foot-note.

Trustees De Facto—Liability of.—See foot-note to *Moorman v. Smoot*, 28 Gratt. 80; *Brown v. Lambert*, 23 Gratt. 256, and foot-note.

Life Tenant—A Trustee.—In *Hawthorne v. Beckwith*, 80 Va. 791, 17 S. E. Rep. 241, the court said: "The modern doctrine, supported by the weight of authority, is that where there is a bequest of specific articles, not consumable in the use, such as books, plate, furniture, and the like, possession of which is essential to the beneficial enjoyment of the property, the life tenant is entitled to the possession, and is regarded (as was decided in *Tabb's Curator v. Cabell*, 17 Gratt. 160) as a trustee for the remainderman."

161 *3. **Same—Same—Same—Evidence of.**—It is not material when the declaration was originally made, or in what form of words, or whether or not it was in writing. It is enough that it appears clearly from her deliberate declaration, that she had made such an appropriation of the slaves, and that she then considered them as hers for life only, with remainder to her children.

4. **Same—Same—Same—Right of Life Tenant to Annul.**—C is a trustee for the remaindermen. If, having sold one of the slaves, she had invested the proceeds in other property, the remaindermen would have been entitled to it; and upon the same principle, having substituted her own slaves for the one sold, the remaindermen are entitled; and she cannot afterwards annul the substitution.

6. **Same—Suit by Remaindermen.**—If, upon the death of the life tenant of slaves, the executor declines or neglects to recover the slaves, and sell them for division, as the will authorized him to do, the remaindermen may sue in equity to recover and divide them among the parties entitled.

The will of Landon Cabell deceased was admitted to probate in the County court of Amherst in January, 1834. By his will, after giving to his wife Judith S. Cabell a number of slaves in absolute property, he gave her for her life three men and three women, one of whom was named Lucinda; and he directed that after the death of Mrs. Cabell, the slaves given her for life and their increase should be sold, and the proceeds equally divided among his three children, Robert H. and Landon R. Cabell and Elizabeth Preston; the daughter's part to be held by a trustee for the benefit of herself and her children. And he directed all his property, not specifically disposed of by his will, to be sold by his executor, and the proceeds to be divided among his wife and children.

In March, 1834, the executor sold the property, and at the sale Mrs. Cabell purchased two slaves, a boy named Edward and a girl named Matilda, paying for them by moneys she received on account of her interest in the estate. He also delivered to her, before the sale, the slaves bequeathed to her, whether absolutely or for life; and among them Lucinda.

162 *In the year 1838 a suit in equity was pending in the Circuit Superior court of law and chancery for the county of Henrico and city of Richmond, brought by Andrew Steedman, to subject the estate of Landon R. Cabell, who was then absent, to the payment of a large debt, and Mrs. Judith S. Cabell was, among others, made a defendant, as having property of his in her possession. In this case she filed her answer, which was sworn to on the 11th of December, 1838, in which is the following paragraph: "This defendant has not now, nor had she at the service of the subpoena in this cause, any property or effects in her hands belonging to her co-defendant Landon R. Cabell, except his interest in the library and negroes hereinafter mentioned. By the will of this defendant's husband, Landon Cabell deceased, there were devised

to her for life, with remainder to her three children, the following slaves, to wit: Burgess, a man; Jordan, a man; Cyrus, a man; Margaret, a woman; Lucinda, a girl; and Charity, a girl. At the sale of said testator's estate, the girl Lucinda was sold, and in her stead this defendant purchased two small negroes, Edward and Matilda, the children of the above named woman Margaret. This was done by consent of parties, to prevent a separation of families. In these slaves the said Landon R. Cabell, after the death of this defendant, will be entitled to an undivided equal third part."

In this case of *Steedman v. Cabell* and others, there was subsequently a decree which, among other things, appointed Henry Dunnington a special commissioner, and directed him to sell at public auction the interest of Landon R. Cabell, who was then dead, in the slaves and their increase mentioned in the answer of the defendant, who was then Mrs. Judith S. Tabb, having married Vincent Tabb.

Mrs. Tabb having on her marriage 163 with Vincent Tabb *reserved the power to dispose of her property, she, by a deed dated the 9th day of April, 1849, conveyed to trustees the slave Matilda and her future increase, in trust for her granddaughter, Marion R. Preston, who afterwards married Samuel D. Williamson. And after this marriage, Williamson or his wife sold Matilda to George Slaughter.

In 1857 Mrs. Tabb departed this life, having made her will, which was duly admitted to probate in the Court of Hustings of Lynchburg; and the executor named not having qualified, the estate was committed to Samuel D. Williamson, as curator. By her will she gave four slaves, one of whom was the boy Edward, to her husband Vincent Tabb during his life, and at his death they were to be hired out, and the hires were to be applied to the support of Marion Williamson for her life; and at her death they were to be divided among Mrs. Williamson's children, except one of them named.

In April, 1858, Robert H. Cabell in his own right and as trustee of Elizabeth Preston and her children, and Henry Dunnington, sergeant of the city of Lynchburg, and as such administrator of the estate of Landon R. Cabell, deceased, filed their bill in the Circuit court of Lynchburg, in which they set out the bequest by Landon Cabell of the six slaves to Mrs. Cabell for her life, and at her death to his children, as hereinbefore stated; the marriage and death of Mrs. Cabell; and the subsequent sale by the parties interested of the slaves bequeathed to Mrs. Tabb for life, except Lucinda. As to this slave they allege, that Mrs. Tabb before her last marriage, being a feme sole, sold the said slave, undertaking to pass the absolute estate; and they do not know her present owner, or whether she is alive or dead. They charge that Mrs. Tabb (then Mrs. Cabell) substituted the two slaves Edward and Matilda, instead 164 of Lucinda, to pass at her *death to

the remaindermen under Landon Cabell's will; and they insist that having made the substitution, neither she in her lifetime, nor those claiming under her, can gainsay it. And in proof of this substitution they file and rely upon the answer of Mrs. Cabell in the case of *Steedman v. Cabell* and others. They state the conveyance of Matilda to trustees, and that Williamson after his marriage sold her to George Slaughter in Albemarle county; and also that the slave Edward was disposed of by Mrs. Tabb's will, and was then in the possession of Williamson as curator of her estate. That the slaves when recovered cannot be divided in kind, and that a sale will be necessary; and further that they seek a discovery as to the present owner of Matilda, and whether she has had any increase, and the names of such increase. And making Williamson as curator of Mrs. Tabb's estate, George Slaughter, the trustee of Mrs. Williamson and her children, and the children of Mrs. Preston, and other parties, defendants, they call for a discovery of the person to whom Matilda has been sold, and of her increase; they pray that the said slaves may be delivered up; for a sale and a division; for an account of hires accrued since the death of Mrs. Tabb; and for general relief. With the bill the plaintiffs filed as exhibits the papers before mentioned.

Williamson demurred to the bill, for want of jurisdiction; and he also answered. He does not admit that Mrs. Cabell sold the slave Lucinda, undertaking to pass an absolute estate to the buyer; and calls for proof of the fact, or that she received the proceeds of the sale. He does not admit that Mrs. Cabell substituted the two slaves Edward and Matilda in place of Lucinda. He denies that any such substitution was made with the consent of the remaindermen. He states the conveyance of Matilda to trustees for the benefit of his then 165 wife: *that she held her until 1852, when she sold her to George Slaughter. He denies that the answer of Mrs. Cabell in the suit of *Steedman v. Cabell* and others furnishes any proof of a contract or agreement for substituting the slaves Edward and Matilda for the woman Lucinda, or in any just sense entitles the plaintiffs to claim the former. That in fact Lucinda was not sold at the testator's sale, and the purchase of Edward and Matilda was not made in her stead; and Lucinda, as she has been informed and believes, was sold years after the testator's sale. There does not appear to have been any replication filed to this answer.

It was in proof by the defendants, that Lucinda was delivered by the executor of Landon Cabell to Mrs. Cabell, before the sale by him of the property of the testator, and that Mrs. Cabell probably sold her some two or three years afterwards. That Edward and Matilda were purchased by Mrs. Cabell at the executor's sale. That Lucinda was appraised at \$400, and Edward and Matilda were sold for \$541.

except for the term of her life, and those in remainder had not given up their claim to Lucinda or her value. But as the object of Mrs. Cabell was only to make a substitution, the remaindermen could not
172 assert a *claim both to Lucinda or her value, and to the slaves who were put in her place.

But even if the property in Edward and Matilda, after the death of Mrs. Cabell, had not passed out of her, upon the grounds which have been considered, I think that the claim of the appellees may be maintained on other principles.

In the view of a court of equity, Mrs. Cabell as tenant for life of the slaves bequeathed to her for life, remainder to her children, was regarded as a trustee. *Fearne on Rem.* 417; *Swann v. Ligan*, 1 McCord's Ch. R. 227; *Martin v. Greer*, 1 Georgia Decisions 109. The sale of Lucinda was a breach of trust if the remaindermen did not consent to it, and upon the well settled principles of equity, the parties entitled in remainder after her death had a right, as *cestuy que trusten*, at their option, if nothing more had happened than the sale of Lucinda, to assert their claim to her in the hands of the purchaser, or to hold Mrs. Cabell responsible to them for her value. If Mrs. Cabell had invested the proceeds of the sale of Lucinda in the purchase of another slave, they would have had the right, at their option, to claim the slave thus purchased with their funds. *Adams' Eq.* 142-3; *Hill on Trustees* 91; *Ib.* 522. And if the specific application of the funds could not be traced, they would have been at liberty to prove it by clear admissions of Mrs. Cabell. Or if Mrs. Cabell had, after the sale of Lucinda, purchased another slave of about the same value, and had held and treated the slave so purchased as one of those held by her for life, it would have been presumed that the purchase was made with the money arising from the sale of Lucinda. *Hill on Trustees* 522; *Lewin on Trusts* 762. *Mathias v. Mathias*, 3 Jurist N. S. 429. Now in this case, Mrs. Cabell did not go into the market and purchase

another slave in the place of Lucinda,
173 but *she elected to hold two slaves already belonging to her, as part of the property held by her for life, to stand in the place and stead of Lucinda. Was this not substantially a purchase of these slaves for that purpose from herself? Was it not in substance and effect, and in every thing except the form, the same as if she had bought them from a third person? And ought she not to be regarded as having applied the money in her hands arising from the sale of Lucinda to the purchase of these slaves from herself, just as if she had bought them from any other person? The relief given to the *cestuy que trusten* in such cases is not on any ground of contract. The court, upon principles of equity, allows them to follow the fund into the property into which it has been converted, with the option to take one or the other. *Turner v. Street*, 2 Rand. 408; *Oliver v. Picott*, 3 Howard's U. S. R. 333.

To entitle the appellees to relief on this ground, therefore, against Mrs. Cabell or those representing her, it was not necessary to show that there was an agreement between Mrs. Cabell and those in remainder, that there should be a substitution of Edward and Matilda for Lucinda. The relief does not proceed upon the ground that there was such a substitution, in the sense that the claim to Lucinda or her value was given up, and the claim to Edward and Matilda substituted for it.

The case of *Denton v. Davies*, 18 Ves. R. 499, relied on by the counsel for the appellants as conclusive of this case, seems to me to have very little bearing upon it. This case is thus referred to in *Lewin on Trusts* (Am. ed. 1858), p. 757: "Where a man borrows money for the purpose of purchasing an estate, and afterwards misapplies a trust fund in discharge of the debt so contracted, the transaction cannot be treated as a purchase with the trust money."

174 And again, p. 762: "Where a *tenant for life with power to sell and invest in the purchase of other land, purchased lands with borrowed moneys, and many years afterwards sold the settled estates and applied the purchase money partly in discharge of the debts thus contracted by him, it was held that the purchased lands could not be treated as liable to the trusts of the settled estates."

These passages, which are cited by the counsel for the appellants, are sufficient to indicate the general character of the case. In that case, as in this, the property in question had been purchased long before the trust property was sold, and, of course, there could not be, in either case, an application of the trust fund to the original purchase. In that case, the only ground on which the court was asked to consider it an investment of the trust fund was, that the trust fund was applied to repay a debt incurred to make the purchase, when the defendant denied that the lands purchased were ever intended by him to be substituted for the lands sold. In the case now before the court, the subject was personal property, which could pass without deed, and the trustee who had sold the trust property declared that she had substituted other property for it, and then held that property subject to the trust. The case cited is, therefore, no authority for holding that a court of equity will not, in such a case as this, regard the money arising from the sale of the original trust property as having, by the act of the trustee, which she was perfectly competent to do, been virtually applied to the purchase of the substituted property.

In the case cited, the bill was filed by parties entitled in remainder, to subject the purchased estates to the trusts of the settlement, on the ground that the tenant for life, who had sold the settled estates under a power, had substituted them for the
175 estates which he had sold. *The purchased estates had not been conveyed upon the trusts of the settlement, which was the only mode in which the substitu-

tion could have been effected, and the master of the rolls held, upon the answer of the trustees and the proofs, that there had been no application of the trust money to the purchase, no agreement by the trustee to substitute the purchased estates for the estates sold, no declaration of trust, and no representation to the plaintiffs that such a substitution had been made or would be, on which the plaintiffs had acted, and that there was, therefore, no ground upon which the court could compel the defendant to convey the purchased estates upon the trusts of the settlement.

The objection to the jurisdiction is not well founded. For though the executor of Landon Cabell deceased might have been authorized to recover the slaves and to sell them for the purpose of division, according to *Almond & wife v. Mason's adm'r*, 9 Gratt. 700, yet if he did not choose to do so, it was competent for the appellees to file a bill to recover them and to divide them among the parties entitled. *Ambler & als. v. Warwick & Co.*, 1 Leigh 195; Code of Virginia, ch. 124, § 1.

I have discussed this case thus fully in deference to the learned counsel for the appellants, who being dissatisfied with the decision announced at the last term, applied for a re-hearing. I am of opinion that the decree was rightly affirmed, and that a re-hearing should be refused. This opinion will be filed in lieu of that filed at the last term, as it discusses the case more fully.

MONCURE, P., concurred in the opinion of Joynes, J.

Decree affirmed.

176 *Orange and Alexandria Railroad Company v. The City Council of Alexandria.

January Term, 1897, Richmond.

ABSENT RIVES, J.*

1. *Railroads—Taxation by Municipality—Statute.*—The 25th section of the act of March 18th, 1856, imposing taxes for the support of the state government, does not extend to exempt railroad companies, complying with said section, from taxation by a city government.†

2. *Municipal Corporations—Power of Taxation—Subjects Not Taxed by State.*—The charter of the city of Alexandria gives the power to raise taxes for the use and benefit of the city: provided the laws passed for the purpose shall not be repugnant to

*He was a stockholder in the railroad company.

†*Railroads—Taxation by Municipality—Statute.*—As to the construction of the 25th sec. of the Act of March 18, 1856, maintained in the first headnote, the principal case was cited in *The City of Richmond v. The R. & D. R. R. Co.*, 31 Gratt. 610; *Williamson v. Massey*, 23 Gratt. 243.

‡See the opinion of JUDON JOYNES for the statute.

§*Municipal—Corporation Power of Taxation—Subjects Not Taxed by State.*—See *Norfolk v. Norfolk, etc., Co.*, 95 Va. 564, 568, 28 S. E. Rep. 959.

the laws and constitution of the state or of the United States. The proviso does not limit the power of the city to tax only such subjects as are taxed by the state.

3. *Same—Same—Railroads—Rolling Stock.*—The City Council of Alexandria may tax the real estate in the city, and the rolling stock, of the Orange and Alexandria railroad company: the residence or domicile of that company being in that city.

4. *Statutes—Rule of Construction.*—The real purpose and intention of the legislature is the thing to be ascertained in the construction of a statute: and to effect this the general meaning of the words may be restricted.

5. *Same—Conferring Power of Taxation on Municipal Corporations—Rule of Construction.*—Though it is true that laws conferring the power of taxation upon municipal corporations are to be construed strictly, it is also true that exemptions from taxation are to be construed strictly; and where the power has once been conferred, it is not to be crippled or destroyed by strained interpretations of subsequent laws.

177 *This was an action of trespass in the Circuit court of Alexandria, brought in January 1860, by the Orange and Alexandria railroad company against the City Council of Alexandria, for seizing and taking possession by the defendant's

§*Statutes—Rule of Construction.*—In *Humphreys v. City of Norfolk*, 25 Gratt. 100, the court said: "As was said in the case of *Orange & Alexandria R. R. Co. v. City Council of Alexandria*, 17 Gratt. 176, 181, the real purpose of the legislature is the thing to be ascertained; and this is to be done by having regard not only to the literal sense of the words in question, but also to the context in which they stand, the subject-matter of the section, and the reasons and purpose of the exception apparent from its provisions."

In *Bolling v. Bolling*, 88 Va. 537, 14 S. E. Rep. 67, the court said: "'The intention of the law maker constitutes the law.' Hence the primary object in the construction of statutes is to ascertain and give effect to that intention, although the construction may not be in conformity with the strict letter of the law. It is the duty of the court, it has been said, to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it. *Brewer's Lessee v. Blougher*, 14 Pet. 178; *Petri v. Commercial Bank*, 142 U. S. 644; *Atkins v. Disintegrating Co.*, 18 Wall. 273; *O. & A. R. R. Co. v. Alexandria*, 17 Gratt. 176; *Chalmers v. Funk*, 76 Va. 717." See also, *Fox v. Com.*, 16 Gratt. 1, and foot-note.

¶*Same—Conferring Power of Taxation on Municipal Corporation—Rule of Construction.*—The proposition laid down in the principal case, that laws conferring the power of taxation upon a municipal corporation are to be strictly construed, was approved in *Schoolfield v. City of Lynchburg*, 78 Va. 373; *Peters v. City of Lynchburg*, 76 Va. 932; *McCrowell v. City of Bristol*, 89 Va. 668, 16 S. E. Rep. 867. See also, *Richmond v. Daniel*, 14 Gratt. 387.

See generally, monographic note on "Municipal Corporations" appended to *Danville v. Pace*, 26 Gratt. 1.

collector, of the goods of the plaintiff, to satisfy a demand for taxes claimed by the defendant. Plea "not guilty." The object of the suit was to test the question whether the City Council of Alexandria had authority to tax the real estate of the company in the city, and the rolling stock employed on the road, and running from the city to Gordonsville and intermediate points. The facts were agreed by the parties and submitted to the judgment and decision of the court.

The charter of the city of Alexandria provides that the City Council "shall have power to raise money by taxes for the use and benefit of said city; provided that such laws shall not be repugnant to or inconsistent with the laws and constitution of this state or of the United States." In 1859 the City Council passed an ordinance for raising a revenue for that year: and under it all the property, real and personal, of the city was duly assessed; and by the ordinance a tax of one hundred cents on every hundred dollars of the assessed value of the property, real and personal, was levied. At this time the plaintiffs were the owners in fee of the real estate in the city, and of the personal property, embraced in the tax bills; and the rate of taxation on the property of the company was the same as that imposed for said year upon real and personal property in the city. The tax bills having been placed in the hands of the city collector, to be collected as directed by the ordinances of the city, he demanded of the Orange and Alexandria railroad company payment of the bills, amounting to \$1,250, and payment being refused, he levied therefor, and took possession of a locomotive or steam engine, the property of the company,

178 *of about \$5,000 value. This levy and seizure were made by the express orders and under the sanction of the City Council of Alexandria, and by virtue of the ordinances of the city in reference to the levying and collecting taxes, which require the collector to collect the taxes by distress and sale of the property of the party charged with the taxes.

The personal property mentioned in the tax bill, and valued at seventy-five thousand dollars, consisted of the rolling stock of the railroad company, locomotives, passenger and freight cars, in the daily use of the company in transporting persons and property between the city of Alexandria and Gordonsville, and the intermediate points on the line of the railroad, sometimes stationed at one place and sometimes at another, as the convenience or business of the company might require.

The principal office of the company for managing its financial or other affairs is situate in the city of Alexandria, where the corporate funds, the stock book for the transfer of shares, and full books of account of its business are kept. There the directors hold their regular meetings: the clerk and treasurer of the company reside there, and its president, who is not a resident of the city, is chiefly there attending on its busi-

ness. The machine shops of the company are also there, where the locomotives and cars are repaired when out of order, and are kept when not in actual service; and the depot of the company is on the lots mentioned in one of the tax bills.

It was also agreed that the said railroad company paid into the treasury of the state of Virginia for the fiscal year 1859, for every passenger transported, a tax of one mill for every mile of transportation, as required by the 25th section of the act of the general assembly of Virginia, passed March 18th, 1856, entitled "an act imposing taxes for the support of government."

179 *The parties, waiving all matters of form and pleading, present to the court for their decision, whether any, and if any, what part of said property is liable to taxation under and by virtue of the corporation laws of the city of Alexandria, under the charter of the city and its supplements, and the laws of the state of Virginia. If the court shall be of opinion that said property, or any part thereof, is liable to taxation, then judgment is to be entered for the defendant, with costs, specifying in said opinion, which, if any, of the said property is so liable; if, however, the court is of opinion that none of the said property is so liable, then judgment of one cent damages is to be entered for plaintiff, with costs. All acts of assembly or ordinances of the city, which either party might deem material, to be read from the printed statutes and ordinances of the state and city.

On the 16th of November, 1860, the cause was heard upon the case agreed, when the court was of opinion that the provision in the law imposing a mill a mile on passengers, merely fixed an amount in lieu of the ordinary taxation, and exempted the road from ordinary state taxation, if such amount were paid; if not paid, the company would be assessed and taxed as upon any other property: that this arrangement with the railroad company does not exempt the property of the company, situate within a corporation, from taxation by the corporation; and as it is a subject of taxation, the corporation has the right to collect the tax: and therefore the law is for the defendants. And there was a judgment for the defendants, with costs. To this judgment the Orange and Alexandria railroad company obtained a writ of error from this court.

Francis L. Smith, for the appellant.

D. L. Smoot, for the appellee.

180 *JOYNES, J. Under the charter of the city of Alexandria, the City Council has authority to "raise money by taxes for the use and benefit of the city." The council imposed a tax for the year 1858 upon "all real and personal estate in the said city," at the rate of one hundred cents for each one hundred dollars of the assessed value thereof. This tax was assessed upon the rolling stock of the Orange and Alexandria railroad company, and upon certain lots in Alexandria belonging to the company. The tax having been levied for,

action was brought by the company to test the right of the City Council to tax the property in question. It came before the court on a case agreed, all matters of form and of pleading being waived, and the parties desiring to present only the question as to the right of the City Council to tax the property of the company. The circuit court, being of opinion that the council had a right to impose the tax, gave judgment for the defendant.

It is insisted that this judgment is erroneous on the ground that the railroad company, having paid to the state the passenger tax imposed by the 25th section of the act of March 18, 1856, was, upon the true construction of that section, exempt from any tax whatever, either municipal or state, upon its lands, buildings, or equipments. The section referred to is in the following words:

"Every railroad, not exempted by its charter from taxation, shall hereafter report semi-annually on the 12th day of April and October in each year, to the auditor of public accounts, the number of passengers transported over said road, or any part thereof, and the aggregate number of miles traveled by such passengers thereon for the six months next preceding the first day of April and October in each year. Such statements shall be verified by the oaths of the president and superintendent of transportation. Every company fail-

181 ing to make such reports *shall be fined five hundred dollars. And at the time of making such report the company shall pay into the treasury for every passenger transported a tax at the rate of one mill for every mile of transportation. Every railroad company paying such tax shall not be assessed with any tax on its lands, buildings, or equipments: but if it fails to pay the tax for any six months, then its lands, buildings and equipments shall be immediately assessed, under the direction of the auditor of public accounts, at the full cost of construction and outfit, and a tax shall be at once levied thereon as on other real estate, to be collected by the sheriff in each county or town, as the auditor may direct."

The question is whether the words "any tax" in the clause of exemption in this section, are to be restricted to state taxation alone, or are to be construed without any restriction, so as to embrace taxation by the city as well as by the state. The real purpose and intention of the legislature is the thing to be ascertained, and this is to be done by having regard not only to the literal sense of the words in question, but also to the context in which they stand, the subject matter of the section, and the reason and purpose of the exemption apparent from its provisions.

I think there is no room for doubt as to the intention of the legislature. The act to which this section belongs is a general law imposing taxes for the support of the state government. This particular section relates to the taxes which railroad compa-

nies shall pay to the state. It does not relieve the companies from liability to be taxed on their property; it only compounds for the tax on property by allowing the companies, in lieu of it, to pay a tax on the transportation of passengers, but expressly reserves the right to tax their property, in case of their failure, in any

182 period of six months, to pay *the tax on the passengers. It only changes the form of taxing the companies by the state, and gives an exemption from the tax in one form, where the tax in the other form has been paid. This exemption was necessary to carry into effect the substitution of one form of tax for the other, and to avoid the injustice of subjecting the companies to a double burden. But this reason did not require that the exemption should be extended to the city tax also, for which no commutation was provided, and which was wholly independent of the tax to the state. I do not perceive any reason connected with the new system of taxation introduced by this act, nor any consideration of convenience or justice, which would make it proper or necessary to allow such an exemption. On the contrary, it would have been obviously unjust for the state to purchase a compliance with the new system on the part of the railroad companies, at the expense of the other tax payers in the cities, who would have to sustain the burden of city taxation from which those companies would be relieved by such an exemption.

I think, therefore, that it is clear, upon the construction of this section, that the legislature intended to give to railroad companies, upon payment of the passenger tax, an exemption only from taxation by the state upon their property, and that the right of cities to tax such companies upon their property was not meant to be affected. This intention must prevail over the mere literal sense of the words, and the more so since the words in this case are not explicit, and in order to give effect to the intention it is not necessary to contradict their plain meaning, but only necessary to limit the scope which they would have, or might have, upon a strictly literal interpretation. Vide 1 Kent's Com. 462; Dwarries on Statutes, 718-726; United States v. Freeman, 3 How. U. S. R. 556; Phil. & Balt. 183 R. R. Co. v. Bayless, *2 Gill's R. 355; Mayor &c. v. Root, 8 Maryland R. 95.

I do not think it necessary to examine the cases which have been cited in the argument, relating to exemptions from taxation contained in acts of incorporation, or in general laws under which companies have assumed their corporate powers. In such cases an exemption from taxation, given in general terms, may well be held to extend to municipal taxation as well as state taxation, on the ground that the exemption is designed to secure an advantage to the company, and thus to encourage the enterprise. And in such a case, the words being general, and there being nothing in the subject matter or provisions of the act, or in its apparent policy, to require that

their meaning should be restricted, they are entitled to have their full effect, upon the ordinary rules of construction.

But such cases can have no application to this. The law now in question was not designed to encourage the construction of railroads, or to confer a bounty of any sort upon railroad companies. It was a mere revenue law, whose whole object was to secure revenue to the state. It was not a part of the fundamental law of such corporations, having the sanctity of a legislative contract, but an ordinary act of legislation, applicable to all railroad companies carrying passengers, whether old or new, finished or unfinished, and liable to repeal at any time. It was in fact amended in 1860, by requiring the payment of a tax on freights, as well as of a tax on passengers. And besides, as we have seen, the provisions of the act in this case indicate clearly that the legislature intended to give an exemption, upon the condition expressed, from the state tax only.

But it is further contended, that the imposition of a tax by the City Council upon the property of the company, 184 *when it was exempt from taxation by the state by reason of the payment of the passenger tax, was beyond the power of the council under the charter of the city. The charter gives to the council power to raise money by taxes for the use and benefit of the city, but subject to a proviso that the laws passed for that purpose shall not be "repugnant to or inconsistent with the laws and constitution of this state or of the United States." Act May 7, 1852, § 9.

This proviso only expresses a limitation upon the power of the council which would have been implied without it. But it does not confine the taxing power of the council to such subjects as may, from time to time, be taxed by the state. The power is general, to be applied, in the discretion of the council, to any subjects of taxation which may not be withdrawn from their power by the paramount authority of the legislature. The necessities of the city might be such, as compared with those of the state, as to make it proper and just for the City Council to embrace subjects of taxation which, for the time, the condition of the state might enable it to spare, and it would be competent for them to do so. And so in this case, by a stronger reason, when the state does not release the property of the company from liability to taxation for the time, but only compounds for it by accepting, in lieu of it, a tax in another form which it deems more advantageous, it was competent for the city to adhere to its tax upon the property. It is undoubtedly true, as held by this court in *City of Richmond v. Daniel*, 14 Gratt. 387, that laws conferring the power of taxation upon a municipal corporation are to be construed strictly. But so too are exemptions from taxation to be construed strictly, and when the power of taxation has been once conferred, it is not to be crippled or destroyed by strained interpretations of subsequent laws. It

185 must *be sustained in its full extent under the original grant, until abridged or taken away by a clear expression of the legislative will.

It is contended further, that the railroad company is entitled to be exempted from all taxation whatever upon such of its property as is necessary for the construction and operation of its road and works, upon the authority of *Lehigh Co. v. Northampton Co.*, 8 Watts & Serg. R. 334, and *Railroad v. Bucks Co.*, 6 Barr's R. 70. These cases, however, are of no authority here, because they proceed upon the local law and policy of Pennsylvania, which do not prevail in Virginia. *Schuylkill Nav. Co. v. Com'rs of Berks Co.*, 1 Jones' (Pa.) R. 203.

What has been said applies to all the real estate of the railroad company upon which the tax in question was assessed, and to all the personal property permanently located in the city. The judgment must, therefore, be affirmed, because, by the agreement between the parties, judgment was to be rendered for the defendant, if the property assessed, or any part of it, was liable to the tax. It is, therefore, not necessary to consider the question which has been raised as to the liability of the rolling stock, which is not permanently located in Alexandria, but employed in the transportation of freight and passengers between that city and Gordonsville and intermediate points. I have considered the question, however, and as our failure to decide it may imply a doubt upon it, and may possibly lead to another suit, I will proceed briefly to express my views upon it.

It appears from the case agreed, that the railroad company has its principal office in Alexandria, where its financial and other affairs are managed and its transfer book and books of account are kept, that the directors of the company hold their regular meetings there, that the machine shops are there, where the rolling stock of the 186 *company is repaired when out of order, and kept when not in actual use, that the clerk and treasurer of the company reside in Alexandria, and that the president, though he resides elsewhere, is usually there attending to the business of the company. Upon this state of facts I am of opinion that the railroad company must be considered, for the purposes of taxation, as having its residence or domicile in Alexandria, and that its rolling stock, though in daily use upon the road, and absent from the city the greater part of the time, is to be considered as belonging there, and is liable to taxation by the city. I think this conclusion is fully sustained by the following authorities: *Ontario Bank v. Bunnell*, 10 Wend. R. 186; *Hays v. Pacific Mail Steamship Co.*, 17 How. U. S. R. 596; *Sangamon & Morgan R. R. Co. v. County of Morgan*, 14 Illinois R. 163; *Wilkey v. City of Pekin*, 19 Illinois 160; *City of Sacramento v. California Stage Co.*, 12 Calif. R. 134. The case in 14 Illinois is in point to the present case, and I am not

aware of any case which holds a contrary doctrine.

I am of opinion that the judgment ought to be affirmed.

MONCURE, P., concurred in the opinion of Joynes, J.

Judgment affirmed.

187 *Fant v. Miller & Mayhew.

January Term, 1867, Richmond.

1. *Chancery Practice—Evidence—Answer.*—The rule in equity practice that the answer of the defendant, upon any matter stated in the bill and responsive to it, is evidence in his favor, applies where a material disclosure is called for by the bill and made in the answer.

2. *Same—Answer—Defendant Unworthy of Credit—Effect.*—A plaintiff cannot destroy the weight of the whole answer by proving that the defendant is unworthy of credit, nor can he incidentally do so by proving that the answer is false in one respect or several respects; the only effect of such proof being to destroy the weight of the answer to the extent to which it is disproved by that amount of evidence which is required by the rule in chancery.

3. *Same—Bills of Discovery—Answer—Evidence.*—The answer of a defendant to a pure bill of discovery, when used on a trial at law, is used as a matter of evidence, the whole of which is to be read as the testimony of a witness, including not only admissions against the interest of the respondent, but, all assertions in his favor; subject however to be credited or discredited in whole or in part by the court or jury, according to its own intrinsic weight, or its relative weight in comparison or connection with the other evidence in the action at law.

**Chancery Practice—Answer—Evidence—Weight.*—The proposition laid down in the principal case, that, where the answer is responsive to the bill, it is to be taken as true unless it is contradicted by two witnesses or by one witness and corroborating circumstances, has been approved by several subsequent cases. See *Morrison v. Grubb*, 23 Gratt. 350; *Corbin v. Mills*, 19 Gratt. 438; *Shurtz v. Johnson*, 28 Gratt. 663, and *foot-note*; *Schultz v. Hansbrough*, 33 Gratt. 581; *Bell v. Moon*, 79 Va. 349; *Batchelder v. White*, 80 Va. 109.

In *Jones v. Abraham*, 75 Va. 469, the court said: "The charge is denied by Abraham in his answer: To the extent of the denial, the answer is responsive and is so far evidence for the respondent. This is so, although the bill does not call for an answer, but expressly waives it; for, where a bill is filed for relief, the complainant, according to the equity practice, cannot, by disclaiming the benefit of a discovery, deprive the defendant of the right to answer on oath and have the advantage of such answer as evidence in his favor, so far as it is responsive. Such is the settled rule in this state. *Thornton v. Gordon*, 2 Rob. 719; *Fant v. Miller & Mayhew*, 17 Gratt. 187, 206."

But see Va. Code, § 3381 (Acts 1883, '84, p. 15), as to the effect of answer as evidence when the bill waives answer under oath.

†*Same—Answer Partly False—Effect.*—In *Broughton v. Coffer*, 18 Gratt. 196, the court said: "The fact that the answer was proved to be false as to the quantity of land embraced in the original parol

4. *Same—Same—Same—Effect.*—When a plaintiff goes into equity for relief on the ground of discovery, the court will give to the answer of the defendant the same effect that would be given to it in a court of law; except that the plaintiff cannot contradict the answer by other evidence, as he would thereby prove himself out of court.

5. *Commissioners in Chancery—Continuances—Discretionary.*—A commissioner properly has much latitude of discretion in granting continuances of proceedings before him; and the court whose order he is executing will not overrule his action in that respect, unless it be plainly erroneous. Still less will an appellate court reverse a decree for that cause.

188 *6. *Witnesses—Re-Examination—When Permitted.*—If the circumstances of the case, and justice, require that a second examination of the same witness should take place, an order will be made to permit it.

7. *Same—Same—Appellate Practice.*—Unless it was palpably improper to grant leave for the second examination of a witness, an appellate court will not, for this cause, reverse the decree; as the circuit court ought to possess much latitude of discretion in the decision of such questions.

8. *Same—Deposition Written Beforehand.*—A witness ought not to write his deposition or his answers beforehand; nor ought they to be written for him beforehand by counsel or any other person; but he ought to answer the questions orally or from memory, as they are propounded to him.

contract, did not destroy the weight ascribed to it by law, in respect to other matters, as to which it was not disproved by the requisite amount of evidence. *Fant v. Miller & Mayhew*, 17 Gratt. 187."

See also, the principal case approved as to this point in *Powell v. Manson*, 22 Gratt. 189.

‡*Same—Bill of Discovery—Answer.*—Several subsequent cases approved the proposition of the principal case that where a cause is retained, which is brought in equity on the sole ground of discovery, it acts as a substitute for the court of law, and the complainant cannot contradict the answer, as to matters discovered by it in response to the prayer of the bill, by other evidence as he would thereby prove himself out of court. See *Thompson v. Clark*, 81 Va. 437; *Smith v. Smith*, 92 Va. 698, 24 S. E. Rep. 280.

See monographic note on "Answers, in Equity Pleading" appended to *Tate v. Vance*, 27 Gratt. 571.

§*Commissioners in Chancery—Continuances—Discretionary.*—See the proposition laid down in the 5th head-note approved in *Atwood v. Shenandoah V. R. Co.*, 85 Va. 975, 9 S. E. Rep. 748.

See generally, monographic note on "Commissioners in Chancery" appended to *Whitehead v. Whitehead*, 23 Gratt. 376.

See generally, monographic note on "Continuances" appended to *Harman v. Howe*, 27 Gratt. 676.

[*Witnesses—Re-Examination.*—In *Burke v. Shaver*, 92 Va. 352, 23 S. E. Rep. 749, the court said: "The subject of the examination of witnesses, says this court, in *Brooks v. Wilcox*, 11 Gratt. 411, lies chiefly in the discretion of the court in which the cause is tried, and its exercise is rarely, if ever, to be controlled by an appellate court. Again, in *Fant v. Miller*, 17 Gratt. 187, this court says: 'Unless it is palpably improper to grant leave for the second examination of a witness, an appellate court will not, for this cause, reverse the decree, as the circuit court ought to possess much latitude of discretion

9. Same—Methods of Refreshing Memory—Memoranda.

—Parties or their counsel may orally or by writing, previous to the examination of a witness, direct his attention to the facts in regard to which he is intended to be examined; and he may refresh his memory in regard to such facts, by examining books or papers, and make memoranda from them or otherwise, especially of dates and amounts, and use such memoranda for the purpose of refreshing his memory, at the time of giving his evidence.

10. Depositions—Opportunity of Party to Be Present—Notice. ¶—A party has a right to be personally present when depositions are taken by his adversary, and a notice which does not afford him an opportunity to be present, is insufficient; and his exception to the deposition on that ground ought to be sustained.

11. Same—Same. ¶—If a party gives notice of the taking of several depositions at different places on the same day, so that the opposing party cannot be present to cross-examine all the witnesses, he may select which examination he will attend, and the other depositions will be suppressed.

12. Same—Exceptions to—Waived—Appellate Practice. ¶—An exception to a deposition, whether endorsed on it, or taken and entered on its face in the process of taking it, or written on a separate paper and filed in the cause (except upon the ground of incompetency, in which case no exception is necessary), not having been brought to the notice of the court below or passed upon by that court, ought to be considered as having been waived, and cannot be noticed by the appellate court; and a general judgment or decree of the court below, against the party making the exception, cannot be considered as involving a decision upon the exception.

in the decision of such questions.' In the light of this authority, this assignment of error cannot be sustained."

The principal case was also approved as to this point in *Carter v. Edmonds*, 80 Va. 68; *Atwood v. Shenandoah V. R. R. Co.*, 85 Va. 976, 9 S. E. Rep. 748; *Myers v. Trice*, 86 Va. 838, 11 S. E. Rep. 428, and cases there collected; *Hoopes v. Devaughn*, 48 W. Va. 454, 27 S. E. Rep. 254.

¶Depositions—Opportunity of Party to Be Present—Notice.—See *Latham v. Latham*, 80 Gratt. 840, and foot-note; *Wise v. Postlewait*, 3 W. Va. 469.

****Same—Exceptions to—Waived—Appellate Practice.**—In *Vanscoy v. Stinchcomb*, 29 W. Va. 271, 11 S. E. Rep. 930, the court said: "If it were true, as claimed, that the objections to the reading of the depositions were valid, they have all been waived by the appellant *except those objections, if there be any, based on the incompetency of the witnesses in the court below to testify as to certain matters testified to by him.* The exceptions taken to these depositions noticed in the statement of this case were, so far as the record shows, never called to the attention of the court below, nor noticed by any decree rendered by the court; and, with the exception of those based on the incompetency of the witnesses to testify to the matter objected to, all these exceptions of the appellant must, in this court, be considered as having been waived by the appellant, and the other defendants in the court below, and cannot now be raised or relied on in this court. This is the well-settled law both in Virginia and in this state. *Fant v. Miller*, 17 Gratt. 187; *Hill v.*

189 *13. Evidence—Reading of Letters from Third Persons—Exceptions to—Must Be Specific.—An exception by a party to the reading of any and all letters from third persons to the other party, filed in the cause, as *res inter alios gesta*, except such as the exceptor made evidence by reading them himself, some of which letters are competent evidence for some purposes, is too broad, and may properly be overruled on that ground. The exception should specify the letters or parts of letters intended to be excepted to.

14. Accommodation Loans—Collateral Security—Case at Bar.—M is a wholesale merchant and F is a jobber, in the city of B; and F makes an arrangement with M to obtain accommodation from M from time to time, in the form of loans, discounts and the sale of goods, on the terms of placing the bonds, notes and accounts of his customers in the hands of M, as collateral security. There is no agreement as to the mode in which these collaterals are to be dealt with by the parties. F afterwards falls largely indebted to M, who holds these collaterals in large number and amount, the debtors being scattered widely over the country. It is to be inferred:

1. Same—Same—Notification to Collateral Debtors.—

That before the failure of F it was not intended or expected that M was to do more than hold the credits thus placed in his hands, receiving the amount of such as might from time to time be paid to him; but taking no steps to enforce such payments, nor even to notify the collateral debtors of the assignment of their debts.

2. Same—Same—Collection by Principal Debtor.—

That it was not intended that F should be authorized to collect or renew or otherwise deal with the collaterals, except upon the terms of his paying or delivering to M the money collected, or

Proctor, 10 W. Va. 78. The law, as laid down and followed both in Virginia and West Virginia, is as follows: "An exception to a deposition, whether indorsed on it or taken and entered on its face in the process of taking it, or written on a separate paper and filed in the cause (*except upon the ground of incompetency, in which case no exception is necessary*), not having been brought to the notice of the court below, or passed upon by the court, ought to be considered as having been waived, and cannot be noticed by the appellate court; and a general judgment or decree of the court below against the party making the objection cannot be considered as invoking a decision upon the exceptions." See, in accord with the opinion above expressed, *Statham v. Ferguson*, 25 Gratt. 88; *Dickinson v. Clarke*, 5 W. Va. 283; *Middleton v. White*, 5 W. Va. 574; in all of which, the principal case is cited as authority.

But, in *Simmons v. Simmons*, 33 Gratt. 460, the court said: "It would seem to be a sufficient answer to this objection, that it does not appear that it was first made in the court below. Notwithstanding some expressions in decided cases, which seem to concede that objections to the testimony of a witness on the grounds of *his incompetency may be properly made in this court* although not made, or considered, or passed upon in the court below, we are of opinion, that such objections, unless first made in the court below, cannot be relied on here, for the reason that if allowed, parties might be taken by surprise. If made in the court of original jurisdiction: First. The incompetency might in some cases be removed by release or otherwise; Second. If not removed

the renewed notes, or substituting others equally good for any that might be withdrawn for the purpose of collection or renewal.

3. *Same-Same-Collection by Principal Creditors.*—After the failure of F it became the right and duty of M to collect, as far and as soon as he could, all the collaterals in his hands, apply the proceeds to the payment of his claim against F, and pays him the surplus, if any. And M was bound to use common or ordinary diligence, such as a man of business and common prudence would exercise about his own affairs in the situation in which M was then placed.

4. *Same-Same-Duty of Principal Creditor.*—M was assignee of these collaterals, bound to use the diligence due by an assignee under the circumstances; and he was not only a principal, as being interested in the subject, but he was agent of F to the extent of his interest, and bound to perform the duty pertaining to such agency.

190 The duty of *M was to realize as much as possible out of the collaterals at the earliest practicable period; and he was invested with all the powers necessary or proper to enable him to attain that object.

5. *Same-Same-Same.*—The first thing to be considered by M was the security of the collaterals, and the next their collection. If a debt were good, he should sue; if doubtful, he might give time and get security; if it was good policy not to sue, he might decline it, and might compound or compromise a debt, if, looking to the interest of the creditor, in the exercise of a sound discretion, that was deemed best: and new securities taken by M might properly be in his own name.

6. *Same-Same-Same-Advice by Counsel.*—In determining whether it would be good policy to sue for a debt, or give time on getting security, or to accept a compromise, the fact that M acted under the advice of and upon information derived from his counsel, affords at least *prima facie* evidence that such action was *bona fide* and proper.

In May, 1852, Miller & Mayhew, late merchants residing in Baltimore, instituted a suit of foreign attachment in the Circuit court of Essex, to attach a debt alleged to be due by Z. S. Farland to E. L. Fant, by the name of E. L. Fant & Co., to satisfy

and the witness be excluded, the loss of his testimony might perhaps be supplied by other evidence. See what was said by JUDGE MONCURE in *Fant v. Miller & Mayhew*, 17 Gratt. 187. Also, *Beverley v. Brooke & als.*, 2 Leigh 425; *Hord's adm'r v. Colbert & als.*, 28 Gratt. 49, 54, 55, 56; *Statham & als. v. Ferguson's adm'r & als.*, 25 Gratt. 28, 38."

And in *McVeigh v. Chamberlain*, 94 Va. 78, 26 S. E. Rep. 306, the court said: "Under the decisions of this court, an exception taken to a deposition on the ground of the *incompetency of the witness* or for other cause, if not brought to the attention of the court below at the hearing, will be taken by the appellate court to have been waived. *Fant v. Miller & Mayhew*, 17 Gratt. 227-228; *Simmons v. Simmons' adm'r*, 23 Gratt. 460-61; and *Martin et als. v. South Salem Land Co.*, ante, p. 28."

See also, *Leonard v. Smith*, 34 W. Va. 448, 12 S. E. Rep. 481, and foot-note to *Statham v. Ferguson*, 26 Gratt. 28.

See generally, monographic note on "Depositions" appended to *Field v. Brown*, 24 Gratt. 74.

a debt alleged to be due by said Fant & Co. to said Miller & Mayhew. It turned out that the debt of Farland had been assigned to Wm. F. Phillips, and the attachment therefore failed of effect. But out of that suit arose a cross-suit, which has been productive of a long and troublesome litigation between the parties, the general outlines of which will be now stated.

Fant in his cross-bill filed in April, 1854, while he admits the execution of the note of E. L. Fant & Co. to Miller & Mayhew claimed in the original bill, yet denies that it is still due, but on the contrary avers that upon a full and fair settlement with said Miller & Mayhew of all their transactions with him, they are largely indebted to him. He avers that before and after the execu-

tion of the said note he had many 191 transactions with them, and *that, under an arrangement with and promise by them to make to him large advances to enable him to carry on his business as a merchant in the city of Baltimore, he was induced by them, on or about the 28th day of May, 1850, to assign to them bonds, notes and other claims, due or to become due to him, to the amount of \$69,760.92, a list of which is filed with the bill; that after the said assignment they refused to make all the advances which they had promised to make, although the assignment thus made to them was amply sufficient to indemnify them, and beyond the amount promised to be made to them; that he had frequently urged them to come to a settlement with him, and render an account of the claims assigned to them as aforesaid, and of the amount received by them on account thereof (which he alleged was a very large sum), but they failed and refused to do so; and that he is without remedy to bring about the said settlement, and cause them to disclose and account for the claims assigned to them as aforesaid, but by the aid of the said court. He therefore prayed that they might be made defendants to the bill, and required on oath to answer all the statements and allegations thereof, and fully disclose and show all that they had done in the premises, and further required to render before a commissioner of the court an account of all the money received by them on account of the claims aforesaid, and should be held responsible for any of them which may have been lost by their mismanagement or negligence; and for general relief.

In November, 1854, the defendants Miller & Mayhew filed their answer, in which, after noticing the matter involved in the original suit, they set out a history of their transactions with the plaintiff and aver that all the matters in said cross-bill not consistent with said history are false and fabricated. That history, and the 192 other *material denials and averments of the answer, are in the words and figures following, to wit: "Your respondents aver and answer, that in the early part of the year 1850, E. L. Fant called on your respondents for assistance in

carrying on the business of E. L. Fant & Co. From the statements by said E. L. Fant of the sound and solvent condition of E. L. Fant & Co., these respondents did indicate to E. L. Fant, that on being supplied by him with security at the rate of two dollars for one dollar, your respondents would from time to time, as they were able, afford E. L. Fant & Co. the notes of your respondents for the accommodation of E. L. Fant & Co., and other assistance. Accordingly, with this understanding, your respondents, from time to time thereafter, did make advances and afford assistance to said E. L. Fant & Co. in money, merchandise and accommodation notes, for which your respondents took the notes of E. L. Fant & Co., for the amount and due at the times stated in the book marked exhibit A (and which book your respondents pray may be taken as a part of their answer), amounting to \$34,147.39, exclusive of expenses, and with expenses amounting to \$35,137.57, and with estimated balance of interest up to November 1st, 1854, amounting to \$37,437.55. Whilst these advances and aid were being rendered as aforesaid by your respondents unto the said E. L. Fant & Co., said E. L. Fant & Co. did place in the hands of your respondents, as collateral security, from time to time, the notes and accounts of the customers of E. L. Fant & Co., amounting in the aggregate to \$69,516.12, as described, both as to their particular amounts and the dates, in the second account in book marked exhibit A, and which your respondents pray may be taken as a part of their answer. And your respondents aver, that they fully complied with all their intimations or engagements to or with E. L. Fant & Co.; *but, on the other hand, said E. L. Fant & Co. have acted most deceptively and fraudulently to your respondent; for said E. L. Fant & Co., after having thus placed with your respondents the collaterals as aforesaid, did, both before and after the suspension of E. L. Fant & Co., proceed to collect from some of the debtors on these collaterals, without the knowledge or assent of your respondents, to a very large amount. All said fraudulent collections will be found marked in red ink, "collected by E. L. Fant & Co." opposite to the respective debts in said account No. 2 on said exhibit A. Your respondents had not given notice of the assignment of these collaterals to any of these debtors on the assigned collaterals until after the suspension of E. L. Fant & Co., as it is never the usage to do so, for fear of its damage to the credit of E. L. Fant & Co.; and your respondents were astounded to find, on notifying said debtors after the suspension of E. L. Fant & Co., that said E. L. Fant & Co. had collected, as above stated, and in many instances in which your respondents were holders of the bonds of said debtors, and are now holders of the same, that said E. L. Fant & Co. had received in whole or in part from such debtors, and had given the receipt of E. L. Fant & Co. for the amount paid and thus fraudulently collected. And

your respondents also aver, that six of the accounts which had been lodged with your respondents among said collaterals, amounting to \$1,059.43, were claimed by William F. Phillips, the uncle of said Fant, as having been assigned to him by said E. L. Fant & Co. And your respondents aver, that in consequence of said fraudulent conduct of said E. L. Fant & Co., there is now due and unpaid to your respondents \$11,732.67, inclusive of estimated interest up to the 1st of November, 1854, which your respondents have every reason to believe will prove nearly *a total loss.

And your respondents aver, that account No. 1 and 2, in book marked exhibit A, contains a true and accurate account of their claims against said E. L. Fant & Co., and of the collaterals so as aforesaid deposited and assigned to them by E. L. Fant & Co., and of the receipt from the same, and of the condition of each account; and when any note or bond has been placed and is still in the hands of an attorney for collection, the names of said attorneys will be found in black ink on the line containing the amount of each claim; and as an evidence of the diligence and energy with which said collaterals have been prosecuted, your respondents aver, that they have written over six hundred letters to debtors or attorneys connected with these collaterals, and they deny that any claim of these collaterals has been lost, in whole or in part, by any mismanagement or neglect of your respondents. And your respondents aver, that they have never been unwilling to come to any settlement with E. L. Fant & Co., though they admit that E. L. Fant did write to them for the accounts, and your respondents took no notice thereof, because, having discovered the fraudulent conduct of E. L. Fant & Co. in collecting these collaterals, they apprehended that the whole purpose of the inquiry was to enable him to perpetrate some further injury on their just rights. And your respondents are now gratified to be able, in a court of justice, to render a full account of their transactions with said E. L. Fant & Co., and to display the frauds practiced on them by said E. L. Fant & Co." &c.

A few days after the filing of the answer, to wit: on the 15th day of November, 1854, the cause came on to be heard on the bill, answer with the replication thereto, and exhibits, and it was decreed that a commissioner of the court should take and state an account between the said Miller & Mayhew and E. L. Fant and E. L. Fant & 195 *Co., showing the amount and nature of the bonds, bills, accounts or other evidences of debt transferred by the said Fant and Fant & Co., which have come to the possession of the said Miller & Mayhew as collateral security for the indebtedness of, and advancements made for, the said Fant or Fant & Co. to or by the said Miller & Mayhew. In settling which account, the said Miller & Mayhew were required to produce and surrender to the commissioner,

to enable him to state said account, all of the said bonds &c. as aforesaid which may still remain in their possession or under their control; and to show to the commissioner what disposition had been made of such as might not be so produced; and each party to that account, upon the requisition of the other, was required to submit to be examined on oath upon any and all matters relating to the same; which account the commissioner was directed to settle and report, with any matter specially stated, &c.

The commissioner proceeded to execute the said decree, when, on the 12th of February, 1855, the defendants laid before him their answer aforesaid as the evidence relied on by them of their charges against the plaintiff: whereupon the plaintiff's counsel excepted to the said answer as evidence, upon the ground of its not being responsive to the charges in the bill. The case having been continued before the commissioner, the plaintiff took the depositions of McKew and Sprigg in the cause.

McKew stated, that he was a clerk in the counting-room of the defendants in 1850, when, by their direction, he copied for the plaintiff a list of collaterals delivered by the plaintiff to the defendants. The copy was made from a book of the defendants, on which the collaterals were entered some time previously, and is annexed to the deposition of the witness as "plaintiff's exhibit A."

Sprigg stated that he was, at the 196 time of giving his deposition, and had been since the year 1835, cashier of the Merchants Bank of Baltimore; that a book filed with his deposition by the plaintiff, and marked "exhibit A," was left at the Merchants Bank by Peabody & Co. (of which firm the plaintiff was a member) on their account in June, 1849. In October, 1849, the account was changed to the name of E. L. Fant & Co. The said book is a list of collaterals left with the said bank by the said parties as security for discounts which had been made, or were intended to be made, for said parties. On the 31st of May, 1850, an order was presented to the bank from E. L. Fant & Co. to deliver the collaterals mentioned in said exhibit A to Miller & Mayhew, when the amount for which they had been deposited as security had been paid said bank. On the 9th of September, 1850, all the collaterals then in possession of the bank (being, it seems, sixty-nine in number) were handed over to Miller & Mayhew in accordance with said order, and at the same time the note of said Miller & Mayhew for \$5,000 was deposited by said E. L. Fant & Co. with the said bank, to secure it from any loss which might possibly accrue on account of said discounts, which at that time did not amount to more than \$5,000. On the 24th of October, 1850, the said note was, by order of said E. L. Fant & Co., returned to said Miller & Mayhew, the bank having then no claims against it.

These depositions were laid by the plain-

tiff before the commissioner, who, having excluded the answer as evidence, proceeded to state the account upon the said depositions, made out a statement of the collaterals with which the defendants appeared therefrom to be chargeable, including interest to the first day of January, 1855, showing an aggregate on that day of \$97,114.09, and returned his report to the court on the 9th of November, 1855.

197 *On the day after the return of this report, the defendants filed an exception thereto, "because the commissioner, in stating the account, rejected as testimony the answer of the defendants and the exhibit filed therewith."

On the 29th of July, 1856, the cause came on again to be heard on the papers formerly read and the report of the commissioner, when a decree was made in effect as follows: "It appearing to the court, from the proofs in this cause, that the debts transferred by the plaintiff to the defendants Miller & Mayhew were transferred to them as a security, or collateral security, for indemnification of the said defendants against their advances and liabilities for the plaintiff (the said debts being spoken of by the plaintiff himself, as well as by the said defendants and the witnesses whose evidence has been taken and filed in this cause, as collaterals), and were treated by all the parties as being recognized only as collaterals, or collateral security, for the purpose above mentioned: that the transfer and acceptance of them were unaccompanied by any express stipulations for collection or otherwise, in any use to be made of them; and that, in the absence of any stipulations in these respects, they must be regarded by the court as delivered and held only as a pledge for securing the said defendants: the rights of the plaintiff on the one hand, and the obligations of the said defendants on the other, as to the account for these collaterals, are therefore such as arise out of that species of bailment called pledge or pignus. See Story on Bailment, ch. 5. The defendants had, as pledgees, the right to recover and receive the money due on the securities, such use of the thing pledged being obviously a use beneficial to the debtor, and of which he could have no cause to complain. But there was no obligation on the said defendants to these securities to benefit the debtor or to benefit themselves. The

198 extent of their obligation was to retain the pledge as it had been delivered to them; nor should they be made liable, except so far as they may have used the securities, or by gross neglect lost or destroyed them. The bill filed by the plaintiff is virtually a bill for a discovery; and the answer of the said defendants, being responsive to the bill and not excepted to, should be taken as true in regard to the matter discovered by it. At all events, it must be taken as true, unless disproved by two witnesses, or by one witness and pregnant circumstances. There is no proof, other than what may be in the accounts

exhibited, to show, on the part of the plaintiff, that there has been any such neglect or misconduct on the part of the pledgees, which should charge them for loss of any of the securities, or that any money has been received by them upon the securities, but what the answer with the exhibits discloses. It is therefore considered by the court, that the said report of Commissioner Daingerfield filed in this cause on the 9th of November, 1855, be recommitment to the said commissioner, with instructions to frame a further report in this cause in conformity with the foregoing view of the court, and that he make report thereof to the court, with any matters deemed pertinent," &c.

After the said decree was rendered and before the commissioner commenced its execution, to wit, in November, 1856, the defendants took the deposition of William Hawkins, who was the cashier and chief book-keeper for the defendants during all the time the transactions between them and the plaintiff were going on, and had special charge of the collection of the collaterals. The defendants, in their first examination in chief of said witness, propounded to him but two questions; 1st, as to what disposition had been made by the defendants of twenty-three collaterals

199 included in the sixty-nine received "by them from Sprigg but not included in the list annexed to McKew's deposition and therefore charged to the defendants, in addition to those included in that list, by the commissioner in his first report; and 2dly, as to the nature of the agreement between the parties respecting the collaterals. The plaintiff in his cross-examination of the witness propounded a great many questions to him, and caused many documents, referred to in that cross-examination, to be annexed to the deposition.

The defendants took no other deposition than that of Hawkins before the commissioner commenced the execution of the decree of the 29th day of July, 1856, but the plaintiff took a good many, and both parties continued to take them while the said decree was in the progress of execution.

On the 17th day of March, 1857, being a day fixed for the purpose by agreement between the counsel of the parties, the commissioner commenced the investigation and settlement of the account; it having been further agreed between the said counsel, that no exception should be taken to the report to be made by the commissioner, on account of its not remaining ten days in his office after having been made, prior to the next term of the court. The proceedings before the commissioner were continued from day to day until the 26th of March, 1857, when the examination of the evidence before him was closed, and he took time to consider the same and make up his report. On the 25th of March the defendants' counsel made an application to the commissioner for a continuance, which he refused. On the 30th day of the same month the application was

renewed, and was again refused. And on the 7th of April, 1857, the application was again renewed, accompanied by an affidavit of William E. Mayhew, Jr.; and 200 the commissioner, deeming "the reasons given in said affidavit sufficient, granted the continuance asked for, and the further taking of the account was continued until some day to be fixed upon at the succeeding spring term of the circuit court. To this decision of the commissioner the counsel for the plaintiff objected, and required him to report all the facts along with the account upon the evidence then before him, and also their special statements, B and C, which he accordingly did. Statement A, which presented the account according to his own views upon the evidence before him on the 9th of April, 1857, shows a balance due from the defendants of \$7,162.05 on the 1st day of January, 1857, with interest on \$2,630.43 from that date.

On the 9th day of September, 1857, on the motion of the defendants, and upon the affidavit of Dudley & Harwood their attorneys, which is stated to have been filed but is not in the record before this court, leave was granted them to retake the deposition of William Hawkins, to be completed on or before the 10th day of October, 1857, but he was not to be examined as to any matters upon which he had been examined by either party when his former deposition was taken.

The said deposition was accordingly retaken, having been commenced on the 5th and closed on the 10th of October, 1857. It was protracted to very great length, and with the exhibits filed with it, occupies one hundred and seventy-seven pages of the printed record. Many exceptions were taken by the plaintiff in progress of retaking it, chiefly upon the ground that matters to which questions propounded by the defendants referred were not embraced in the order of court authorizing the deposition to be retaken. All letters and papers referred to by the witness and filed with his deposition, of which there were a great many (except such as were made evidence 201 "by being called for by the plaintiff), were also excepted to.

Many other depositions were taken by the parties, both before and after the retaking of the deposition of Hawkins, though most of the depositions on the part of the plaintiff were taken before that time. The plaintiff excepted to many of the defendants' depositions, chiefly on the ground of the insufficiency of the notice under which they were taken.

On the 9th of November, 1857, the commissioner made his report, presenting the account according to his own views in statement A, according to the defendants' in statement B, and according to the plaintiff's in statement C. Statement A showed a balance due the plaintiff, on the 1st of October, 1857, of \$4,756.53, of which \$4,441.38 was principal. Statement C showed a much larger balance due the plaintiff, while

statement B showed a large balance due the defendants.

Both parties excepted to the report. The exceptions of the plaintiff were twenty in number; those of the defendants were twenty-two. They were set out by the judge in giving an opinion upon them.

On the 24th of April, 1858, the cause came on again to be heard, on the papers formerly read, the depositions of witnesses, the exhibits filed, and the said report and exceptions; when the court sustained some of the exceptions on both sides, and overruled the rest, and recommitting so much of the report and account as was not confirmed to the commissioner, with instructions to reform the same according to the opinion of the court, and make report forthwith.

On the same day the commissioner made and returned his reformed report, to which the plaintiff excepted.

On the 28th of April, 1858, a petition was filed by the plaintiff, representing that he had been informed and believed
202 *that the defendants had become insolvent, and praying that they might be enjoined from making any further collections on account of the collaterals, and required to account for what they had received and not already accounted for; and that a receiver might be appointed to collect any sums still remaining due on said collaterals, and hold the same subject to the order of the court.

On the same day the cause came on again to be heard on the papers formerly read and the report of the commissioner made in pursuance of the decree of the 24th of the month, with the exceptions thereto and the petition aforesaid, when the court made a decree recommitting the said report with the said exceptions to the commissioner to correct the same if erroneous; directing the defendants to render, under oath, before the commissioner, a further account, showing any and all sums of money received by them since the 4th day of August, 1857 (to which day they had already accounted), upon any of the collaterals aforesaid, and also showing the present condition, amount and description of all the collaterals, with all changes and transfers thereof, which have not been surrendered or accounted for under the decree of the 29th of July, 1856; to surrender, under oath, to C. G. Griswold, who was thereby appointed receiver of the court for that purpose, such of the said collaterals as might then remain in their hands or under their control; and to transfer and assign to the said receiver any and all such collaterals as might have been so changed as to be then payable to the said defendants, and any and all judgments which might be pending upon any of the said collaterals in the name of or for the benefit of the defendants; injoining the said defendants from making any further collections, and all other persons from paying to them, or any person for them, any

203 *further sums on account of any of the said collaterals; and directing the receiver to collect and receive all sums

which might still remain due upon any of the said collaterals, and hold the same, when collected, subject to the future order of the court, and to render an account and make report of his proceedings to the court.

On the 9th of November, 1858, the plaintiff filed a petition for a rehearing, and to set aside the decrees of the 24th and 28th of April, 1858.

On the 10th of November, 1858, the receiver made a report of his proceedings to the court.

On the 11th of November, 1858, the commissioner made a report in pursuance of the decree of the 28th of April, 1858, correcting his former report according to the exceptions thereto which he ascertained to be well founded, and referring to papers filed with him and returned with his report; being, first, a statement of the defendants under oath, of the condition, &c. of the collaterals remaining in their hands or under their control, &c. as required by the said decree of the 28th of April, 1858, and that they had not received any money on account of any of the collaterals since the 4th day of August, 1857; secondly, the receipt of the receiver for the collaterals transferred to him by the defendants under the said decree; and thirdly, a statement of expenses paid by them in collecting the collaterals, there being no evidence before the commissioner (as he reports) to sustain this account. To the first mentioned statement exceptions were taken by the plaintiff.

On the 29th of April, 1859, the cause came on again to be heard on the papers formerly read, upon the report of the commissioner under the decree of the 28th of April, 1858, and the report of the receiver, to which reports there was no exception, upon the report and statement of the defendants

made in pursuance of said decree,
204 *with the exceptions thereto, and upon the petition of the plaintiff for a rehearing, together with an exhibit filed by the plaintiff on the 23d of April, 1859; and a final decree was rendered, overruling the said exceptions, rejecting the said petition for a rehearing, confirming the said reports, directing the plaintiff to pay to the defendants the sum of \$652.48 (without interest, the same being itself interest), being the balance due to them according to the said report of the commissioner, and their costs of suit, directing the clerk of the court to deliver to the receiver all of the collaterals uncollected and surrendered by the defendants to the commissioner and returned with his report, directing the receiver, out of any money realized by him from any of the collaterals in his hands, after deducting all proper charges against the same, if sufficient therefor, to pay to the defendants the sum above decreed to them and their costs, and to pay the surplus, if any, to the plaintiff, and reserving leave to any of the parties to apply to the court, upon the foot of said decree, for any order or direction which might be proper with reference to the said collaterals and to the action of the receiver in relation thereto.

Fant applied for and obtained an appeal from the decrees made in the cause.

Griswold for the appellant.

There was no counsel for the appellees.

MONCURE, J., delivered the opinion of the court. After stating the case he proceeded:

The plaintiff prayed for and obtained an appeal from the decrees made in the cause, or such of them as he complained of in his petition, assigning many errors therein, which we will proceed to consider.

205 *And first he complains of the decree of July 29th, 1856, as erroneous in several respects, as first in sustaining the exception of the defendants to the commissioner's report; second, in deciding that the bill of the plaintiff was a bill of discovery; and third, in regard to the principles and extent of the liability of the defendants for the collaterals which went into their hands, as declared by the court.

The exception to the commissioner's report was that in stating the account he rejected as testimony, the answers of the defendants and the exhibit filed therewith. There is nothing better settled than that where the answer is responsive to the bill, it is to be taken as true, unless it be contradicted by two witnesses or by one witness and corroborating circumstances. 2 Tuck. Com. book 3, p. 502, and cases cited. The rule is thus broadly laid down by Story: "In every case the answer of the defendant to a bill filed against him upon any matter stated in the bill and responsive to it, is evidence in his own favor. Nay, the doctrine of equity goes farther, for not only is such an answer proof in favor of defendant, as to the matters of fact of which the bill seeks a disclosure from him; but it is conclusive in his favor, unless it is overcome by the satisfactory testimony of two opposing witnesses, or of one witness corroborated by other circumstances and facts, which give to it a greater weight than the answer, or which are equivalent in weight to a second witness." 2 Story's Eq. § 1528. In the absence of such opposing testimony, the court will neither make a decree, nor send the case to be tried at law; but will simply dismiss the bill. *Id.* This is strongly illustrated by two cases recently decided by this court, in each of which a decree in favor of the plaintiff in such a case was reversed, because the court below, instead of ordering an issue, ought to have dismissed the bill. *Wise v. Lamb*, 9 Gratt. 294; *Smith v. Betty*, 11 *Id.* 752.

206 *The rule not only applies where a material allegation of the bill is denied by the answer, but also where a material disclosure is called for by the bill and made by the answer. The answer is as much responsive to the bill in the latter as in the former case, and comes as plainly within the very terms of the rule. Nor is the rule in regard to the effect of such a disclosure confined to an answer to a bill of discovery, technically so called, or a pure

bill of discovery, as it is sometimes called. As to the nature of such a bill, see *McFarland v. Hunter*, 8 Leigh 489, and the authorities cited; 1 Story's Eq. §§ 64, 74; 2 *Id.* §§ 690, 1483. Indeed the rule cannot be said to be applicable at all to such a bill, for the answer to it is conclusive, in the case at least in which it is filed, and cannot be overthrown by any amount of countervailing testimony. But every bill requiring an answer is more or less a bill of discovery. 1 *Mad. Ch.* 196. "Every bill in equity," says Story, "may properly be deemed a bill of discovery, since it seeks a disclosure from the defendant, on his oath, of the truth of the circumstances constituting the plaintiff's case, as propounded in his bill." 2 Story's Eq. §§ 689, 1483. The defendant is entitled to the benefit of his answer as evidence in the cause, if the bill be filed for relief, and the plaintiff cannot, even by expressly waiving a discovery, deprive him of it. *Thornton v. Gordon*, 2 Rob. R. 719, 727. Judge Allen, in his opinion in the case (in which, so far as relates to this question, the rest of the court concurred), said: "To whatever source the rule is traced, it is firmly established as one of the fundamental principles of a court of equity. It is the law of the forum, and all who apply to it for relief must submit to have their cause tried according to its established modes of procedure. It would be as competent for this court to remodel the whole 207 doctrine of the court of *equity in regard to pleadings and evidence, as to declare that, in this particular case, the defendant should be deprived of his answer. The cases do not confine this privilege to answers to bills seeking a discovery. In truth, the rule has no application to a mere technical bill of discovery, where no relief is prayed, but the discovery is required to be used in some trial at law: for there the plaintiff has his election to use the answer or not. The principle becomes of importance in those cases alone where an issue of fact is to be tried by the court." *Id.* 725-6.

The learned judge of the court below surely did not mean to say that the bill in this case was a pure or technical bill of discovery, but that it was a bill of discovery in a general sense; that is, not only a bill in equity, and therefore a bill of discovery, but a bill in equity calling for a discovery. In ascertaining his meaning, we must take into view all that he said, and look at the case as it was when he made the decree. At that time there was nothing in the case but the bill, answer and replication (besides three depositions taken by the plaintiff, but not affecting the question), and in that state of the case the answer, so far as it was responsive to the bill, was conclusive; just as much so as if the bill had been a pure bill of discovery. "The bill filed by the plaintiff," said the court, "is virtually a bill for discovery; and the answer of the defendants, being responsive to the bill and not excepted to, should be taken as true in regard to the matter discovered by it. At all events, it must be taken as true un-

less disproved by two witnesses, or by one witness and pregnant circumstances. There is no proof, other than what may be in the accounts exhibited, to show on the part of the plaintiff," &c. In this view of the subject, there is no error or even inaccuracy in what was said by the court in regard to a bill of discovery, 208 *and the case was expressly subjected to the operation of the rule we have been considering. So that in no view has there been any error in this respect to the prejudice of the plaintiff.

The rule in question being well settled, its application to this case is very clear. The plaintiff in his bill, after stating his case, says he is "advised that he is wholly without remedy for bringing about the settlement as aforesaid, and any means of causing the said Miller & Mayhew to disclose, show and account for the notes, bonds and claims transferred and assigned to them as aforesaid, without the aid of this court;" and he prays "that they shall fully disclose and show all that they have done in the premises," and may be "required on oath to answer all the statements and allegations of the bill," and "to settle the account and make the disclosures as aforesaid." The answer throughout, including the exhibit filed therewith, so far as they relate to the collaterals, is responsive to the bill, and is therefore, under the rule before stated, evidence for the defendants, and conclusive in their favor except so far as it may have been overcome by the evidence of two witnesses or of one witness and corroborating circumstances.

But it was argued by the plaintiff's counsel, that the answer contradicts itself and is contradicted by the evidence in several material respects, and its credit as evidence was thus entirely destroyed, even when directly responsive to the bill: and 2 Tuck. Com. book 3, ch. 22, p. 503, and *East India Co. v. Donald*, 9 Ves. R. 275, are relied on to sustain the argument.

Very little evidence had been taken on either side when the decree of the 29th of July, 1856, was rendered, and the correctness of that decree when rendered cannot depend upon the evidence afterwards taken.

But as that after evidence might affect 209 the weight of the answer as evidence before the commissioner in taking the account under that decree, we will consider in this place how far the answer is affected by any evidence taken in the cause.

The passage referred to in Tucker's Com. is in these words: "Where the answer is contradicted in any one or more important particulars by adequate evidence (i. e. two witnesses or one and corroborating circumstances), it is deprived, in all other respects, of that weight which is allowed to answers by the rules of a court of equity: for, being falsified in one thing, no confidence can be placed in it as to others; according to the maxim, *falsum in uno, falsum in omnibus*. And the answer may in itself contain the circumstances giving greater credit to the testimony of the single witness (9 Ves. R.

275; 2 John. Ch. R. 94); or destroying its own credibility; as where it is plainly contradictory in itself."

Certainly the learned author did not mean to say that a mere contradiction of an answer in a material respect, either by other evidence or by itself, would wholly discredit the answer in all other respects as evidence in the cause. The most he could have intended to say was, that if any part of the answer is proved or shown to be wilfully false, the whole is thereby discredited and destroyed as evidence for the defendant in the cause.

But is the position true, even to that extent? The cases cited by Judge Tucker do not sustain the position to that extent, and were probably only cited in support of the latter part of the passage, that "the answer may in itself contain the circumstances giving greater credit to the testimony of the single witness," which they fully sustain. They are the cases of *The East India Co. v. Donald*, 9 Ves. 275, and *Hart v. Ten Eyck*, 2 John. Ch. R. 62. The latter is chiefly important to show that where the defendant admits a fact

210 charged in the bill *and insists upon a distinct fact by way of evidence, he must prove the fact so insisted on in defence. The plaintiff cannot destroy the weight of the whole answer by proving that the defendant is unworthy of credit; nor can he, indirectly, do so by proving that the answer is false in one respect, or several respects; the only effect of such proof being to destroy the weight of the answer to the extent to which it is disproved by that amount of evidence which is required by the rule in chancery. It is a general rule, applicable alike to courts of law and equity, that a party will not be permitted to produce general evidence to discredit his own witness. 1 Phil. Ev. 308. But if a witness state facts against the interest of the party that called him, another witness may be called by the same party to disprove those facts; for such facts are evidence in the cause, and the other witness is not called directly to discredit the first, but the impeachment of his credit is incidental only, and consequential. *Id.* 309; *Bull. N. P.* 297; *Cowen & Hill's* notes to *Phil. Ev.* part 1, notes 535 and 536. Where a party calls a second witness to contradict a fact which his first witness has sworn to, the whole of the first testimony is not therefore to be repudiated. *Id.* *Bradley v. Ricardo*, 8 Bing. R. 57, 21 Eng. C. L. R. 220.

If it be true, however, that proof of falsehood of the answer in one or more respects destroys its weight as evidence in the cause in all, still there is no such proof in this case, either in the answer itself, or the evidence, or both combined, and at most nothing more than a mere conflict of evidence which may well be accounted for without imputing falsehood or wilful misstatement to any person.

It may be proper to notice here the difference between the effect of an answer to a

technical bill of discovery and an answer to other bills in equity, as matter of evidence *for the defendant. We have seen what is its effect in the latter case, and what amount of countervailing evidence is required to overthrow it. In the former case, where the discovery is sought to be used in an action at law, the party obtaining it has his election to use it or not in the trial at law, and if used it is used as matter of evidence, the whole of which is to be read as the testimony of a witness, including not only admissions against the interest of the respondent, but all assertions in his favor, subject, however, to be credited or discredited, in whole or in part, by the court or jury, according to its own intrinsic weight, or its relative weight in comparison or connection with the other evidence in the action at law. In such a case the chancery cause terminates "with the discovery obtained or the failure to obtain it" (*Lyons v. Miller*, 6 Gratt. 427, 438); and of course the answer is conclusive in the court of chancery. In England, where discovery is the only ground of equity jurisdiction in a case, generally relief is not prayed by the bill, but the discovery is sought to be used in an action at law. "With us the general rule is the other way, the court of equity retaining the cause after the discovery is obtained, and proceeding to give the proper relief founded upon it; instead of turning the parties over to a common law tribunal in order that the answer may be used as evidence there." *Id.* Where the court of equity retains the cause and proceeds to give the proper relief, it acts as a substitute for the court of law, and gives the same effect to the answer that would be given to it in that court. *Id.* It would seem, however, with this difference, that in the court of equity, the only ground of jurisdiction being the necessity for a discovery, the plaintiff cannot contradict the answer by other evidence, as he would thereby prove himself out of court. But in other respects the effect would be the same in each forum. In the present

212 case a court of equity *has jurisdiction independently of the ground of discovery, and the effect of the answer as evidence for the defendants is therefore governed by the ordinary rule of equity in such a case; but if it were governed by the rule which applies to a technical bill of discovery, as laid down in *Lyons v. Miller*, supra, the result in this case would, we believe, be precisely the same.

The principles declared by a majority of the judges who decided the case of *Mertens v. Nottebohm*, 4 Gratt. 163, would give to the account given by the defendants in their answer, in regard to the collaterals placed in their hands by the plaintiff, the effect of prima facie evidence of its correctness, independently of the rules before referred to. It was there held that an account of sales rendered by a consignee to a consignor is prima facie evidence of its correctness. "I take it to be correct as a general proposition," said Judge Baldwin, "that in the

case of a factor, agent, trustee or executor, whose duty it is by law or by contract, to sell and account for the proceeds of goods in his hands, and who makes a due return of his sales to the proper person or the proper custody, he may rely upon the same as prima facie evidence in his favor; inasmuch as he is bound not only to sell, but to keep and render an account of his sales. It is for the benefit of persons interested in the proceeds that this duty should be performed, and when performed it is unreasonable that they should have the power of rendering it wholly nugatory, and throw upon the agent, &c., the task of furnishing evidence in relation to the transaction, which may involve minute details difficult of proof." *Id.* 168. The views of Cabell, P., were to the same effect. *Id.* 175. The application of these principles to this case would, we believe, conduct us to the same result to which we are brought by the application of the ordinary rule of equity before referred to.

213 *And now in regard to the principles and extent of the liability of the defendants for the collaterals which went into their hands, as declared by the court in the decree of July 29th, 1856.

There was no written agreement between the plaintiff and defendants setting out the duties and obligations assumed by the latter in regard to these collaterals, nor were those duties and obligations the subject of any express parol agreement between the parties. The only written evidence of the terms on which the collaterals were placed in the hands of the defendants consists of two papers filed in the cause, one as exhibit W filed with Hawkins' first deposition, being a statement of four notes of \$2,500 each, discounted by the defendants for the plaintiff on the 31st of May, 1850, under which is written a receipt signed by the defendant in these words: "As collateral security for the payment of the above described notes, and also other notes that we hold, we have received of Messrs. E. L. Fant & Co. bills receivable and open accounts which are recorded in two books in our possession, a statement of which they have;" and the other, as exhibit L, filed with the deposition of John W. Ball, being a receipt signed by the plaintiff in the name of E. L. Fant & Co. in these words: "Received, Baltimore, June 4th, 1850, of Miller & Mayhew, \$2,095.28, being the proceeds of my two notes in our favor for \$1,500 each, dated May 4 and 9, at seven months, discounted by them for our use, for the security of which I have placed in their hands collateral security, a copy of which we have. In consideration of the facilities granted by them, they are to hold the said securities or the proceeds thereof, for the payment of all notes, open accounts, borrowed money now due them, or to fall due, or any that they may hereafter hold." And yet those papers,

together with the evidence which the record *affords of the relation of the parties to, and their dealings with, each other, and of the usages among mer-

chants in such cases, leave no room for doubt as to what were the rights, duties, and obligations of the parties in regard to the collaterals. Both parties were dry goods merchants in Baltimore. The defendants were wholesale dealers, and the plaintiff was a jobber, extensively engaged in selling goods to retail merchants throughout the surrounding country. He had little or no capital, and for the purpose of continuing to carry on his business, made an arrangement with the defendants to obtain accommodations from them from time to time, in the form of loans and discounts and sales of goods, on the terms of placing the bonds, notes and accounts of his customers in their hands as collateral security. So long as he continued to carry on his business, it was not expected or intended that the defendants were to do more than continue to hold the credits thus placed in their hands, as collateral security, receiving the amount of such as might from time to time be paid to them, but taking no steps to enforce such payment, nor even to notify the collateral debtors of the assignment of their debts. To have taken such steps would have injured the credit of the plaintiff and defeated the object which he had in view. Collections or renewals of the collaterals during that period, as they might become necessary or convenient or proper, were no doubt intended to be made through the agency of the plaintiff, upon his paying or delivering to the defendants the money collected or the renewed notes, or substituting other and equally good notes for any that might be withdrawn for the purpose of collection or renewal. It could not have been intended that the plaintiff should be authorized to collect, or renew, or otherwise deal with the collaterals, on any other terms than as

aforesaid; for the existence of such
215 an authority would *have been destructive of the security, and made the transaction nothing more than a contract founded on the personal credit of the plaintiff. To be sure, the defendants, by not giving to the collateral debtors due notice of the assignment of their debts, incurred the risk of loss by means of the plaintiff's collecting such debts and appropriating the same to his own use without accounting to them therefor, but they could not have intended to authorize him to do so. The plaintiff says that after May, 1850, when the arrangement was made with the defendants and most of the collaterals were placed in their hands, he placed other collaterals in their hands to a large amount, which much more than covered the whole amount of his collections. But it does not appear that any of those other collaterals were placed in the defendants' hands on any other account than as security for new loans and discounts, which were from time to time made by the defendants for the plaintiff, or as substitutes for notes from time to time withdrawn by him from their hands. It was the obvious duty of the plaintiff to collect no collateral until he had withdrawn it from the defendants' hands,

or, if he undertook to make such collection, he ought at once to have handed the amount collected to the defendants. Instead of which it appears that at the time of his failure on the 6th of November, 1850, they had in their hands collaterals to the nominal amount of about sixty-nine thousand dollars, which they were authorized to suppose were wholly due and unpaid, when in fact a large amount of them, amounting in all to about eighteen thousand dollars, had been collected by the plaintiff without having rendered any account thereof; and a few days before the plaintiff's failure he was furnished by the defendants with a list of the collaterals then in their hands, embracing those which had been collected by him as aforesaid, but it does not ap-
216 pear that even *then he gave them any information of any of his said collections.

Such were the transactions between the parties which occurred before, and such was the state of things which existed at the time of the plaintiff's failure. Then new rights, duties and obligations arose between them, springing from their relation to each other and the altered condition of the plaintiff. What those rights, duties and obligations were, we will now proceed to consider.

The plaintiff's failure occurred on the 6th of November, 1850. He then owed the defendants about \$34,000; and their only means of payment were the collaterals then in their hands, amounting nominally to \$69,760.94, including fifteen, amounting to \$3,096.93, which on that day and a few days before appear to have been returned to the plaintiff. What the condition of these collaterals was; what proportion and which of them were due by insolvents, or had been collected by the plaintiff, the defendants did not know. It became then their right and their duty to collect, as far and as soon as they could, all of the said collaterals remaining in their hands, apply the nett proceeds to the payment of their claim against the plaintiff, and pay him the surplus, if any; and they were bound to use due diligence in the performance of their said duty. In other words, they were bound to use common or ordinary diligence, such as a man of business and of common prudence would exercise about his own affairs in the situation in which the defendants were then placed. They were not then mere pledgees of the collaterals, but they were assignees, bound to use the diligence due by an assignee under the circumstances. They were not only principals, as being themselves interested in the subject, but they were also agents of the plaintiff to the extent of his interest, and bound to perform the duty pertaining to such
217 agency. The object of *their duty was, to realize out of the collaterals as much as possible at the earliest practicable period; and they were invested with all the powers which were necessary or proper to enable them to attain that object. The first thing to be looked to was the security of the collaterals, and the next their

collection. If a collateral was already secure, but was not paid on demand, it was their duty to bring suit upon it as early as convenient. If it was of doubtful solvency, and security could be obtained by giving reasonable time, it was their right if not their duty to give such time and obtain security. If a debtor could not, or would not, give security for his debt, and good policy required that he should not be sued, they were justifiable in not suing him. If more could be made by compounding or compromising a debt than in any other way, or if such a compromise was deemed advisable in the exercise of a sound discretion, looking to the interest of the creditor, they had a right to make such compromise. New securities taken by them in the discharge of their duties might properly be taken in their own names. In determining whether it would be good policy to bring no suit for a debt, or to give time for its payment on obtaining security, or to accept a compromise, the fact that they acted under the advice of, and upon information derived from, their counsel, affords at least prima facie evidence that such action was bona fide and proper. They were assignees not of one debt or a few debts only, of the situation of which they had personal knowledge, but of several hundred debts due by persons living in different and distant places in four states, and when it became their duty to collect these debts they had no knowledge whatever of the condition of the debtors, and had to depend on such information and advice as to the best course to be pursued upon the counsel they employed to make the collection.

218 *These are the principles which seem properly to govern this case and to make out the duties which the defendants had to perform in regard to the collaterals. The best guaranty which could possibly have been given for the faithful performance of those duties consisted in the fact that the defendants were deeply interested in such performance. They were men of business, wide awake to their interest, and the presumption is, they pursued it. If so, they probably did their duty. In some instances they may have had a countervailing interest which outweighed the other and swerved them from their duty; and in some, perhaps, they may have given undue indulgence to the debtor, considering his debt to be safe. Their duty was to look not only to the safety of the debt, but to its prompt collection. It will be found, however, that, in the main, they used due diligence in the collection of the debts. They commenced writing to the debtors on the very day of the plaintiff's failure, giving them notice of the assignment, and urging the necessity of immediate payment. They probably wrote such a letter to most, if not all, of the debtors, at or about that time, and placed the debts in the hands of attorneys for collection as soon as convenient thereafter. And they continued to correspond with the debtors and the attorneys during the whole course of the collections, having,

before the time of filing their answer, as they state therein, written over six hundred of such letters, many of which are to be found in the record.

We have applied the foregoing principles to the decision of this case, and to the extent to which they are variant from the principles declared by the decree of July 29, 1856, to which extent we consider that decree erroneous, we have thus corrected the consequences, if any, which may have resulted from such error to the prejudice of the plaintiff.

219 *The next error complained of is, that the court did not overrule the action of the commissioner in granting a continuance on the 1st of April, 1857, and decide the case upon his report made on the 20th of April, 1857.

A commissioner, properly, has much latitude of discretion in granting continuances of proceedings before him, and the court whose order he is executing will not overrule his action in that respect unless it be plainly erroneous. Still less will an appellate court reverse a decree for that cause. If such a reversal would in any case be proper, it certainly is not in this. We think there were good grounds for the continuance, and that it was properly granted by the commissioner.

The next complaint is, that the court erred in granting leave to retake the deposition of William Hawkins; and 2 Daniels Ch. Pr. pp. 1150-'6, sec. 9, is cited in support of this assignment of error.

There is greater strictness in England than in this state in permitting the deposition of a witness to be retaken, arising from the difference in the practice of the two countries in regard to the mode of taking depositions. It may however be said here as well as in England, that "the court is always desirous that the examination of witnesses should be completed as much as possible, *uno actu*, and that whenever it can be accomplished, no opportunity should be offered, after a witness has once signed his deposition, and turned his back upon the examiner, of tampering with him, and inducing him to retract or contradict or explain away what he has stated in his first examination upon the record. But notwithstanding this unwillingness to allow a second examination of the same witness, there are cases in which, if justice requires that a second examination of the same witnesses should take place, an order will be made to permit it." *Id.* p. 1150. In the 9th section, before referred to, are collected many

220 *cases, in which a re-examination of a witness was ordered in that country.

In this case the motion to retake the deposition was founded upon the affidavits of the attorneys for the defendants, which are stated in the order to be filed, but do not appear in the record. It might therefore properly be inferred, in the absence of the affidavits, that the order was made upon good and sufficient grounds. But it otherwise plainly appears from the record, that the retaking of the deposition was proper,

and indeed necessary. The case involved a great number of questions, in regard to a great variety of transactions. Several hundred collaterals had been placed by the plaintiff in the defendants' hands, and their liability for such of these collaterals as had not been collected and credited or otherwise accounted for by the defendants to the satisfaction of the plaintiff, was the main subject of controversy in the suit. The witness Hawkins was the cashier and chief book-keeper of the defendants during all the time the transactions in regard to the collaterals were going on, and had special charge of the collection thereof. The materiality of his evidence, in the whole case and almost every step of it, was palpable. It was impossible to examine him so fully when his first deposition was taken as to render any further or other examination unnecessary. When his first deposition was taken, in November, 1856, only six depositions had been taken by the plaintiff. It was then impossible for the defendants to anticipate what other depositions would afterwards be taken by the plaintiff, or what particular liabilities he would attempt to fix upon them. Between that time and the 9th of September, 1857, when leave was granted to retake the deposition of Hawkins, twenty-four additional depositions were taken by the plaintiff, many exhibits were filed by him, the commissioner made a special report at his instance, and he

221 filed various exceptions thereto; thus developing, in these different ways, the claims he intended to assert against the defendants. They had a right to defend themselves against these claims by countervailing testimony, and the best, if not the only means of doing so was, by a re-examination of their witness Hawkins. The importance of this witness and the materiality of his evidence, even to the plaintiff, is demonstrated by the great extent of his examination on both sides, and especially on the side of the plaintiff, and the great number of exhibits filed with his depositions, derived chiefly from the books and papers of the defendants. His first deposition and exhibits filed therewith occupy forty-seven pages of the printed record, and contain answers to eleven questions propounded by the defendants, and one hundred and eighteen by the plaintiff. His second deposition and the exhibits filed therewith occupy one hundred and seventy-seven pages of the record and contain answers to eighty-one questions propounded by the defendants, and two hundred and eighteen by the plaintiff. Many, if not most, of the questions propounded by the plaintiff had nothing to do with the cross-examination of the witness, but were framed with the view of obtaining original evidence for the plaintiff. The object of the defendants in obtaining leave to re-examine the witness was, not to afford him an opportunity "to retract, or contradict, or explain away" what he had stated in his first examination, but to prove facts rendered necessary to their defence by the

action of the plaintiff since the first deposition was taken, and which could not be proved by any other witness. According to the strictest construction of the rules of equity practice, there is none which forbids the re-examination of the witness under such circumstances and for such a purpose. To guard against any possible abuse, the court in granting leave to the defendants to retake the deposition of Hawkins,

222 *directed that they should not examine him as to any matters upon which he had been examined by either party in the cause, and that the retaking of the deposition should be completed on or before the 10th day of October, 1857. We therefore think the court did not err in granting such leave.

Even if this court differed from the Circuit court in regard to the propriety of granting such leave, it would not afford just ground for reversing the decree, at least unless it was palpably improper to grant such leave; as the Circuit court ought to possess much latitude of discretion in the decision of such questions.

But it is argued that even if the court properly permitted the deposition to be retaken it cannot be relied upon as evidence against the plaintiff for several reasons.

First, because the re-examination was altogether upon the same matters on which the witness was examined in taking his first deposition. Certainly this objection is not well founded, in its whole extent. The re-examination was upon many matters not involved in the first, even if it can be said that any of the matters to which the re-examination relates were matters upon which he had been previously examined, within the meaning of the order. It is believed that none of the many interrogatories propounded to the witness in taking his first deposition were repropounded to him, at least by the defendants, in taking his second deposition; and that no interrogatory propounded to him by the defendants in taking his second deposition was intended by them, or in any manner tended to induce him to alter, retract, contradict, or explain away, anything that he had stated on his first examination: and thus the chief, if not the only, object which the court had in view in the guarded terms of the order, has in fact been attained. At all events we

think that the limitation imposed on

223 the defendants in retaking *the deposition, should not have exceeded that extent. In any other view it would be difficult for this court to compare the deposition, and determine how far and in what respects they can be said to be upon the same matters. All the matters involved in the suit are perhaps dependent upon some common principle or facts as to which they may, in a general sense, be said to be the same matters. The defendants seem to have acted bona fide in retaking the deposition of their chief witness. When they filed their answer and exhibit, which were evidence in their favor, they were ready for trial. The plaintiff took some evidence in

opposition to the answer, which made it necessary for the defendants to take the first deposition of Hawkins; when they were again ready for trial. The plaintiff then took and exhibited a great deal more evidence, which made it necessary for the defendants to retake the deposition of Hawkins; in doing which it was difficult from the very nature of the cases to avoid occupying to some extent the same ground which had been occupied in taking the first deposition. The plaintiff observed no limits in his re-examination of this witness, and it was but fair and reasonable that the defendants should be equally free from restraint, taking care, however, as they did, not to ask any question with a view, or tending to induce the witness to alter, retract, contradict or explain away, anything stated by him on his former examination.

Secondly—Because he could not testify on his own memory, without the aid of his memoranda. "A witness may be permitted to use such short notes as he brings with him to refresh his memory, but not the substance of his deposition; nor may he transcribe such notes verbatim." Thus the law is laid down in 2 Dan. Ch. Pr. 1062. A witness ought not to write his deposition

or his answers beforehand, nor ought they to be written for him beforehand by counsel or any other person, but he ought to answer the questions orally and from memory as they are propounded to him. Parties or their counsel may, orally or by writing, previous to his examination, direct his attention to the facts in regard to which he is intended to be examined, and he may refresh his memory in regard to such facts by examining books and papers, and make memoranda from them and otherwise, especially of dates and amounts, and use such memoranda, for the purpose only of refreshing his memory, at the time of giving his evidence. The memoranda themselves are not evidence, and, a fortiori, what he says of their contents is not, unless he remembers the facts after his memory is refreshed. The books and papers referred to may be evidence, and if so and it be desired to use them they must be produced, or secondary evidence be given of their contents after laying the proper foundation for such evidence. In this case it was necessary, from the very nature of the case, and the number and extent of the transactions involved in it, and the intimate connection of the witness with them, and the lapse of time between their occurrence and the date of the deposition (a period of seven years), that the attention of the witness should be directed to the facts as to which he was to be examined, that he should refer to the books and papers relating to them and make memoranda, and that he should use these books, papers and memoranda in giving testimony for the purpose of refreshing his memory. It does not appear that more than this was done, except once or twice the witness in giving his answer was reading from his memoranda,

when he was at once checked and the paper taken from him. The error was a common and natural one, and seems to have proceeded from mistake and not evil design.

It was corrected before it created any mischief. The books and papers referred to were present, and the plaintiff's counsel caused such of them as he chose to be made evidence in the case.

Thirdly—Because the witness is not to be believed; his deposition showing a strong bias against the plaintiff, and being both contradictory in itself and contradicted by other evidence in the cause.

The feelings of the witness were certainly and naturally with the defendants, and doubtless influenced him to some extent in giving his evidence. The court in weighing it, must remember his close relation to the defendants, his agency for them in attending almost exclusively to the transactions involved in the suit, and his strong desire for their success in the result. We have accordingly done so, and we find nothing in the evidence which cannot be justly and properly accounted for without attributing to the witness any intention to tell a falsehood or to suppress the truth. We could not give as much weight to his testimony as we would to that of an impartial witness, but there is certainly nothing in the record to warrant us in discrediting and disregarding it altogether. With these remarks we deem it unnecessary to review in detail all the numerous instances referred to by the counsel for the plaintiff under this head of objection to the testimony of this witness.

The remaining assignments of error relate to the exceptions to the commissioner's report, but before we proceed to notice them in detail it will be convenient to state one or two rules of practice which have a material bearing on some of the said exceptions; and,

First, in regard to a notice to take depositions on the same day at two different places so far distant, the one from the other, that the party cannot attend at both. Is such a notice sufficient, and ought not an exception taken to the depositions on that ground to be sustained?

*This question has never been expressly decided by this court, but it was in effect decided in *Unis and als. v. Charlton's adm'r and als.*, 12 Gratt. 484, 498, in which case it was held that a deposition taken at so late a day that the other party cannot attend at the time and place of taking it, and then get to the court where the cause in which it is taken is to be tried, by the commencement of the term, is not admissible in evidence. Judge Daniel in delivering his opinion in that case, in which the other judges concurred, said: "The defendants had a right to be present at court as well as at the taking of the depositions." But the question has been expressly decided in some of the other States. In *Waters' heirs v. Harrison and wife*, 4 Bibb's R. 87, it was held that such a notice was not good, and that the deposi-

tions taken at either place could not be used, the party to whom the notice was given having attended at neither place. Chief Justice Boyle, in delivering the opinion of the court, well remarked that a notice which precludes the party from attending to it, unless by an agent, is not reasonable. "Though the law allows a man the privilege of acting by his agent it never compels him to do so." In *Hankinson and al. v. Lombard*, 25 Illinois R. 572, it was held that if a party gives notice of the taking of several depositions at different places, on the same day, so that the opposing party cannot be present to cross-examine all the witnesses, he may select which examination he will attend, and the other depositions will be suppressed. We think the principle on which these decisions rest is a sound one, viz: that a party has a right to be personally present when depositions are taken by his adversary, and that a notice which does not afford him an opportunity of being so is insufficient, and his exception to the depositions on that ground ought to be sustained. Whether the depositions

227 *excluded, as was done in the case in Kentucky, or whether the party should be required to select which place he will attend, and be permitted to exclude only the depositions taken at the other place, as was done in the case in Illinois, may be a question of doubt. But we think the latter is the better rule. When a party cannot attend both places at the same time it is no reason why he should not be required to attend either, and in giving him a right to select which of the two places he will attend, he has every advantage to which he is entitled. By making the selection he confines the notice to the place selected, and makes it no notice at all as to the other place.

Secondly—In regard to exceptions merely taken by being endorsed on the depositions, or written on a separate piece of paper and filed in the cause, or taken and noticed on the face of the depositions in the progress of taking them, without being brought to the notice of the court below for the purpose of obtaining the judgment of the court thereon, of which exceptions a great many appear in the record in this case. There seems to have been no express decision of this court upon this question any more than upon the one we have just been considering. In *Rowton v. Rowton*, 1 Hen. & Mun. 94, 110, Judge Lyons expresses an opinion which strongly applies to the question. "The affidavits," he says, "although excepted to at the rules, were not objected to at the hearing, but allowed to be read, whereby the former exception was waived, and cannot now be repeated in this court." In *Beverly v. Brooke & als.*, 2 Leigh 425, there was an endorsement on the envelope of the deposition, in the handwriting of counsel, that he excepted to the reading of the deposition on account of the interest of the witness in the event of the cause;

but it was not signed by the counsel, nor did it appear that the attention of the 228 court *was called to the exception, or that the court decided upon it. "This would have presented a serious difficulty," said the court, "had the deposition been taken under a general commission." But the court was of opinion that the same difficulty did not exist in the case of a special commission, and accordingly considered the question of the competency of the witness and rejected his deposition on the ground that he was incompetent. 2 Rob. Pr. old ed., 337-8. In some of the other states the question has been expressly decided. In *Scott, &c. v. Cook, &c.* 4 Monr. R. 280, it was held that exceptions to depositions for want of notice and other irregularities must be called up and decided in the court below, otherwise it cannot be assigned for error that they were read. It is otherwise when the objection is for interest and incompetency to be proved by the facts in the cause. In *Black v. Lamb*, 1 Beasley's R. 108, a case decided in the court of chancery of New Jersey, it was held that objections to testimony taken before the master are to be settled by the court, and if they are not renewed at the hearing, or when the depositions are acted upon by the court, they are waived. We approve the principle maintained in these cases, and are of opinion that an exception to a deposition (except upon the ground of incompetency, in which case no exception is necessary), not having been brought to the notice of the court below nor passed upon by that court, ought to be considered as having been waived, and cannot be noticed by this court; and that a general judgment or decree of the court below against the party making the exception cannot be considered as involving a decision upon the exception.

And thirdly—In regard to an exception taken by the plaintiff to the reading of any and all letters from third persons to the defendants filed in the cause, as *res inter alios acta*, except such as he has made 229 evidence by reading *them himself.

This exception was not brought to the notice of the court below, and what has been already said on that subject will apply to it, at least to some extent, if not entirely. But in addition to that, the exception is too general. It was competent for the defendants to produce and prove letters addressed to and received by themselves from their attorneys, at least for some purposes; as for instance, to show that a claim had been put in the hands of an attorney for collection, and at what time and what advice he gave in regard to it. The sweeping objection was therefore too broad and might very properly have been overruled on that ground. It ought to have specified the letters or parts of letters intended to be excepted to, instead of devolving on the court the necessity of looking over such a mass of letters to find out which of them the plaintiff had made evidence by reading them

himself, and whether any, and if any, what part of the rest was admissible evidence on any other ground.

We will now proceed to consider the exceptions to the report of the commissioner; and first those of the plaintiff.

The judge then considered the exceptions *seriatim* upon the evidence.

Decree reversed in favor of the appellee.

230

***Sawyer v. Corse.**

January Term, 1897, Richmond.

1. **Pleading and Practice—Want of Issue—Case Agreed—Effect.**—When before the defendant files a plea the parties agree a case, and submit it to the decision of the court, the want of a plea or issue is cured by the agreement.
2. **Same—Same—Same.**—When there is a declaration and no plea, and a case agreed is submitted to the court for its decision, the plaintiff's cause of action set forth in the declaration, is submitted to the court without reference to any particular form of defence, and the defendant is entitled to judgment, if the facts stated afford him a defence, of which he might have availed himself under any form of pleading.
3. **Same—Issue—Case Agreed.**—When there is an issue in a cause, and it is submitted to the court upon a case agreed, the decision must be restricted to the issue.
4. **Case Agreed—Substituted for Special Verdict—What Rules Govern.**—A case agreed is a substitute for a special verdict, and is subject to like rules. It must state facts and not merely the evidence of facts; and the court cannot infer other facts from those stated, unless they result as a legal conclusion, or unless the parties agree that it may be done.
5. **Public Officers—Liability for Personal Negligence.**—A public officer or other person who takes upon himself a public employment, is liable to third persons, in an action on the case, for any injury occasioned by his own personal negligence or default in the discharge of his duties.
6. **Same—Liability for Negligence of Agent.**—A public officer is liable to third persons for any injury

***Case Agreed—Substituted for Special Verdict—What Rules Govern.**—The rule laid down in the fourth headnote of the principal case is approved in *Stockton v. Copeland*, 23 W. Va. 700, citing the principal case. In *Dearing v. Rucker*, 18 Gratt. 481, it is said: "But this was not a case agreed to be argued in lieu of a special verdict, as in *Sawyer v. Corse*, 17 Gratt. 230, where the court could not do otherwise than apply to the case the same rules that would have been applied to a special verdict. In this case the whole matter of law and fact was submitted to the court in pursuance of the statute. The facts stated by agreement of the parties were submitted to the court, without any restriction as to the mode in which they should be treated. It was, therefore, competent for the court to make such inferences from the facts thus submitted to it as the jury might have made from the same facts, if they had been submitted to them. There was, therefore, no necessity for a *venire de novo*, and it was error in the district court to award it." See also, on the same point, *B. & O. R. Co. v. Faulkner*, 4 W. Va. 184, citing the principal case.

occasioned by the negligence or default of his private agent or servant in the discharge of his official duties.

7. **Same—Liability for Official Subordinate.**—A public officer is not responsible to third persons for the negligence or default of his official subordinates.

231 ***8. Municipal Corporations—Enterprise of Private Nature—Liability for Officer's Defaults.**—This principle of exemption from liability, for the defaults of its officers is not extended to municipal corporations, where the authority, though for the accomplishment of objects of a public nature, and for the benefit of the public, is one, from the exercise of which, the corporation derives a profit, or where the duty may be presumed to be enjoined upon the corporation in consideration of privileges granted.

9. **Mail Carriers—Liability of Contractor for Negligence of.**—A mail carrier is not an officer of the government, but is the private agent of the contractor for carrying the mail, and the contractor is liable to third persons for any injury sustained through the negligence or default of such agent in the performance of his duties.

10. **Same—Failure to Take Oath—Liability of Contractor.**—The act of congress of March 3, 1855, Brightley's Dig. p. 759, § 2, requires that mail carriers shall be sworn, and it is the duty of the contractor to see that this is done. If the carrier is not sworn he is the private agent of the contractor, for whose defaults the contractor is liable to third persons, even if on being sworn the contractor would not be liable for his acts. And it is not sufficient that the mail carrier took the oath when acting for a former contractor.

†Municipal Corporation—Enterprise of Private Nature—Liability for Officer's Defaults.—For the proposition, that a municipal corporation is not exempt from liability for the defaults of officers, where the authority, though for the accomplishment of objects of a public nature, and for the benefit of the public, is one from the exercise of which the corporation derives a profit, or where the duty may be presumed to be enjoined upon the corporation in consideration of privileges granted, the principal case is cited and followed in the following cases: *Jones v. City of Williamsburg*, 97 Va. 724, 34 S. E. Rep. 883; *Wilson v. City of Wheeling*, 19 W. Va. 533; *Noble v. City of Richmond*, 31 Gratt. 278; *DeVoss v. City of Richmond*, 18 Gratt. 346; *Orme v. City of Richmond*, 79 Va. 80; *McCull v. City of Manchester*, 85 Va. 566, 8 S. E. Rep. 379. See, in accord, *City of Richmond v. Courtney*, 32 Gratt. 798; *Gordon v. City of Richmond*, 83 Va. 436, 2 S. E. Rep. 727; *City of Richmond v. Long*, 17 Gratt. 375; 2 Dillon on "Municipal Corporations," 949, 966. See monographic note on "Municipal Corporations" appended to *Danville v. Pace*, 25 Gratt. 1. In *Mendel v. Wheeling*, 28 W. Va. 257, where it was sought to hold the city liable for failure to supply water to extinguish fire on the ground that it owned and operated the waterworks and received water rents from those supplied with water, it was held that the city was not liable, the court saying: "The case of *Sawyer v. Corse*, 17 Gratt. 241, is not opposed to the principles we have announced. The case is not relevant to the subject before us, as it involved the right to recover damages from a mail carrier for a package of money lost through his negligence. He was properly held liable."

11. Same—Same—Contractor Not Insurer—Liability for Negligence.—The fact that the mail carrier did not take the oath prescribed does not make the contractor an insurer, but he is liable to third persons for injury caused by the negligence or default of the carrier.

This was an action on the case in the Circuit court of Alexandria county, brought in February, 1854, by John D. Corse against Frederick P. Sawyer, to recover an amount of money lost out of the mail between Alexandria and Washington, on a route on which Sawyer was the mail contractor. The declaration contained three counts. In the first, after stating that Sawyer was the contractor for carrying the mail on the route between Alexandria and Washington, and that the plaintiff had deposited a sealed letter, containing \$988 in bank notes, in the post office at Alexandria, to be carried by the mail to Washington, and the delivery of it to the defendant, charged that by the negligence, carelessness and default of the defendant the letter and its contents were lost.

232 *The second count set out that the defendant had employed Archibald Fleming as his agent and servant to carry the mail, and that through the carelessness, negligence and default of Fleming the letter and its contents were lost. And the third count charged that Fleming was a careless, faithless and incompetent person.

In May, 1856, without a plea filed by the defendant, or issue in the cause, came the parties by their attorneys, and a case was agreed by them to be argued in lieu of a special verdict. From the case agreed it appeared as follows:

On the 6th of December, 1853, the plaintiff enclosed in and sealed up a letter addressed to Maury & Morton, at the city of Richmond, current notes of Virginia banks amounting to the sum of nine hundred and eighty-eight dollars, the property of the plaintiff, and on the same day deposited this letter in the post office at Alexandria, to be forwarded in due course of mail, by way of Washington city, to Richmond, to the persons to whom it was addressed. The letter was on the 6th of December duly mailed at Alexandria, and along with other mail matter deposited in a United States mail bag, which was duly locked by the postmaster, and this mail bag was, on the same day, about 4 o'clock in the evening, delivered by the postmaster at the post office, together with another mail bag of larger size, containing mail matter, to one Archibald Fleming, who was at the time in the employment of the defendant, who was then the contractor with the government of the United States for carrying the mail between the city of Alexandria and Washington.

Fleming having received the said mail bags, started immediately, on horseback, to carry them from the post office in Alexandria to the post office in Washington city. When he received the mail bags he placed them upon the saddle, which was

upon the horse to be ridden by him in
233 *carrying them, and seating himself upon them started for the post office in Washington. When he had gone about two miles he found that the smaller bag, the one which contained the letter aforesaid, had, without his knowledge or observation, slipped from under him after his departure from the post office at Alexandria. He immediately returned along the route he had traveled, and made diligent search for the missing bag, but was unable to find it, though it was still daylight, and the said mail bag, with all the matter therein contained, was wholly lost. It was agreed that this mail was most usually carried on the steamboats plying between the two cities, sometimes along the turnpike road, and sometimes along the tow-path of the Alexandria canal, and that at the time of the loss the steamers were not running, in consequence of the ice in the river, and that the tow-path was easier than the turnpike for the horse to travel upon, and it was little farther than the route by the turnpike. Fleming had been the employee from time to time of various contractors to carry the mail between the cities of Alexandria and Washington and elsewhere, and had always been a faithful, diligent and careful agent. Many years previous to the time of this loss, and whilst he acted in the same capacity as the employee of the Hon. William Smith, as a contractor to carry the United States mail, he was sworn faithfully to perform his duties; but he took no oath whilst in the employment of the defendant. It was agreed that either party might refer to any law of Congress or regulation of the post office department.

The contract between Sawyer and the government under which the mail was carried at the time of the loss of the letter as aforesaid, is set out at length in the case agreed, and it is presumed is in the usual form. It shows the compensation for
234 carrying the mail for a year *was four hundred and fifty dollars, and it contained, among other covenants on his part, the following:

Second. To carry said mail in a safe and secure manner, free from wet or other injury, under a sufficient oilcloth or bear skin.

Third. To take the mail and every part of it from, and deliver it and every part of it at, each post office on the route, or that may hereafter be established on the route, and into each post office at the end of the route, and into the post office at the place at which the carrier stops at night, if one is there kept, and if no office is there kept to lock it up in some secure place at the risk of the contractor.

He and his sureties also bound themselves to be answerable for the person to whom the said contractor should commit the care and transportation of the mail, and accountable to the United States for any damages which might be sustained by the United States through his unfaithfulness or want of care, and that said contractor would

discharge any carrier of said mail whenever required so to do by the postmaster general.

The cause came on to be heard upon the case agreed in November, 1858, when the court gave a judgment for the plaintiff for nine hundred and eighty-eight dollars, with legal interest thereon from the 6th of December, 1853, until paid, and his costs. And thereupon Sawyer applied to this court for a writ of error to the judgment, which was allowed.

Daniel, for the appellant, contended:

First. That no issue had been made up in the cause, and for that error the judgment must be reversed.

Second. The evidence did not sustain the first and third counts; and on the second count that the contractor was not liable for the negligence of the carrier; and that in fact there had been no negligence.

235 *On the first head he insisted that the contractor was not a common carrier. He made no contract with the public; receives no pay from the public; and made no warranty to the public.

That both the contractor and the carrier were public officers, each liable for his own acts, but not for the acts of the other. That in view of the regulations of the post office department the carrier was not an agent of the contractor. That after the nomination of the carrier to the department and his acceptance, he was to take an oath, which it was the business of the post office department to see was taken; and the contractor was bound by his bond to dismiss the carrier if required by the department to do so. Moreover the duty was imposed upon the carrier to collect the postage on way-letters. He referred to Brightley's Digest, § 2, p. 759, for the law of 1825: *Id.* 766, § 47, p. 780, §§ 141, 138.

The contractor being a public officer and the carrier being appointed to the discharge of public duties, the doctrine of respondeat superior does not apply. Story on Agency, § 319; 2 Parsons on Contracts, 144 and note b; *Conwell v. Vorhees*, 13 Ohio R. 523, *Stanton* 541.

He insisted further, that if the carrier was the mere agent of the contractor, that the contractor was obliged to employ agents, and was not bound for their acts. That no one would contract for carrying the mails if he was to be held bound for all the misfeasances or malfeasances of his agents. The United States was secured by the bond of the contractor; and there was no liability to the public. He referred to *Hutchins v. Brackett*, 2 Foster's, New Hamp. R. 252; *Dunlop v. Monroe*, 7 Cranch's R. 242; *Schroyer v. Lynch*, 8 Watts' R. 453.

He said that the case of a sheriff and deputy was the only case of public 236 officers in which a principal was *held liable for the acts of his deputy, and this was an exceptional case; and it was said by Best, Ch. J., to be founded on a very ancient statute. *Hall v. Smith & als.*, 2 Bingh. 156, 9 Eng. C. L. 357; *Cameron v. Reynolds*, Cowp. R. 493.

3d. That there was no evidence to subject the contractor in this case. That no more than ordinary care was required; and here there was no sufficient proof of negligence; and negligence was not stated in the case agreed.

Brent, for the appellee, insisted:

First.—That Fleming was not a public officer, but was the agent of Sawyer. He referred to the cases of *Lane v. Cotton*, 1 Ld. Ray. R. 646, 12 Modern R. 482, and *Whitfield v. Le Despencer*, Cowp. R. 754; and insisted that these cases showed clearly that Fleming was not a public officer; and he insisted that the American cases followed these; and they all established the principle that the officer is responsible for any malfeasance and neglect of his own whilst in office; and that to relieve the officer from responsibility for the act of his subordinate, an official relation must exist between them. The case of *Conwell v. Vorhees*, 13 Ohio R. 523, is an exception to this principle, but the case is called in question in 1 American Lead. Cas. 661, note to *Wilson v. Peverly*.

Second.—That if an official character existed, yet Sawyer was responsible because of his neglect, and violation of law, in employing as his carrier one not duly qualified to carry the mail. That the act of congress, of March 3, 1825, *Brightley's Digest*, p. 759, § 2, requires that all persons employed in the care, custody or conveyance of the mail, shall previous to entering upon the duties assigned to them, be sworn before some magistrate faithfully to perform all the duties required of them.

237 *And Fleming had never been sworn as the carrier of Sawyer and under his contract. To constitute an official relation between Sawyer and Fleming, the latter should have been sworn. When the subordinate is not sworn the principal is liable. *Bishop v. Williamson*, 2 Fairfield (Maine) R. 495, 507. And this case fully meets the objection that it was not the duty of Sawyer to see that the oath was administered to Fleming.

JOYNES, J. The judgment in this case was rendered against Sawyer, who was defendant in the court below, upon a case agreed by the parties. He now contends that the judgment must be reversed, because it does not appear from the record that he had filed any plea. But this objection cannot be sustained. A case may be submitted to the court on a case agreed without a plea as well as with one, and it is sometimes done without either declaration or plea. The defect of pleadings is cured by the agreement. When there is a declaration and no plea, as in the present case, the plaintiff's cause of action, as set forth in the declaration, is submitted to the court without reference to any particular form of defence, and the defendant is entitled to judgment, if the facts stated afford him a defence of which he might have availed himself under any form of pleading. When

the case is submitted after an issue is made up, the decision of the court is restricted to that issue.

Sawyer was contractor with the post office department for carrying the mail between the cities of Alexandria and Washington, and Fleming was the carrier employed by him. A mail bag containing a letter of Corse, in which there was an enclosure of bank notes belonging to him, was delivered to Fleming at the post office in Alexandria to be carried to Washington, and was lost by him on the route under circumstances which need not be stated.

This is an action on the case brought by Corse against Sawyer to recover the value of the bank notes. The declaration contains three counts. The third which alleges that Fleming was not competent and trustworthy, and seeks to charge Sawyer on the ground that he had appointed an unfit person as carrier, is not sustained by the facts agreed, and may therefore be laid out of view. The first count alleges that the loss of the letter was occasioned by negligence and want of care on the part of Sawyer himself.

It is well settled that a public officer, or other person who takes upon himself a public employment, is liable to third persons in an action on the case, for any injury occasioned by his own personal negligence or default in the discharge of his duties. So that if the facts of this case establish that the loss of the letter was occasioned by the negligence or default of Sawyer himself, he is liable even though he should be considered as holding the position of a public officer or public agent, and whatever may be the legal character of his relation to Fleming. 2 Kent, 610; Story on Agency, §§ 320, 321; Nowell v. Wright, 3 Allen's R. 166.

The second count alleges that the loss was occasioned by the negligence of Fleming as the agent and servant of Sawyer, employed by him to carry the mail according to his contract with the post office department. And here again it is clear, that if Fleming was merely the private agent and servant of Sawyer, Sawyer is liable to third persons for injury occasioned by his negligence in the performance of his duty, according to the maxim respondeat superior. And it is equally clear that the fact that Sawyer's obligation to carry the mail arose under a contract with the government, and that he made no contract with Corse, is no answer to the present action, which is not founded on the contract, but on the breach of duty.

Winterbottom v. Wright, 10 Mees. & Welsb. 109; Burnett v. Lynch, 5 Barn. & Cres. 589 (12 Eng. C. L. R. 327); Farrant v. Barnes, 11 Com. B. R. N. S. 553 (103 Eng. C. L. R.); Marshall v. York Railway Co., 11 Com. B. R. 655 (73 Eng. C. L. R.).

Sawyer contends however that Fleming is not his agent or servant, but the agent or servant of the government, and that as such he is liable for his own default. The leading case relied upon is Lane v. Cotton

& al. decided in the year 1701, and reported in 1 Ld. Ray. R. 646, and in several other books. That was an action on the case against Cotton and Frankland, who were together the postmaster general of England, to recover the value of exchequer bills belonging to the plaintiff, which were abstracted from a letter deposited by him in the London post office to be transmitted by post. The letter was delivered at the office to one Breese who was appointed by the defendants to receive letters, who was removable by them, but who received his salary from the receiver general out of the revenues of the post office. In the opinion of the judges it was assumed that the bills were abstracted by Breese, though it was found by the special verdict that they were abstracted by a person unknown.

Three of the judges held that the defendants were not liable. Without going over all the grounds on which the decision was placed, it will be sufficient for the present purpose, to state that it was placed, in part, upon the ground, that the post office establishment was an instrument of government, established for public convenience under the management and control of the defendants as officers of the government, and that Breese was himself an officer under the government, and liable as such for his own acts, and that he was not the agent or servant of the defendants. Lord Holt dissented,

but he only differed from the other judges upon the point whether Breese was to be regarded as the agent and servant of the defendants or not. See 15 East, 392.

The doctrine of this case was followed by Whitfield v. Le Despencer, Cowp. R. 754, and may be considered as well established in England. The same doctrine has been applied to the case of a deputy or local postmaster, and his assistants duly appointed and qualified. These, in like manner, are regarded as agents and servants of the government, who are liable for their own acts and defaults, and not as agents and servants of the postmaster, for whose acts and defaults he is to answer. Schroyer v. Lynch, 8 Watts' R. 453; Wiggins v. Hathaway, 6 Barb. S. C. R. 632; Dunlop v. Munroe, 7 Cranch's R. 242; Bolan v. Williamson, 1 Brevard's R. 181.

There has been some diversity of opinion in reference to this class of cases, but it has been rather as to the application of the principle on which they proceed, than as to the soundness of the principle itself. See Franklin v. Low & al., 1 John. R. 396; Maxwell v. McIlroy, 2 Bibb's R. 211; Jones on Bailments, 109.

Indeed, the principle which exempts a public officer from liability for the acts and defaults of his official subordinates appears to have been long recognized, and to be one of general application. Doctor & Student, Dialogue 2, chap. 42; Nicholson v. Morrissey, 15 East's R. 384; Viscount Canterbury v. Attorney General, 1 Phillips' R. 306.

The doctrine is thus stated in 1 American Leading Cases (3d ed.), 621: "With regard

to the responsibility of a public officer for the misconduct or negligence of those employed by or under him, the distinction generally turns upon the question whether the persons employed are his servants, employed voluntarily or privately and paid by him, and responsible to him, or whether they are his official subordinates, 241 nominated perhaps *by him, but officers of the government; in other words, whether the situation of the inferior is a public officer or private service. In the former case the official superior is not liable for the inferior's acts; in the latter he is."

The exemption of public officers from responsibility for the acts and defaults of those employed by or under them in the discharge of their public duties, is allowed, in a great measure, from considerations of public policy. From like considerations it has been extended to the case of persons acting in the capacity of public agents, engaged in the service of the public, and acting solely for the public benefit, though not strictly filling the character of officers or agents of the government. *Hall v. Smith*, 2 Bingh. R. 156 (9 Eng. C. L. R. 357), *Holliday v. St. Leonards, Com. B.* (N. S.) R. 192 (103 Eng. C. L. R. 192).

The effort has been made, both in England and the United States, to extend the application of this principle of exemption so as to embrace every case of a municipal corporation, clothed with authority or charged with a duty for the accomplishment of objects of a public nature and for the public benefit. But it has been held that where the authority, though for the accomplishment of objects of a public nature and for the benefit of the public, is one from the exercise of which the corporation derives a profit, or where the duty, though of a public nature and for the public benefit, may fairly be presumed to have been enjoined upon the corporation in consideration of privileges granted to and accepted by it, the exemption does not apply. And the reason is that, in such cases, the corporation is not acting merely as an agent of the public and with a view solely to the public benefit, but that in the former it is pursuing its own interest and profit, and in

242 the latter is executing a contract *for which it has received a consideration. *Scott v. Mayor, &c., of Manchester*, 2 Hurl. & Nor. R. 204; *Weightman v. Corporation of Washington*, 1 Black's R. 39.

The books which have been cited show the grounds upon which this sort of exemption has been allowed, and the extent to which it has been generally carried. It ought not to be extended to other cases that do not fall clearly within the same reasons. I have seen no case in England, and none in this country, except two hereafter mentioned, in which such exemption has been allowed to a person undertaking by contract to perform work, or render service for the government, for a compensation to be paid to him, and with a view to his own profit. and where his subordinates are employed

and paid by him, and liable to be dismissed at his pleasure. Such a contractor is in no just and proper sense, an officer of the government. And though he may be said to be, in a certain sense, an agent of the government, because he is engaged in working for the government, yet the laborers and others whom he employs under him, in the execution of his contract, cannot be said to be agents of the government, which does not know them, does not appoint them, does not control them, does not pay them, and has nothing to do with them. The cases above cited from 2 Hurl. & Nor. and 1 Black. show that he is not such a public agent as comes within the principle of *Hall v. Smith*, because he is working for his own profit, by fulfilling a contract which he has bound himself to perform, and for which he is to receive compensation.

In *Collett v. London, &c., Railway Company*, 16 Q. B. R. 984 (71 Eng. C. L. R.), the company had been required by the postmaster general to carry the mail under an act making it the duty of all railway 243 companies to *carry the mail when required to do so by the postmaster general. The plaintiff was an officer of the post office department accompanying the mail, whom it was the duty of the company to carry along with the mail. It was held that the plaintiff was entitled to recover against the company for an injury received by him through the negligence of the servants of the company in charge of the train.

Now this was a stronger case than that of a voluntary contractor, because the company could not refuse to undertake the service. Yet it was not even contended at the bar that the company could be regarded as a public agent, exempt as such from liability to answer for the acts of their servants. If not such a public agent in respect to the officer in charge of the mail, how was the case different in respect to the mail, where both the mail and the officer were carried by virtue of the same duty, and for one and the same compensation?

The mail carriers, like all others in the service of the mail contractor, are selected and employed by him; are paid by him; are under his direction and control; enter into contract with him alone; work for his benefit and profit, and may be discharged by him at pleasure. What more is necessary to constitute the relation of master and servant? The case comes fully within the doctrine laid down by Chief Justice Best in *Hall v. Smith*, where he says: "The maxim of respondeat superior is bottomed on the principle that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it." The fact that the law requires the carrier to be sworn before he enters on the discharge of his duties does not make him the agent or servant of the government, or affect, in any degree, his relation to the contractor. The safety of the mail 244 and the regularity of *the service being dependent, in a great degree, upon

the fidelity of the carrier, the law requires that he shall be sworn, as a guaranty to that extent, of his fidelity, just as it required, for like reasons, that he shall be a white person, and of not less than a certain age. But if he is an agent of the government, for whose acts the contractor is not responsible, why does the law trust him without security, while it exacts security from the contractor, and that too when the contractor is, of necessity, a man of substance, which the carrier seldom or never is?

But if a carrier who has taken the oath required by the act of congress can be justly regarded as an agent and servant of the government, and no longer the mere agent and servant of the contractor, a carrier who has not taken the oath cannot be so regarded, because the act requires that he shall take the oath before he enters upon his duties. As Fleming had not taken the oath to perform his duties under Sawyer, therefore it is not competent for Sawyer to shield himself by alleging that Fleming was the agent and servant of the government; and especially as it was a breach of duty in him to allow a person who had not been sworn to carry the mail. Act March 3, 1825.

The terms of the contract between Sawyer and the department indicate clearly the understanding and intention of the parties to it, that the carriers whom Sawyer might employ would be his agents and servants, for whose acts he would be answerable. Sawyer stipulates to take the mail, and every part of it from, and deliver it, and every part of it, into the several post offices, and to deliver it into the post office at the place where the carrier stops at night, if one is there kept; and if no office is there kept, to lock it up in some secure place, "at the risk of the contractor." These

245 were duties *which, from their nature, were to be performed by the carrier. The provision that the mail when locked up at night shall be at the risk of the contractor, implies that the mail, while in the hands of the carrier, is at the risk of the contractor. The meaning is, that this risk shall continue, notwithstanding the mail has been locked up in a secure place, while the contractor will be relieved of the risk if the mail is deposited in a post office where it will be in the care of the postmaster. The stipulation that Sawyer shall be responsible to the United States for any damage sustained through the unfaithfulness or want of care of his carriers; and the other, which precedes it, that he shall be "answerable" for them, in general terms, indicated as clearly as anything could, short of express words, that his carriers would be his agents and servants, for whose acts and defaults he would be responsible.

Two cases have been cited as expressly sustaining the proposition that a mail contractor is not responsible for the loss of mail through the misfeasance or negligence of a carrier. The first of them is *Conwell v. Vorhees*, 13 Ohio R. 523. The court stated the question to be whether the con-

tractor was a common carrier or a public agent, although the declaration, in all the counts, set forth misfeasance and negligence, and not the liability of a common carrier, as the ground of action. The court held that he was a public agent, on the ground that he was engaged in the performance of a public service, under a contract with the government, and was therefore not responsible for the misfeasance or negligence of those employed by and under him. For the reasons already given, I do not think that this decision can be supported. The editor of *American Leading Cases*, vol. 1, p. 621, intimates the opinion that the case cannot be sustained on the ground upon which it was 246 placed by the court, *and that if it can be sustained at all, which he evidently doubts, it must be on the ground that the carrier holds an official situation, and is really in the employment of the post office department.

The other case relied upon is *Hutchins v. Brackett*, 2 Foster's R. 252. That case, though put upon the authority of *Conwell v. Vorhees*, was really decided upon a ground not relied upon, or even mentioned by the court in that case, to wit: that the carrier was a public agent, engaged in the performance of a public duty, and not the mere servant of the contractor. It will be observed that in *Conwell v. Vorhees* the judge uses "mail carrier" in the sense of "mail contractor" (p. 542, line 15), and that the judge in *Hutchins v. Brackett* misquotes the opinion in *Conwell v. Vorhees* by substituting "mail carrier" for "mail contractor," where it occurs in the 24th line of p. 542. Thus the court in *Conwell v. Vorhees* is represented as holding that a mail carrier is a public agent, when, in point of fact, they held only that a mail contractor is such.

It thus appears that *Hutchins v. Brackett* affords no support to *Conwell v. Vorhees*, and I think it clear that *Hutchins v. Brackett* cannot be sustained on the ground upon which it was put. But however that may be, that ground, as I have shown, is not applicable to this case, in consequence of the fact that the carrier had not been duly sworn, and in consequence of the special stipulations of the contract between the contractor and the department.

It is objected that upon grounds of public policy a contractor ought not to be held responsible for the misfeasance or negligence of a carrier, because to hold him so would operate as a discouragement to the taking of contracts for the transportation of the mail. Such considerations are of little weight when the rights and ob- 247 ligations *of the parties are clear on legal principles. But I do not perceive that there is any real ground for such an apprehension. A stage owner is liable for injury to a passenger, or for the loss of his baggage, occasioned by the fault of the driver. What greater hardship is there, if the stage owner is a contractor for carrying the mail, in holding him liable for the loss

of a letter in the mail, occasioned, likewise, by the fault of the driver. Indeed, a just regard for the interest of the public requires that the contractor should be held responsible; "for," to adopt the language of Judge Livingston in reference to postmasters, *mutatis mutandis*, "such liability will greatly increase the security of the public, not only by preventing collusion between contractors and their carriers, but by rendering the former more circumspect in their choice, more watchful over their agents, and more attentive to taking bonds for their faithful conduct. It may, it is true, now and then fall hard on a contractor, but it is better it should be so than that individuals should be without remedy for injuries committed by their agents." 1 John. R. 404.

It has been contended by the counsel for Corse that Sawyer is liable, under the first count of the declaration, on the ground that he was guilty of misfeasance and negligence of his duty in entrusting the mail to a carrier who had not taken the oath required by law, and *Bishop v. Williamson*, 2 Fairf. R. 495, is relied upon. In that case it was held that where a clerk in the post office had not taken the oath, the postmaster was guilty of a neglect of duty, which made him liable for a theft committed by the clerk, while in the absence of such neglect of duty he would not have been liable, on the principle of *Lane v. Cotton & al.* But the court did not hold that the postmaster was liable, because of this neglect of duty, to answer, like 248 an insurer, for all losses *that might have happened. If a loss had happened without any fault on the part of the clerk, the case does not hold that the postmaster would have been held liable. And so in this case, the fact that Sawyer allowed Fleming, who had not been sworn, to carry the mail, did not render him liable at all events as an insurer. Judged according to what I have said heretofore, it had no effect upon his liability, for he was liable for a loss occasioned by Fleming's negligence, whether sworn or not. The decision in the case, therefore, at last depends on the question whether the loss was occasioned by negligence and want of care on the part of Fleming.

The case agreed does not state whether the loss was or was not occasioned by negligence and want of care on the part of Fleming. Facts are stated, which have a bearing on that question, and the parties probably understood that the court would determine it by inference from the facts agreed, as was in fact done by the Circuit court. But a case agreed, called in the English practice a "special case," is a substitute for a special verdict, and is subject to like rules. It must state facts, and not merely the evidence of facts (2 Tidd. 899), and it is not competent for the court to infer other facts from those stated, unless they result as a legal conclusion. If the parties intend that the court shall have authority upon a case agreed to make such inference, they must make an agreement to

that effect, as is frequently, if not usually, done in England in making up a "special case." 8 Ad. & El. 799; 7 M. & Gr. 295. This cannot be regarded as a case submitted to the court under the provision of the Code, ch. 162, § 9, because the record states that a "case was agreed" by the parties, "to be argued in lieu of a special verdict." There is no alternative, therefore, but to reverse the judgment, set aside the case agreed, and award a venire de novo. 1 Rob. (old) Prac. *373-4.

If upon the new trial it shall be found by the jury that the loss, for which the action is brought, was occasioned by the negligence and want of due care on the part of Fleming, in the carriage and preservation of the mail, the defendant in error will be entitled to recover. The degree of care which Fleming was bound to exercise was such as a man of ordinary prudence would have exercised about his own affairs, under like circumstances.

I am of opinion to reverse the judgment, with costs to the plaintiff in error, set aside the case agreed, and award a venire de novo.

The other judges concurred in the opinion of Joynes, J.

Judgment reversed, and venire de novo awarded.

250

*Adams v. Lawson.

January Term, 1867, Richmond.

[94 Am. Dec. 455.]

1. *Libel—When Innuendo Unnecessary.**—In an action of libel, when the writing on its face relates to the plaintiff and the words are libellous in themselves, the innuendo is unnecessary, and may be rejected as surplusage.

2. *Same—No Crime Imputed—Language Tending to Injure Reputation, etc.*†—To constitute a libel it is not necessary that the writing should impute an offence which may be indicted and punished. It is sufficient if the language tends to injure the reputation of the party, to throw contumely, or to reflect shame and disgrace upon him, or to hold him up as an object of scorn, ridicule or contempt. And the words will be understood in their plain and ordinary import.

3. *Same—In Form of Insinuation.*—A libel may be in the form of insinuation as well as of positive assertion.

**Libel—When Innuendo Unnecessary.*—See the principal case distinguished in *Johnson v. Brown*, 13 W. Va. 111, 112.

If plaintiff does not declare under the statute, his declaration must set out a common-law slander, and if the words charged do not amount to slander they cannot be helped by the innuendo. *Moseley v. Moss*, 6 Gratt. 534.

†*Same—Language Tending to Injure Reputation.*—In *Chaffin v. Lynch*, 83 Va. 113, 1 S. E. Rep. 803, the court said: "It is true that written defamation is actionable at common law, and that any writing is libellous which tends to injure the reputation of a person, or to render him odious or ridiculous. *Villers v. Monsley*, 2 Wils. 403; *Adams v. Lawson*, 17 Gratt. 250; 4 Min. Inst. (1st Ed.) 383."

4. *Same—Case at Bar.*—To write to the plaintiff—"As you will make considerable by being summoned to court, I would advise you to go and pay George Bowman the balance you owe him for his wild hogs you killed," is libellous. "I hope you will stop swearing lies about the trees," and "I will close this letter by advising you either to quit lying or preaching, one," are libellous.

5. *Same—Publication of—Case at Bar.**—The letter containing the libel is sent sealed. The writer afterwards states in the presence of several persons, that he had got W. to write the letter for him and he had signed his own name to it, and kept a copy; and states the contents of the letter; but without producing it or a copy of it. This was a publication of the libel.

6. *Same—Evidence—Plaintiff's Good Character.*†—In an action for libel, the plaintiff may introduce evidence in chief on his general good character, before the defendant has introduced any evidence.

251 *This was an action on the case for a libel in the Circuit court of Patrick county brought in November, 1857, by William Lawson against Nottley P. Adams. The declaration after the usual colloquium set out the latter (omitting the references to the defendant and plaintiff), as follow: "Mr. William Lawson, I understand by one of the grand jury (meaning the grand jury that presented the defendant for perjury) that you appeared before the jury (meaning the said grand jury) and made

**Same—Publication of.*—See the principal case cited in *Granger v. Commonwealth*, 78 Va. 214.

†*Same—Evidence—Plaintiff's Good Character.*—In *Shroyer v. Miller*, 8 W. Va. 161, the court said: "On this question (right of plaintiff to give evidence in chief of his general good character) very much conflict of decision and authority is found in the earlier cases, both in this country and England. It is evident, I think, however, that the tendency of the judicial mind of this country, at the present day, is toward the admission of such testimony; and in the very recent case of *Adams v. Lawson*, 17 Gratt. 250, it was expressly held that such evidence was proper and admissible. As a question of practice I perceive no objection to the doctrine."

In this case the court held that it was not error to permit the plaintiff to introduce evidence to prove his good character even though it had not been assailed by the defendant nor had evidence been introduced by him to impeach it. But in 18 Am. & Eng. Enc. Law 1102, it is said that, though some cases have held the character of the plaintiff is always in issue in such an action (*i. e.* libel or slander) and therefore he may, in the first instance, introduce evidence to show it to be good (citing the principal case as authority), yet the preponderance of authority supports the view that in such an action, as in other civil actions, the good character of the plaintiff is presumed (citing *Shroyer v. Miller*, 8 W. Va. 158, as authority), and until it is attacked by the defendant, no evidence should be introduced on behalf of the plaintiff to show that his character or reputation is good; but that such evidence is admissible when the good character of the plaintiff is put in issue by the pleadings or attacked by evidence or otherwise during the course of the trial.

oath, that at the farthest there was not more than eight trees cut in the two fields (meaning thereby the two fields upon the fences around which the plaintiff swore that not more than eight trees had been cut, whereas the defendant had sworn in a former prosecution that more than eight trees were cut down upon said fence), and if you did, you swore—a lie, knowingly and willfully; for I can prove that there was nine on one field and seven on the Underwood field; though I was not surprised at your swearing that, after your swearing as you did about the presentment between Jerman Lee and myself while I was absent from home. I understand that the voice of the church was, that they (meaning the Baptist church of which the plaintiff was a member) would as leave fellowship stealing as to fellowship old Cox—(meaning thereby an old Baptist preacher in Carroll county, Virginia)—the way he acted about the land, offering to sell under the power of attorney in the name of James Powell, and then bringing suit in the name of others, making out Powell's claim not good to the land; and William Conner says he blames you more than he (meaning said Conner) does Cox. As you will make considerable by being summoned to court, I would advise you to go and pay George Bowman the balance you owe him (meaning George Bowman) for his (meaning said Bowman) wild hogs you killed (meaning thereby that the

252 *plaintiff had killed and stolen said George Bowman's wild hogs); and the four you killed last fall I believe to belong to Abram Adams (meaning thereby that the plaintiff had feloniously stolen Abram Adams' hogs). I suppose Abram (meaning said Abram Adams) is able to lose his (meaning said Adams' hogs), but I would advise you to go and pay Bowman (meaning said George Bowman), as he (meaning said Bowman) is a poor man. I want you to call at William Bryant's as you go home, and ask him (said Bryant) to go and show you the number of trees that was on the Nauman field, as Bryant helped to cut them (meaning said trees) up, and David Lewis helped to cut them down; and then I hope you will stop swearing lies about the number of trees. I say now, as I said in the commencement of this letter, that if you swore that there was not more than eight trees, you or any one else swore a lie.

"I will close this letter by advising you either to quit lying or preaching, one (meaning thereby that the plaintiff, although a preacher of the gospel, had been guilty of swearing lies), and if you want to know how you stand in this community, I would just refer you to Green Conner, as he tore down an advertisement about you, so he (meaning said Green Conner) told me, as I suppose, as Green (meaning said Green Conner) told me that they (meaning authors of the said advertisement) charged you in that (meaning said advertisement) of being a hog thief. All your object in acting as you do towards me is just to run me to

costs, and I disregard it, as I am able to bear it.

Yours, &c.,

Notley P. Adams."

The defendant demurred to the declaration on the ground, that the innuendoes, 253 and averments of facts by way of innuendoes, were not sanctioned by the words of the letter itself, or any facts and circumstances averred by way of colloquium or inducement. He also pleaded "not guilty."

Upon the hearing, the court overruled the demurrer; and on the trial the jury found for the plaintiff eight hundred and ninety-one dollars damages; for which the court rendered a judgment. To this judgment Adams obtained a writ of error from a judge of this court.

On the trial the defendant filed two bills of exception to opinions of the court overruling his motions to exclude evidence offered by the plaintiff.

1st. The plaintiff offered in evidence to the jury as the libel for the publication of which this action was brought, the letter which is set out in the declaration.

He proved by a witness that previous to the institution of this suit the said letter was delivered to him by the defendant, folded up and sealed, so as to conceal the contents from observation, and requested the deponent to deliver said letter to the plaintiff, but that the defendant did not inform the witness of the nature of the contents of said letter; and that in compliance with said request of the defendant the witness did deliver the said letter, so sealed and folded, into the hands of the plaintiff. It was also proved by another witness, that the signature to the letter was in the handwriting of the defendant. And thereupon the letter was permitted to be read to the jury without objection.

The plaintiff then introduced another witness, William Conner, who testified that some time in the summer of 1857 the defendant told the witness, in the presence of other persons, that he had sent a letter to the plaintiff; that he had got a certain Thomas B. Woolwine to write the said letter for him, and that he, the defendant, had signed his own name to it, and that he

254 had kept a copy of the letter; that at the same time defendant stated to witness the contents of the letter, without however producing or exhibiting the letter, or the copy of it. The witness was then asked by the plaintiff's counsel to state to the jury what the defendant had so informed him were the contents of the letter, but the defendant by counsel objected to the witness being allowed to make said statement to the jury; which objection was overruled by the court, and the witness was allowed to proceed with the statement thus called for from him; when the witness stated that he did not recollect sufficiently what the defendant said were the contents of the letter to state them to the jury, but that at a former term of this court he was a member of the grand jury, and the grand

jury were engaged during its session in inquiring into the facts connected with the delivery of a letter to the plaintiff by the defendant, with a view to the finding of an indictment against the defendant for libel, and that on that occasion a letter from the defendant to the plaintiff was proved and read, and that the contents of that letter were in substance the same with the statement made by the defendant of the contents of the letter, which he said he had caused to be written to the plaintiff by Woolwine as above stated. The witness was then shown by the plaintiff's counsel the letter above set forth, which was read in evidence to the jury in this suit, and asked to inspect it, and say whether it was the same letter he had heard read before the grand jury; and after inspecting it, the witness stated that it was the same letter. To the admission of all which statements of the said witness in regard to the contents of said letter and the correspondence in substance with the witness' recollection of the statements made by the defendants to him of the contents of the letter he had caused to be written by Woolwine, the defendant by counsel 255 objected, but his objections were overruled by the court, and the testimony was permitted to be given to the jury.

2d. After the plaintiff had introduced the evidence referred to in the first bill of exceptions, and before the defendant had introduced any testimony, the plaintiff offered evidence to prove his general good character, which was objected to by the defendant as not competent; but the court overruled the objection, and admitted the testimony; and the plaintiff was allowed, before the introduction of any testimony by the defendant, to introduce a number of witnesses, by whom it was proved, that previous to the publication of the libel aforesaid, the plaintiff's general character for truth and honesty was good.

Early, for the appellant.

Tucker, for the appellee.

JOYNES, J. The first question to be decided in this case is that which arises upon the demurrer to the declaration. The ground of demurrer assigned in the petition is, that the innuendoes give a meaning to the letter upon which the action is founded which its language does not authorize. But we need not trouble ourselves with this question. Where the writing on its face relates to the plaintiff, and the words are libellous in themselves, the innuendo is unnecessary and may be rejected as surplusage. 4 Rob. Prac. 733, and cases cited. I think this is a case of that sort.

It is not necessary to constitute a libel that the writing should contain the imputation of an offence which may be indicted and punished. It is sufficient if the language tends to injure the reputation of the party, to throw contumely, or to reflect shame and disgrace upon him, or to hold him up as an object of scorn, ridicule

256 or *contempt. And the court will understand the words of the writing as they would generally be understood by the rest of mankind, or as we ourselves would understand them out of court: that is to say, according to their plain and ordinary import. These are familiar and well settled principles. Vide 1 Am. Lead. Cases 132 136; Ibid 152-161.

Thus construed, the letter contains at least two express charges against the plaintiff of a libellous character. He is charged with killing wild hogs belonging to two other persons, which he is advised to pay for. We cannot fail to understand by this that the hogs were killed under such circumstances as made the killing improper and unlawful. He is also charged with pursuing a course of conduct towards the defendant with no other motive than to run him to costs, which plainly imports that the conduct was improper and unjust, and that the plaintiff was actuated by a wicked and malicious motive.

But it is not necessary to make a writing libellous that the imputations should be made in the form of positive assertion. It is equally so if they are expressed in the form of insinuation, provided the meaning is plain. 2 Saund. Pl. & Evid. 900-902; 1 Am. Lead. Cases 156; Cooke on Defamation, 4-5. The plaintiff is advised to "quit lying" and to "stop swearing to lies," which plainly imports, according to the common acceptance of language, that he has been telling lies and swearing to lies. He is further told, if he wants to know how he stands in the community, to apply to Green Conner, who told the defendant that he tore down an advertisement about the plaintiff, in which the defendant supposes, as Green Conner told him, that the plaintiff was charged with being a hog thief. What is this but an imputation that the plaintiff has been posted as a hog thief, or, at least, that the defendant had been told so
257 by Green Conner? *The letter is, on its face, addressed to Lawson, so that every imputation in it applies plainly to him.

The Circuit court, therefore, did not err in overruling the demurrer.

The next question is, whether the evidence set forth in the first bill of exceptions was properly admitted. After proving that the defendant delivered the letter to a witness, folded up and sealed, and requested him to deliver it to the plaintiff, which he did; and after the letter had been read to the jury, the plaintiff introduced another witness, who testified that the defendant stated to him, in the presence of other persons, that he had sent a letter to the plaintiff; that he had got Thomas B. Woolwine to write the letter for him, and that he (the defendant) had signed his own name to it, and kept a copy; and that the defendant, at the same time, stated to the witness the contents of the letter, but without producing it, or a copy of it. Evidence was introduced tending to show that the letter thus

referred to was the one on which the action is founded.

This evidence was, of course, offered to prove the publication of the libel, and the question is whether it was admissible for that purpose. To constitute a publication it is not necessary that the contents of the writing should be made known to the public generally. It is enough, it is said, if they are made known to a single person. Holroyd, J., 6 Eng. C. L. R. 375. They were made known to Woolwine, who wrote the letter at the request of the defendant. The defendant adopted and sanctioned what Woolwine wrote at his instance and request, and if the defendant's signature to the letter was necessary to render the act complete, there was evidence from which the jury might have inferred that the signature was attached in the presence of Woolwine. My

impression is, that there was a sufficient publication to *Woolwine stated in this evidence to maintain the action. The subsequent repetition of the contents of the letter was undoubtedly a publication. In the case de libellis famosis, 5 Rep. 125, it is said that publication may be "verbis aut cantilenis, as when the libel is maliciously repeated or sung in the presence of others." In Lamb's case, 9 Rep. 59, it is said, that if one who has read a libel, or heard it read, repeats it, or any part of it, in the hearing of others, that is a publication. In Bac. Abr. Libel B. this is laid down as undisputed law. The court did not err, therefore, in receiving the evidence.

After the plaintiff had given evidence as to the writing and publication of the libel, and before the defendant had introduced any evidence, the plaintiff offered to introduce evidence to prove that before the publication of the libel, his general character for truth and honesty had been good. The defendant objected to the admission of this evidence; but the court overruled the objection: and the admissibility of this evidence constitutes the only remaining question in the case.

This question has given rise to much difference of opinion in England and in this country. In England the question appears to be unsettled. The only cases I find were cases at Nisi Prius; and they are conflicting. In King v. Waring & ux., 5 Esp. R. 13, Lord Alvanley allowed the plaintiff to give evidence of her general character, before any evidence had been introduced by the defendant. The decision was put on the ground that the general character of the plaintiff was, in some respects, in issue, and that such evidence ought to be received in answer to the slander. Starkie expresses the opinion that the plaintiff must rely upon the presumption which the law makes in favor of the goodness of his character; and that he cannot, therefore, give evidence to

259 prove his character to be good until it has been assailed by evidence on the part of the defendant. 2 Stark. Ev. 218. The case which is usually cited as showing that in England the plaintiff is

not allowed to give evidence in chief to prove his general character, is the decision of Chief Justice Abbott in *Cornwall v. Richardson, Ry. & Mood*. 305 (21 Eng. C. L. R. 446). But that decision appears to have been placed upon the doctrine that the defendant is not at liberty to introduce evidence to impeach the general character of the plaintiff; a doctrine which was condemned by this court in *McNutt v. Young*, 8 Leigh 542.

It is not necessary to make any further reference to the English cases, as they afford no material aid in the solution of the question.

In this country the cases are conflicting. Many of them are collected in 1 Am. Lead. Cases 207. Cases are there cited from Connecticut and South Carolina, in which the right of the plaintiff to give evidence in chief as to his general character is maintained. To these may be added a recent case in North Carolina, in which the same doctrine was held upon full consideration. *Sample v. Wynn*, Busbee Law R. 319. These cases proceed upon the ground that, from the nature of the case, the general character of the plaintiff is involved in the issue, or more properly in the trial of the issue, in every such action. Greenleaf says, that in actions of slander (and the same reason applies to libel), it is well settled, that the plaintiff's general character is involved in the issue, and that, therefore, evidence showing it to be good or bad, and consequently of much or little value, may be offered on either side to affect the amount of damages." 2 Greenl. Evid. § 275.

This precise question has never been decided by this court. But in *McNutt v. Young*, 8 Leigh 542, it was held that though, strictly speaking, the general character of the plaintiff was not within the issues, yet it was involved in the trial of the issues, because it was necessary to be considered with reference to the quantum of damages. Hence a man of bad character is not entitled to recover as much as a man of good character. Upon this ground it was held that the defendant was entitled, in mitigation of damages, to give evidence of the general bad character of the plaintiff in reference to the subject matter of the slander. The reasoning of the judges in that case, and the decision in the subsequent case of *Lincoln v. Chrisman*, 10 Leigh 338, seem to show that the defendant will not be confined to the character of the plaintiff in reference to the particular subject of the slander.

It being thus important to the decision of the case that the jury should hear evidence as to the character of the plaintiff, either generally or in reference to the particular subject matter of the slander or libel, can any good reason be assigned why it should depend on the option of the defendant whether they shall hear such evidence or not? Such a one-sided rule would not be fair and equal as between the parties, would often defeat the justice of the case, and might operate great hardship upon a plain-

tiff who is unknown to the jury. The defendant would not open the door by an attack on his character, and he would not be allowed to sustain it by evidence in chief. It does not appear to me to be a satisfactory answer to say, that the plaintiff ought to stand upon the presumption which the law makes, in the absence of evidence to the contrary, that his character is good. Why should the plaintiff be compelled to rely upon such a general presumption, when he offers to prove that the presumption, in his particular case, is in accordance with the fact? And what right has the defendant to complain, since the evidence is only offered to establish with

more certainty what the law would presume to be true in the absence of all evidence? I am not aware of any case in which a mere presumption that a fact exists, which is liable to be rebutted, is held to preclude a party in whose favor the presumption is made from introducing evidence to prove that the fact is really so. And besides, the character of the plaintiff is always impeached when the slander or libel imputes crime or moral delinquency, and the charge moreover may proceed from a person whose known position and character give it weight with the jury.

I think, therefore, that the evidence offered by the plaintiff in this case was properly received. Such evidence was admitted in *Lincoln v. Chrisman*, above cited, and there was no intimation by any of the judges of this court that it was not admissible. Indeed the language used by Judge Parker in that case, and by Judge Brockenbrough and Judge Tucker in *McNutt v. Young*, seems strongly to indicate that they would have held such evidence admissible, if the question had been before them.

I am of opinion to affirm the judgment.

The other judges concurred in the opinion of Joynes, J.

Judgment affirmed.

262

**White v. Dobson & al.*

January Term, 1867, Richmond.

1. *Contract for Sale of Land—Specific Performance—When Purchaser May File Bill for.*—When a vendor of land has notified the purchaser that he will not fulfill the contract, the purchaser may file a bill for a specific execution of it without making a tender to the vendor of the securities provided for therein.
2. *Same—Same—Defective Title.**—There being two parcels of land embraced in the contract, each at a specific price, if the vendor can make a good title to but one parcel the vendee is entitled to have a conveyance of that parcel, if he will pay the stipulated price of that parcel, and accept it in full satisfaction of the contract.
3. *Same—Same—Rents, etc.—Interest.*—The vendee is entitled to have, if he elects it, an account of the rents, issues and profits of the land, and to have

*See foot-note to *Griffin v. Cunningham*, 19 Gratt. 571.

them set off against the purchase money; or if he elects to waive an account, he shall not pay interest on the purchase money.

This was a suit for the specific performance of a contract for the sale of two tracts of land in the county of Gloucester, brought by Samuel C. White, of York county, against William Dobson and Joel Hayes. The subpoena was issued and served on the 4th of March, 1859. The plaintiff in his bill stated that on the 20th of January, 1859, he had entered into an agreement with Wm. Dobson, under the hands and seals of the parties, by which Dobson had sold to the plaintiff two tracts of land in the county of Gloucester, upon terms which he sets out. That the plaintiff had at all times been willing and ready to carry the agreement into execution, and had repeatedly applied to Dobson for that purpose; but that

Dobson, without any sufficient reason
263 therefore, refuses to *comply with said agreement on his part, and declares that he will not execute the same. He makes Dobson and Joel Hayes, who he understands has a lien on the land, parties defendants, and prays for a specific performance; and for general relief.

Dobson answered the bill. He says it is untrue as stated in the bill that he refused, at the time the process was issued in the cause, to carry out the contract. On the contrary, he says that before the process in the cause was issued he notified the plaintiff that he was ready to execute the contract as far as he could do so on his part; and the plaintiff was fully aware of the fact. That the plaintiff has wholly failed to do and perform his obligations under the said contract; and having so failed, the defendant insisted that he was absolved from it.

The contract which was exhibited with the bill, states that Dobson had sold to White one undivided half of a tract of two hundred and five acres, describing the land, at \$1,742.50, payable in one, two and three years, to be secured by mortgage on the land, with interest from the date of the contract, free from all lawful claims upon it; and also another tract of six acres, at the price of \$550, payable on the 1st of January, 1860. And they bound themselves to each other in the sum of \$500 for the faithful performance of the contract.

The plaintiff introduced evidence to prove that in February, the parties and John T. Dobson, the owner of the other half of the larger tract, with a surveyor, came to the house of the witness to divide the land, when Wm. Dobson said to White that he (Dobson) would pay the forfeit rather than White should have the land. He also introduced another witness who stated that at the request of White, the witness did, about the 8th of February, deliver to Dobson a letter from White, in which he stated that

he wished to settle the contract amicably, and was *ready on his part to comply with it; and informing Dobson if he did not comply, White would be

under the disagreeable necessity of instituting a suit to enforce the contract. And that Dobson upon reading the notice declared to the witness, that he would not comply with the contract; and that White might bring a suit to enforce it as soon as he pleased.

The defendant introduced a witness, who stated that on the 28th of February Dobson informed him that, on mature consideration, he had made up his mind to comply with the contract between himself and White, for the sale of the two tracts of land; and as White and himself had had some difference about it he wished the witness to go with him to see White. That the next morning, the first of March, they went together to White's house in York county. When they arrived there they were told by a son of White, that he had gone to Williamsburg, but he was expected to be at home by dinner time. That they remained until late in the evening, when witness, at the request of Dobson, wrote a note to White, which was signed by Dobson, stating that he had been there to see him but could not; he therefore took this method of informing him that he was willing and ready to comply with the contract; and requesting White to come over to Dobson's house the next day, or as early as possible, to execute his bonds for the purchase money; and that he, Dobson, would at the same time execute the deeds for the land. This note was directed to Samuel C. White, and left with his son, at the residence of Samuel C. White; and the son said he would deliver it to his father as soon as he returned home.

The cause came on to be heard at the August term of the court for 1860, when the court dismissed the bill, with costs. And thereupon White applied to this court for an appeal, which was allowed.

265 *Lyons, for the appellant.
Seawell, for the appellee.

JOYNES, J., delivered the opinion of the court:

The court is of opinion that there is no sufficient evidence that the appellant, before the filing of his bill in this case, received notice, as alleged in the answer of the appellee William Dobson, of the willingness of the said appellee to fulfill on his part, the contract in the bill mentioned. And as the said appellee had notified the appellant of his intention not to fulfill the said contract, the court is further of opinion that the appellant was entitled to file his bill for a specific execution of the said contract without making a tender to the said appellee of the securities provided for therein; and that therefore the decree of the Circuit court dismissing the bill of the appellant is erroneous. Therefore it is adjudged and ordered, that the said decree be reversed and annulled, and that the appellee William Dobson pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here.

And this court proceeding to render such decree as the said Circuit court ought to

have rendered, it is further adjudged and ordered, that it be referred to one of the commissioners of the court to inquire and report whether a good title in fee simple can be made to the appellant to the two parcels of land in the said contract mentioned, or to either of them, with the character and amount of any liens or incumbrances that may exist on the same or either of them, and also to take an account, if the appellant shall desire it, of the rents, issues and profits of the said parcels of land, respectively, since the date of the said contract, with any matters specially stated deemed pertinent by himself or required by any party to be so stated.

And if, upon the coming in of said report, it shall be ascertained that a good title as aforesaid can be made to the said two parcels of land, or that a good title as aforesaid, can be made to either one of the said parcels, and not to the other, then the court is further of opinion, that the said Circuit court should make a decree requiring the said appellee William Dobson, by a day to be fixed by said decree, to convey to the appellant, by deed with general warranty duly executed and authenticated for recordation, and duly stamped according to the act of congress, the said two parcels of land, or that one to which a good title can be made, in case a good title cannot be made to both, provided that, in the latter case, the appellant shall elect to take a decree for that parcel alone, in full satisfaction of the contract, upon payment by the appellant to the said appellee William Dobson, of the money stipulated by the said contract to be paid for the land so to be conveyed, with interest thereon according to the terms of said contract, after deducting therefrom what shall be found to be due from the said appellee for the rents, issues and profits of the land so to be conveyed; which shall be applied to the reduction of the purchase money at the end of each year: or if the appellant shall elect to waive an account of rents, issues and profits, then upon payment by the appellant to the said appellee of the principal money stipulated by the said contract to be paid for the land so to be conveyed, without interest; in which decree the said Circuit court should make provision in such manner as may seem best, for the satisfaction of any liens or incumbrances that may be found to exist upon the land so to be conveyed. And that in case the said appellant shall, upon the tender of such deed, pay the money so to be paid by him, or in case no title can be made as aforesaid, then, in either of said cases, the said Circuit court should decree the costs in said court to be paid by the said appellee William Dobson.

267 *And the court is further of opinion, that in case the appellant should, upon the tender of the conveyance aforesaid, fail to pay the money to be paid by him, the said Circuit court should dismiss the bill of the appellant, and should decree that he pay to the said appellee William Dobson the costs of the suit in said Circuit court,

together with the costs and expenses attending the execution of the said conveyance, including the value of the stamps thereon.

And the cause is remanded to the said Circuit court for further proceedings to be had therein, according to the principles of the foregoing opinion and decree.

Decree reversed.

268

*Smith's Ex'or v. Smith & als.

January Term, 1867, Richmond.

1. **Wills—Residuary Clause—Construction of.**—"All the rest and residue of my estate which may at any time come to the hands of my executor, either from the lapsing of the aforesaid legacies or otherwise," held, upon a consideration of the whole will and surrounding circumstances, to include the testator's real estate.

2. **Same—Legacies Chargeable on Real Estate.**—Legacies held to be made good out of the real estate if the personal estate is not sufficient.

This was a bill filed in the Circuit court of Alexandria county, in August, 1855, by Richard C. Smith, executor, trustee, devisee and legatee of Hugh C. Smith deceased, to obtain a construction of the will of his testator. The heirs, devisees and legatees of Hugh C. Smith were made parties defendants to the suit. The will bears date on the 25th of July, 1854, and was admitted to probate in the County court of Alexandria

***Wills—Residuary Clause.**—In *Gallagher v. Rowan*, 86 Va. 827, 11 S. E. Rep. 131, the court said: "When a man makes his will, the presumption, as already remarked, is that he intends thereby to dispose of his whole estate, especially where the will contains a general residuary clause, and hence very strong and special words are required to show that the testator intended the residuary bequest to have a limited effect, and thus to rebut the presumption in favor of the residue. *Smith's Ex'or v. Smith*, 17 Gratt. 268; 2 Jarm. Wills, 762."

†**Same—Legacies—Chargeable on Real Estate.**—In *Wood v. Sampson*, 25 Gratt. 848, the court said: "One of the rules or canons of construction is, that where there is a general gift of legacies, and then the testator gives the rest and residue of his property real and personal, the legacies are chargeable upon the realty. It is considered that the testator, in blending his real and personal estate into a common fund, plainly indicates his purpose to make no distinction between them. And as there is no previous devise of any portion of the real estate, the residue can only mean what remains after satisfying the legacies. This is the established doctrine of the English courts; is almost universally recognized in this country; and was acted on by the court in *Crouch v. Davis' Ex'or*, 23 Gratt. 62, where the authorities are cited. See *Greeville v. Brown*, 7 House of Lords Cases 688; *Smith's Ex'or v. Smith*, 17 Gratt. 268."

See also, *Crouch v. Davis*, 23 Gratt. 62, and *foot-note*.

Same—Rules of Construction—When They Do Not Apply.—In *Withers v. Sims*, 80 Va. 661, the court cited the principal case and *Tebbs v. Duval*, 17 Gratt. 361, as authorizing the proposition that general rules of construction as to wills cannot apply when a contrary intention appears in the will.

county, on the 9th of August, 1854. As almost every part of the will is referred to in the opinion of the judge as bearing upon the construction of the instrument, it is here given at length.

I, Hugh Charles Smith of Alexandria, Virginia, do make this my last will and testament, hereby revoking all others at any time by me heretofore made.

I give, devise and bequeath to my beloved niece Mary Jane Smith (who for some time past has resided in my family), all my stock in the fire insurance company of Alexandria, also all my household and kitchen furniture, including beds, linen, plate, &c., together with all my books and parlor ornaments and wine. I desire that

269 *these shall be handed over to her without inventory or appraisement; but should it become necessary that they should be valued, I would estimate them at eighteen hundred or two thousand dollars. To my friend, the Rev. Joseph R. Wheeler, I give and devise the sum of two hundred dollars. To my servant Addison Webster, when he attains his freedom, the sum of one hundred dollars, recommending him to place it in the savings bank until he can use it profitably. I would recommend him also to seek Liberia as his home. I give and devise to my friend J. P. Milledge of Boston, and to my brother Richard C. Smith, the sum of twelve thousand dollars upon trust, to invest the same, and to apply the proceeds, or so much thereof as may be necessary, for the support and maintenance of my son H. Charles Smith, now at the school for the feeble-minded at Boston; and should there be any surplus from the income from the said twelve thousand dollars, after paying for the support and maintenance of my said son, and affording him every necessary comfort, and defraying the expenses of the trust, they will be authorized, and I direct them to use the same sum from time to time, or so much thereof as may be necessary, in defraying the traveling expenses of any of my sisters who may from time to time desire to visit my said son H. Charles. Any surplus of the income not expended as above directed, will be added to the principal, and re-invested by the trustees upon the trust above mentioned. I desire that full and ample allowance be made for my said son; and if the fund here set aside should prove to be insufficient for the purpose of his support and maintenance, I direct my executor to make up and provide for the deficiency out of the residue of my estate. Upon the death of my said son H. Charles, I give and devise the said twelve thousand dollars and the unexpended increase thereof, to the children of my

270 *deceased wife's brothers and sisters, viz: to the children of Archibald Keightly, Elizabeth Job, Wm. T. Keightly and Mary Smith deceased, or their heirs; and in making a division of the fund, each family shall receive an equal share. I solicit my friend J. P. Milledge and my brother Richard C. Smith to act as trustees in this case, and request that no security

shall be required of them. Should the investment of the said twelve thousand dollars not be made by me for the purposes above mentioned before my decease, I request that it be attended to as soon after my decease as possible. In the event of my making other provision for my said son's maintenance and support before my decease, it will be considered in lieu of the trust hereinbefore created.

I give and devise to my beloved son Alfred Archibald Smith, the sum of ten thousand dollars, to be paid over to him on his attaining to the age of twenty-one years. If invested in stocks, I wish it paid over to him in that shape, estimating the stocks at their par value, provided they are then worth par or over, it being my desire that on his attaining his majority he shall receive ten thousand dollars in stocks, which are then worth at least their par value. On my son Alfred Archibald attaining to the age of twenty-one years, I desire my executor to invest the further sum of twenty thousand dollars in some safe stock, or upon real security, any premium on which stock shall be paid out of my estate; and the same to be held by him upon trust to collect and re-invest the interest and profits thereof until my said son Alfred shall attain to the age of twenty-five years; and then and thereafter the said fund and the accumulations thereon shall be held by my executor upon trust, to pay over the income and interest arising therefrom to my said son Alfred Archibald during his life; and upon

his death to be equally divided amongst 271 any children he may leave *or their descendants, per stirpes; and should he leave no children nor their descendants, then the said fund shall be paid over to such persons as my said son may by his last will and testament designate and appoint. I desire that his cousin Mary Jane Smith shall have the care and charge of my said son Alfred and of his education until he shall attain to an age when it will be proper for him to determine as to what profession or business he would desire to qualify himself for; say the age of seventeen. For the purpose of securing to my said son Alfred a plain and solid education and a comfortable and adequate maintenance and support, I direct my executor to pay to his cousin Mary Jane Smith, or to such other member of my own or my wife's family who may have the care and charge of him, the sum of one thousand dollars per annum so long as he may remain under her or their care, and charge the said sum to be paid over to the person having charge of him, to be used and appropriated by them for the purposes above mentioned, without account, further than her or their receipt for the money. I wish that no extravagance shall be connected with his education in any way; and I trust he will be taught care and economy and a prudent and generous liberality.

Should there be any surplus of the said annual sum of one thousand dollars after affording him all necessary comforts, I wish the party to whom it shall have been paid

to apply it to his or her own use. When my said son Alfred shall desire to select a profession or business, I trust his kind friends and relations in England and America will consult and advise with him on his course in life. My main object and ardent desire is that he shall have religious and domestic influences and domestic comforts wherever he may be. Should my son Alfred die before attaining to the age of twenty-one years, I desire that the sum of ten thousand dollars shall be divided
272 amongst *the children of my deceased wife's brothers and sisters in the same manner as hereinbefore directed in reference to the sum of twelve thousand dollars, and the unexpended increase thereof, on the death of my son H. Charles.

All the rest and residue of my estate, which may at any time accrue and come to the hands of my executor, either from the lapsing of any of the aforesaid legacies or otherwise, I wish to be divided into equal portions corresponding in number with the number of my brothers and sisters living at the time of my decease. And should any of my brothers and sisters die leaving children before my decease, a share shall be set apart for such children, as if my said brother or sister were still living. And I direct that each of my brothers and sisters who are unmarried or childless, shall receive one of said shares, and the other shares to go to the children of my other brothers and sisters, so that each family will receive an equal share, and each child to receive their portion on attaining the age of twenty-one years.

I nominate and appoint my brother Richard C. Smith executor of this my last will and testament, and solicit him to act as such, and as guardian to my son Alfred. I direct that no security shall be required of him; and I hereby grant him full power to sell or lease any or all of my real estate, when in his discretion and judgment it may be right and proper. He is also authorized, when needed, to employ a clerk and also an agent to attend to the settlement of the estate or to the preservation and management of the real property.

In testimony whereof, I have hereunto set my hand and seal this 25th day of July in the year of our Lord eighteen hundred and fifty-four.

Hugh Charles Smith. [Seal.]

273 *The plaintiff states in the bill, and it seems to have been taken as correct, that the real estate of the testator was appraised at the sum of forty-seven thousand dollars; that the appraised value of the personal estate was forty-five thousand nine hundred and sixty-seven dollars and fifty-eight cents; and that the debts due by the testator amount to about twenty-five hundred dollars.

It appears that the legatees of the testator were numerous and some of them were of age at the time of his death, and others of them were minors: those who are spoken of as relations on the part of his wife numbered twenty. He left six brothers and

sisters at his death, one of whom was married and had no children, another was unmarried; and the rest were married and had children; the number of children were seventeen; all but five of them infants.

Among the questions submitted to the court are the following:

1. Whether the real estate of the testator passes, under the residuary clause of the will, to the children of the testator's brothers and sisters, or whether it is undisposed of by the will, and descends to the testator's two sons as his heirs at law?

2. If the personal estate should be inadequate to meet the legacies and charges upon it, are these legacies chargeable upon the realty?

3. Does not the testator convert the realty into personalty for all the purposes of the will, so as to make the surplus, after paying the legacies, a part of the residue which is to pass to the children of his brothers and sisters, and to such of his brothers and sisters who may be unmarried or childless?

The cause came on to be heard on the 27th of May, 1856, when the court held—
274 That the testator Hugh C. Smith died intestate as to his real estate; but that if the *personal estate should prove inadequate for the payment of the legacies, the deficiency would be a charge upon the real estate: and that the charge upon the real estate for such deficiency extends for the benefit of the relatives of the testator's wife in the event of his son Alfred's dying before he attains the age of twenty-one years.

That the real estate of the testator is not by his will converted into personalty; but the executor has a discretionary power to sell the same; which discretion would, according to circumstances, be regulated and controlled by a court of equity.

The court held further, that the legacies to the brothers and sisters of the testator vested immediately; and the legacies of the \$10,000, on the death of Alfred before attaining the age of twenty-one years, would vest immediately on his death. And that the executor might invest the \$10,000 in Virginia state stocks, under the order of the court; and if on Alfred's coming of age the stocks were depreciated so that they would not sell for \$10,000, the deficiency must be made good out of the estate. The executor asked for an appeal from this decree, which was allowed.

The case was argued by Brent and Wattles, in a printed note, for the residuary legatees, and orally by Tucker, for the heirs at law.

MONCURE, J. The question to be decided in this case is, whether the residuary clause of the will of Hugh Charles Smith embraces his real estate?

When a man makes his will the presumption, in the absence of evidence to the contrary, is, that he intends thereby to dispose of his whole estate. He often manifests this intention at the commencement of the
275 will by *using such language as this:

"I dispose of my estate in the following manner."

This or similar language in the beginning of a will has been held in several cases sufficient to enlarge the meaning of words used in the residuary clause so as to make them embrace real estate, though the words in their proper signification were more applicable to personality, and that, even though the effect of such construction would be to disinherit the heir.

No such language was used at the commencement of the will in this case. And yet I think it plainly appears from the whole frame of the will, the manifest scheme of the testator, and the circumstances which surrounded him when he made his will, so far as they are disclosed by the record, that he intended by his will to settle and dispose of his whole estate.

He had when he wrote his will, which was a few days only before his death, the will being dated the 25th of July and recorded the 9th of August, 1854, no wife living, and only two children: his son H. Charles, then at the school for the feeble-minded at Boston, and his son Alfred Archibald, who appears to have been very young, though his precise age is not mentioned in the will nor elsewhere in the record. These two children were naturally chief objects of the testator's bounty. But he had a large estate, worth, after the payment of his debts, about \$90,000, a little more than half in value of which consisted of realty, and there were living many brothers and sisters of himself and his wife, who, or most of whom, had large families, who were also chief objects of his bounty.

The will has all the formality of a perfect disposition of his whole estate, and the language used is sufficiently apt and comprehensive for the purpose. The introductory clause is just such a one as might
276 be expected in *such a will. "I, Hugh Charles Smith, of Alexandria, Virginia, do make this my last will and testament, hereby revoking all others at any time by me heretofore made."

The testator then proceeds to give to a beloved niece (on the side of his wife) Mary Jane Smith, who for some time had resided in his family, some specific articles, amounting in value to \$1,800 or \$2,000; to his friend the Rev. Joseph R. Wheeler, \$200; and to his servant Addison Webster, \$100; after which he provides for the chief objects of his bounty in the manner following, to wit: "I give and devise to my friend J. P. Milledge of Boston," &c. (See the will.)

The words "All the rest and residue of my estate" in the residuary clause of the will, are certainly in themselves comprehensive enough to embrace real as well as personal estate; and there could have been no question as to the testator's meaning in this respect, if he had not coupled them with the immediately succeeding words, "which may at any time accrue and come to the hands of my executor, either from the lapsing of any of the aforesaid legacies

or otherwise." These additional words, without more, would have had the effect of confining the word "estate" to personality; which alone, in the absence of other provisions of the will, could accrue and come to the hands of the executor. But the next clause, which nominates the executor, clothes him with extensive and important powers, duties and trusts in regard to the real estate, in these words: "I hereby grant him full power to sell or lease any or all of my real estate when, in his discretion and judgment, it may be right and proper. He is also authorized, when needed, to employ a clerk and also an agent to attend to the settlement of the estate, or to the preservation and management of the real property."

Here the testator, by the strongest
277 possible language, *gives to his executor the control, management, possession and administration of his real estate, granting him full power to sell or lease any or all of it, according to his discretion and judgment. Whatever might have been his relation to the real estate under such a will as this, anterior to the provisions of our statute law on the subject, there certainly can be no doubt but that under the Code he is chargeable with the real estate in his character of executor as much as he is with the personality. Code, ch. 131, pp. 598, 599. The second section of that chapter declares, that "it shall be one of the duties of an executor or administrator by virtue of his office, and as such embraced by his official bond, faithfully to pay the rents and profits or proceeds of sale of real estate which may lawfully come to his hands, or to the hands of any person for him, to such persons as are entitled thereto." Real estate is made by statute assets for the payment of debts like personality, where it is not made equitable assets by will, and is liable like other assets in the hands of an executor or administrator whenever it or its proceeds come to his hands by the terms of the will, whether under a power coupled with an interest or a trust, or under a mere power, the distinction between which seems, as to this question, to be wholly immaterial. The real estate then, by the express terms of this will, is a part of the estate which accrued and came to the hands of the executor, and is therefore expressly embraced in the residuum.

I do not think there is any material force in the argument that as the person named as executor is also requested to act as guardian to the testator's son Alfred, the powers given to him over the real estate may have been given to him in his character of guardian, and not in his character of executor. It is obvious from the nature of the powers, and from the terms of the
278 particular *clause which give them, and from the whole will, that the powers were given to him in his character of executor.

This being the natural and proper meaning of the words used in the residuary clause, the question to be now considered is, whether there be anything in the other

parts of the will, or in the whole will taken together, read by the light of surrounding circumstances, which requires us to put upon those words a different meaning, and to confine them to the personal estate? So far from that, I think it will be found that the natural and proper meaning of the words used in the residuary clause is confirmed by the rest of the will.

The will is certainly not inofficious. The testator provides most amply for both of his sons. In regard to his feeble-minded son H. Charles, who, I suppose, in the nature of things, could have no family, and who therefore required no provision for a longer period than his life, the testator gives \$12,000 to trustees to be invested for the support and maintenance of his said son during life, expressing a desire that full and ample allowance should be made for that purpose; and if the fund thus set apart should prove to be insufficient for the support and maintenance of his said son, directing his executor to make up and provide for the deficiency out of the residue of his estate. Upon the death of his said son, the testator gives the said \$12,000 and the unexpended increase thereof to the children of his deceased wife's brothers and sisters. There are two things observable in regard to this provision for the feeble-minded son, as materially bearing upon the question we are now considering. First—That his executor is directed to provide for the deficiency out of the residue of his estate, that is, his whole estate, real and personal, which is to come to the hands of his executor, by whom the deficiency is to

279 *be made up. Secondly—The provision thus made for this son is not only a full and ample provision for him, but evidently all that the testator intended him to have out of the estate. Surely the testator could not have intended that this son should have, in addition to what was thus given him, one-half of the real estate, worth \$47,000. What could he want with it? or, to speak more properly, what need had he of it? All his possible wants were amply supplied by the provision expressly made for him, and the whole residue of the estate, real and personal, was charged with the deficiency, and the executor was clothed with ample power to make up any such deficiency out of such residue. If the said son could have needed anything beyond a life estate, the \$12,000 would not have been given over at his death to the children of the brothers and sisters of the testator's deceased wife. But what was to be done with his share of the real estate during his life and after his death, supposing that the testator intended that he should have one-half of the real estate? Are the rents and profits to accumulate during his life, for the benefit of his collateral heirs at law at his death? He did not need them for his support during his life. Would the testator, who has been so careful in regard to the \$12,000, have said not a word in regard to the disposition to be made of the real estate or the rents and profits thereof, either during the life

or at the death of his said son, if he had intended said son to have one-half of the real estate? If he so intended, could there have been any occasion for providing that, should the fund set apart for the support and maintenance of his said son prove insufficient for the purpose, the deficiency should be made up out of the residue of the estate? It is impossible, I think, to read the will without being satisfied that the testator intended to give to his son H.

Charles no more of his estate than 280 *that which was devoted to the support and maintenance of his said son as aforesaid.

In regard to his other son Alfred Archibald, a full and ample provision is made for him also. It does not appear what was his age at the testator's death, though he was certainly under seventeen, and probably very young. For the purpose of securing to him a plain and solid education, and a comfortable and adequate maintenance and support, the testator directs his executor to pay to Mary Jane Smith, a niece of his wife and a favorite of the testator, living in his family at the time of his death, or to such other member of his own or his wife's family who might have the care and charge of his said son, the sum of \$1,000 per annum, so long as he might remain under her or their charge. This was certainly a most ample provision for the purpose. On his attaining the age of twenty-one years, \$10,000 are to be paid to him, to be his absolutely. In the event of his death without attaining that age, this sum of \$10,000 is directed to be divided among the children of the brothers and sisters of the deceased wife of the testator, in the manner directed in reference to the sum of \$12,000 before mentioned. On his attaining to the age of twenty-one years, the testator desired his executor to invest the further sum of \$20,000 in some safe stock or upon real security, to be held by the executor upon trust to collect and re-invest the interest and profits thereof until his said son Alfred should attain to the age of twenty-five years, and then and thereafter the said fund and the accumulations thereon to be held by the executor upon trust to pay over the income and interest arising therefrom to the said Alfred during his life, and upon his death to be equally divided amongst any children he might leave, or their descendants, per stirpes; and in the event of his leaving no issue living at his death, then

281 *the said fund was directed to be paid over to such persons as the said Alfred might, by last will and testament, designate and appoint. Now this is not only an ample provision for the testator's son Alfred, but it is obviously, I think, all that the testator intended to give him. To have given him more the testator may have supposed might do his said son more harm than good, by diminishing his incentives to exertion, and causing him to spend his life in idleness and extravagance. The testator manifested in his will much solicitude on this subject, and while he secures to his

said son the means of procuring "a plain and solid education, and a comfortable and adequate maintenance and support," he expresses a "wish that no extravagance shall be connected with his education in any way," and a trust that "he will be taught care and economy, and a prudent and generous liberality." And then he says: "When my said son Alfred shall desire to select a profession or business, I trust his kind friends and relations in England and America will consult and advise with him on his course of life. My main object and ardent desire is that he shall have religious and domestic influences and domestic comforts wherever he may be." Can it be believed that, in addition to these careful and ample provisions in regard to his son, the testator intended to give him, or leave to descend upon him, in fee simple, one-half, and ultimately the whole, of a real estate worth \$47,000? If he had intended that his said son should have that estate, would he not have created a trust and prescribed limitations in regard to it, as he did in regard to the \$20,000? Would he not have said plainly, whether the estate was to be delivered to his said son on attaining the age of twenty-one years, or was to be continued to be held thereafter by his executor, and what, in the latter event, was to be done with the profits; whether to be paid

over as received *to his said son, or to accumulate for the benefit of the issue or devisees of his said son? Having provided amply for his two sons, and also for the children of the brothers and sisters of his wife, and having several brothers and sisters of his own who, or most of whom, had large families, for whom and their families he wished to provide, was it not reasonable and natural that he should give the residue of his estate, whether consisting of realty or personalty, to his said brothers and sisters or their children? And if we find, on reading the balance of his will, that he uses language which, according to its proper import, creates such a gift, can we defeat his intent upon any such ground as that an heir at law cannot be disinherited by implication? Certainly not.

And now let us look to the residuary clause and that which nominates the executor and prescribes his duties and powers in regard to the real estate.

It is impossible to read the residuary clause without being satisfied that the testator thereby intended to give a substantial benefit to the objects of his bounty therein mentioned. Those objects were his own brothers and sisters and their children, the nearest living relations he had, after his two sons, whom he had in the previous part of his will amply provided for. "All the rest and residue of my estate which may at any time accrue and come to the hands of my executor, either from the lapsing of any of the aforesaid legacies or otherwise, I wish to be divided into equal portions, corresponding in number with the number of my brothers and sisters living at the time of my decease. And should any of

my brothers and sisters die leaving children before my decease, a share shall be set apart for such children, as if my said brother or sister were still living. And I direct that each of my brothers and sisters who are unmarried or childless shall receive one of said shares, and the other

283 *shares to go to the children of my other brothers and sisters, so that each family will receive an equal share; and each child to receive their portion on attaining the age of twenty-one years."

The testator had six brothers and sisters living at the date of his will and also at the time of his death, two of whom were at the latter period unmarried or childless; the rest had children in different numbers amounting in all to seventeen. So that the residuum was first to be divided into six parts, and four of the parts were then to be subdivided in different proportions into seventeen parts; that is, one of the four into two parts, one into three, one into four, and one into eight parts. Five of these children were of age when the testator died, or at least when the suit was brought, and the rest were under age. The debts of the testator and the pecuniary legacies given by his will are about equal to his personal estate. So that if he did not intend to dispose of his real as well as his personal estate his residuary legatees will get nothing except in the remote contingency of his son Alfred's dying without issue and without disposing by will of the \$20,000 left to him, in which event the residuary legatees will become entitled to that sum as a lapsed legacy. It was argued that the testator may have over-estimated the value of his personal estate, and may have supposed that he was giving to his residuary legatees, numerous as they were, a substantial benefit in giving them only the residuum of his personal estate. But it must be remembered that the testator died a few days only after his will was written, and there could have been no material change in the value of his property in that short interval. It does not appear of what his personal estate consisted. His debts amounted to but \$2,500. It is not probable that he estimated his personal estate much above its real value. He gave to

284 *the nephews and nieces of his wife what was equivalent to a certain legacy of \$12,000 at the death of his son H. Charles, and a legacy of ten thousand more in the event that his son Alfred should die under age. It is fair to presume that he did not intend to give less to his own brothers and sisters, nephews and nieces. He contemplated an immediate division, at least to some extent, among his residuary legatees at the time of his death or in a reasonable time thereafter. His death is fixed as the period when his residuary legatees are to be ascertained. Any brother or sister then living, unmarried or childless, was to have a share, and the rest was to be divided among the children of the other brothers and sisters, each child to receive his or her portion on attaining the age of

twenty-one years. Some of the children were already of age, and were of course entitled to receive their shares immediately, or so soon as the subject came to hand and was ready for division. The testator evidently wrote the residuary clause of his will in reference to a subject the chief part of which he contemplated as presently divisible at or shortly after the period of his death. He did not anticipate the death of his son Alfred without issue and without will as a probable event, though he knew it was possible, and therefore made his residuary clause broad enough to embrace it. But he made the clause more in view of a subject which was at the same time substantial and certain and capable of being presently enjoyed. The testator has clearly manifested an intention that the children of his brothers and sisters should be preferred as objects of his bounty to their parents, and therefore includes among his residuary legatees only such of his brothers and sisters living at his death as were unmarried or childless. Is it reasonable to suppose that he would have left the whole

of his real estate to descend to his 285 brothers and sisters as heirs at *law in the event of his son Alfred's dying under age, or without issue or will? If he had intended that his real estate should descend at all to his sons, is it not reasonable to suppose that he would have provided for the contingency of their dying under age or without issue or will, and directed the real estate in that event to be divided in the same manner and among the same persons as he had directed in regard to the residuary personal estate.

It seems to me, therefore, that the residuary clause itself affords strong intrinsic evidence of an intention to include therein the real as well as the personal estate. And this, I think, is rendered conclusive by the clause immediately succeeding, which nominates the executor and prescribes his duties and powers in regard to the real estate. "I hereby grant him full power to sell or lease any or all of my real estate when, in his discretion and judgment, it may be right or proper. He is also authorized when needed, to employ a clerk and also an agent to attend to the settlement of the estate or to the preservation and management of the real property." The testator obviously intended to place both his real and personal estate, except specific legacies, in the hands of his executor for all the purposes of his will, as a fund out of which he might draw, as most convenient, the means of paying the debts and pecuniary legacies, and then to be divided among the residuary devisees and legatees. It might be more convenient to sell real than personal estate, to some extent at least, for the payment of legacies; or it might be convenient to sell some part or the whole of the real estate for the purpose of division among the residuary devisees; or it might, and doubtless would, be necessary or proper to hold the real estate or a portion of it until a final division could be made under the will; or it might be good

policy to sell the real estate or part of it and invest the proceeds in other subjects 286 *until required for division under the will. To meet all these contingencies ample power is conferred upon the executor. Can it be supposed that all this power is conferred in regard merely to a descended estate? Can it be supposed that the testator with his valuable real estate thus fully in his mind, and thus conferring on his executor these ample powers in regard to it, would have omitted it altogether in the disposition of his estate? Can it be supposed that in the clause immediately preceding that which confers these powers, he would have given the residuum of his estate in language broad and apt enough to embrace the realty without expressly saying that he intended not to embrace it, if such had, in fact, been his intention? I cannot think so.

I am therefore of opinion that whether we look to the residuary and concluding clauses alone, or to the whole will taken together and read in the light of surrounding circumstances, the residuary clause applies as well to real as to personal estate.

In the foregoing opinion I have referred to no authorities, because I think they oftener mislead than aid us in the construction of a will. If two wills could be found exactly alike, and made under precisely the same circumstances, a decision in regard to the construction of one might be good authority for the construction of the other. But as that is rarely if ever the case, as there is almost as much diversity in wills as there is in the human countenance, the construction of one rarely if ever throws light on the construction of another. To be sure there are rules of construction which have been settled by the courts; and which therefore must govern us in other cases. But the first and best of all these rules is, that the intention of the testator is the polar star by which we are to be guided in the construction of his will; and that in order to ascertain the intention we 287 may, if *necessary look at the whole will and all the surrounding circumstances. The application of that rule to this case leaves no doubt on my mind as to the true construction of the residuary clause of the will in question.

In my view of the case the doctrine of conversion does not apply to it, and it is therefore unnecessary to notice the cases of *Achroyd v. Smithson*, 1 Bro. C. C. 508; *Amphlett v. Parke*, 2 Russ & Myl. 221, 13 Cond Eng. Ch. R. 4; and other cases of that class, which are collected and commented upon in the notes to the first named case in 1 *Leading Cases in Equity* 557 marg. If personal estate only had been included in the residuary clause it would then have been material to inquire whether the real estate was converted out and out into personalty by the will. But the words of the residuary clause apply as well and as much to real as to personal estate; and in my opinion were plainly intended by the testator to be applied to both.

I therefore think the decree of the Circuit court so far as it is inconsistent with the foregoing opinion, ought to be reversed, and a decree entered in conformity with the said opinion.

RIVES, J., concurred in the opinion of MONCURE, J.

JOYNES, J., dissented.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the testator Hugh Charles Smith did not die intestate as to his real estate, and that the words, "all the residue of my estate which may at any time accrue and come to the hands of my executor, either from the lapsing of any of the aforesaid legacies or otherwise," in the residuary clause of the will, are applicable, and were intended by the testator to be applied to *real as well as personal estate: and that the said decree of the Circuit court, so far as it is inconsistent with the foregoing opinion, is erroneous. Therefore, it is decreed and ordered, that so much of the said decree as is above declared to be erroneous be reversed and annulled, and the residue thereof affirmed. And that the appellant Richard C. Smith, executor of Hugh C. Smith deceased, out of the assets of his said testator, pay to the appellees the residuary legatees of the said testator, their costs by them about their defence in this behalf expended; which is ordered to be certified to the said Circuit court.

Decree reversed.

289 *Harvey's Adm'r &c. v. Steptoe's Adm'r & als.

January Term, 1897, Richmond.

1. *Wills—Case at Bar.*—S by his will gives certain personal property to his son J, out of which he directs J to pay his debts, and gives him the remainder. J conveys his whole estate, real and personal, to T, in trust to pay specific debts, some of which are his own and others are the debts of S. He dies in 1838, and by his will authorizes his executors to sell his whole estate, for payment of debts. The executors refuse to qualify, and T is appointed administrator with the will annexed. Afterwards T as trustee sells the whole estate, and after selling enough to pay the debts provided for in the deed, he allows an agent of the widow of J to purchase eight slaves at a price far below what they would have brought if there had been fair competition. **Held:**

1. *Legacy for Payment of Debts—Liability of Legatee.*—By accepting the legacy J was not bound to pay the debts of S beyond the value of the property given him.

2. *Deeds of Trust—Voluntary—Effect as to Creditors.*—There being no actual fraud in the execution of the deed, it is nevertheless voluntary and void to the extent of the debts of S secured by it, as against the creditors of J not secured by it.

3. *Same—Same—Same—Effect between Parties.*—But though the deed is void as to creditors, it is valid

as between the parties, and T is not responsible for the debts of S secured by the deed, which he paid, either as trustee or administrator.

4. *Liability of Devises and Legatees—Case at Bar.*—The devisees and legatees of S are each responsible to the creditors of J, for the amount of debts of S paid out of J's trust fund, to the extent of the value of the property received by such devisee or legatee.

5. *Trustees—Administrator of Grantor's Estate—Payment to Himself—Liability of Sureties on Administration Bond.*—T being trustee and administrator, when he sold the trust property after the death of J, it was his duty to pay to himself, as trustee under the will, so much of the surplus money remaining after payment of the debts secured by the deed *as arose from real estate, and to himself as administrator, so much of said surplus as arose from the sale of the personal estate or the collection of debts. And there was no need of any election on his part to fix the liabilities of his sureties as administrator. This is not like the case of an executor of two estates or of executor and guardian.

6. *Same—Same—Same.*—If the fund was not in indentment of law transferred upon the close of the trust, from himself as trustee to himself as administrator, he and his sureties as administrator, would still be liable for a *devastavit* for his failure to account as administrator for the money so due from himself.

7. *Same—Same—Same—Extent.*—The liability of his sureties does not extend merely to the balance of the personal fund actually in his hands as

**Trustees—Administrator of Grantor's Estate—Payments to Himself—Liability of Sureties on Administration Bond.*—In *Green v. Thompson*, 84 Va. 289, 5 S. E. Rep. 507, the court said: "Hence in 2d Williams on Executors, p. 902, it is said: 'If the same person be the personal representative both of the creditor and of the debtor, he may retain out of the effects of which he is possessed as the representative of the debtor, to satisfy the debts due to him as the representative of the creditor.' The same doctrine has been recognized and acted upon time and time again by this court. See *Morrow v. Peyton*, 8 Leigh 54; *Harvey v. Steptoe*, 17 Gratt. 289; *Caskie v. Harrison*, 76 Va. 85."

In support of the above proposition the principal case is cited and followed in the following cases: *Allen v. Shriver*, 81 Va. 186; *Thurston v. Sinclair*, 79 Va. 112; *Caskie v. Harrison*, 76 Va. 90; *Brown v. Lambert*, 83 Gratt. 268. See, in accord, *Utterback v. Cooper*, 28 Gratt. 233; *Farmer v. Yates*, 23 Gratt. 145.

†*Same—Same—Same.*—In *Smith v. Gregory*, 26 Gratt. 263, it is said: "Now it is sufficient to say, that this doctrine of transmutation of possession by operation of law, where the same person is both executor and guardian, has been repudiated by this court in every case before it. It was disapproved in *Morrows' Adm'r v. Peyton*, 8 Leigh 54; in *Swope v. Chambers*, 2 Gratt. 319; in *Harvey's Adm'r v. Steptoe's Adm'r*, 17 Gratt. 288, 290; and by JUDGE STORY himself in the subsequent case of *Pratt v. Northam*, reported in 5 Mason 95. As the time when the transfer is to be made depends upon the condition of the estate and the state of the administration, the court will not shift the responsibility from one set of sureties to the other without some act or declaration on the part of the representative, indicating an intention to transfer the assets. *Harvey's Adm'r v. Steptoe's Adm'r*, 17 Gratt. 289, 301."

trustee, but extends to the whole amount of that fund for which he is liable upon a proper settlement of his accounts; including what he may have wasted as trustee.

8. **Same—Duty to Be Present at Sale—Liability When Sale Not Fair.**—It was the duty of T to be present at the sale and to superintend and control it; and if the sale was so conducted as to prevent fair competition, whether cognizant of the circumstances or not, he is bound to make good the loss, and should be charged, in the settlement of his account, with the fair value of the slaves sold to the widow, and interest upon it, just as if the money had been received.

9. **Acts of Agent—Ratification of.**—The widow, though not present at the sale, must be bound by the acts of her agent, and having accepted the benefit of the purchase, she is liable to the extent of the loss, to indemnify T and his sureties.

2. **Creditor's Bill—Decree Ordering Account of Debts—Effect upon Statute of Limitations.**—In a bill by a creditor against the trustee and executor of his debtor to have payment of his debt, and charging, deed fraudulent, and voluntary in part, court makes a decree directing a commissioner, among other things, to take an account of debts of testator. The statute of limitations ceased to run against creditors from the date of that decree.

3. **Trustees—Manner of Executing Trust While in Progress—When Closed.**—Whilst the execution of a trust is in progress, the account of the trustee should be stated on the principle of execu-

***Trustees—Duty to Be Present at Sale.**—For the proposition that it is the duty of a trustee to be present at the sale to superintend and control it, the principal case is cited and approved in *Morris v. Va., etc., Ins. Co.*, 90 Va. 373, 18 S. E. Rep. 843.

***Acts of Agent—Ratification of.**—For the proposition that, where a principal knowingly accepts the fruits of the agent's services he is estopped to deny the agency, the principal case is cited as authority in *Owens v. Boyd Land Co.*, 95 Va. 562, 28 S. E. Rep. 950. See, in accord, *Story on Agency*, sec. 229 *et seq.*; *Crump v. U. S. Min. Co.*, 7 Gratt. 309; *N. Y. Life Ins. Co. v. Taliaferro*, 95 Va. 532, 28 S. E. Rep. 879.

†**Creditor's Bill—Decree Ordering Account of Debts—Effect upon Statute of Limitations.**—For the proposition that, in a creditor's bill the statute of limitations ceases to run against creditors from the time the court decrees an account of debts, the principal case is cited and followed as authority in the following cases: *Houck v. Dunham*, 92 Va. 214, 23 S. E. Rep. 238; *Craufurd v. Smith*, 93 Va. 690, 23 S. E. Rep. 236; *Scott v. Ashlin*, 86 Va. 589, 10 S. E. Rep. 751; *Paxton v. Rich*, 85 Va. 381, 7 S. E. Rep. 531; *Norvell v. Little*, 79 Va. 148; *Bank of Old Dominion v. Allen*, 76 Va. 205; *Ewing v. Ferguson*, 38 Gratt. 560, and *note*; *Woodward v. Polesley*, 14 W. Va. 318; *Laidley v. Kline*, 23 W. Va. 571; *Nat. Bank v. Shenandoah Iron Co.*, 35 Fed. Rep. 443. See also, *Piedmont & A. Life Ins. Co. v. Maury*, 75 Va. 513, citing the principal case and holding that the litigating creditor is master of the suit until there is a decree in the cause.

In *Robinson v. Allen*, 85 Va. 724, 8 S. E. Rep. 835, it is held that, where two suits having the same object are pending, decree in one for account, suspends the other, and consequently stops the running of the statute; but this is not true where the objects of the suit are not the same.

tors' accounts. But when it is substantially closed, it should be stated on the principle of debtor and creditor, interest to be charged upon each sum received from the end of six months after its receipt, and disbursements first applied to interest whilst there is any due.

291 *4. **Deeds of Trust—Grantor Dies Intestate—Equity of Redemption.**—Where a grantor in a deed of trust to secure debts, which conveys real and personal estate, dies intestate, before a sale of the trust subject, the *quasi* equity of redemption descends to his heirs, and the surplus proceeds of the real estate, after the trust is satisfied, is applicable ratably to the payment of the debts of the grantor by specialty binding the heirs. If he by will directs the sale of his real estate for payment of debts, such surplus proceeds are equitable assets to be distributed among all the creditors.

5. **Same—Same—Same.**—In such a case the *quasi* equity of redemption in the personal estate embraced in the deed, is legal assets.

6. **Same—Same—Method of Ascertaining Legal and Equitable Assets.**—In such a case, in order to ascertain how much of the assets in the hands of the trustee and administrator is equitable, and how much is legal assets, the debts paid by him as trustee will be apportioned ratably between the two funds.

In March, 1816, James C. Steptoe and others entered into a covenant with Matthew Harvey, to pay him one hundred and seventy-two shares of the capital stock of the Farmers Bank of Virginia. In 1820 Harvey instituted an action on this covenant, which, for some cause, had to be dismissed. On the 4th of April, 1827, James C. Steptoe made a deed by which he conveyed all his property to Thomas Steptoe and three others, in trust to dispose of the same, and out of the proceeds to pay a large amount of debt due from himself, and also debts due from his father. He died in the same year, and left a will which he had executed in 1821, which was duly admitted to probate in November, 1827. By his will he authorized his executors to sell the whole of his real estate for the payment of his debts. The executors nominated having refused to qualify, administration with the will annexed was committed to Thomas Steptoe and Wm. Langhorne. Thomas Steptoe seems, however, to have been the sole acting administrator and trustee.

Matthew Harvey's action having been dismissed, his executors brought another action, and in 1830 they
292 *recovered a judgment against James C. Steptoe's administrators for \$17,200 with interest from the first of March, 1819; and in 1836 this judgment was affirmed by the court of appeals.

In January, 1837, Harvey's representatives filed their bill in the Circuit court of Bedford county, against James C. Steptoe's administrators, widow, heirs, &c., Thomas Steptoe as trustee in the deed, and as devisee and legatee of his father James Steptoe deceased, James S. Penn, another devisee of James Steptoe deceased, and the sureties of the administrators, in which they charged that the deed of James C.

Step toe was intended to hinder and delay them in the collection of their debt, and was fraudulent and void. That at least it was void so far as it provided for the payment of the debts of his father James Steptoe. That Thomas Steptoe, without applying to the court for directions, had gone on to pay a large amount of James Steptoe's debts out of the trust fund; much larger than the value of the property bequeathed by his father to James C. Steptoe; and they charged that there had been a sale of eight of the slaves conveyed by the deed, to Catharine Steptoe, the widow of James C. Steptoe, so conducted as intended to defeat the claim of the plaintiff's testator. They charged that Thomas Steptoe and James S. Penn had each, as devisees of James Steptoe, received a considerable property which was liable to repay what had been improperly paid out of the estate of James C. Steptoe.

The prayer to the bill was for a settlement of the accounts of the trustee and of the administrators, and of the debts of James Steptoe paid by the trustee out of the trust fund, or by James C. Steptoe in his lifetime. That Thomas Steptoe be required to pay the full value of the eight slaves sold by him to the widow and daughter of James C.

293 Steptoe; that he and Penn should be *compelled to pay their just proportion of the debts of James Steptoe, paid either by James C. Steptoe in his lifetime, or by the trustee after his death; and for general relief.

Thomas Steptoe answered the bill, stating that he was the sole acting trustee and administrator; and insisting that James C. Steptoe took under the will of his father James Steptoe, a legacy which bound him to pay the debts. He admits that the eight slaves were purchased at a price below their real value; but he denies that he did anything himself to effect that result.

Catharine Steptoe answered, admitting that she purchased six of the eight slaves referred to in the bill, but denying that there was any combination or design, so far as she was concerned or had any knowledge, to conduct the sale so as to defeat the claim of the plaintiff's testator.

It appears that James Steptoe by his will, which was admitted to probate in February, 1826, in the first clause, provides as follows: "My will and desire is that all my just debts be paid, and for that purpose I give and devise to my son James C. Steptoe (hereafter named one of my executors), the following slaves, to wit: Winnie and her five children (naming them), all my stock of horses and likewise all debts, dues and demands, which may be due and owing to me, whether evidenced by mortgage, deed of trust, judgment, bond, bill or otherwise; and the property and debts hereby bequeathed to my said son, James C. is to hold and dispose of as a fund out of which he is to discharge all debts due from me; and whatever surplus of the fund, either in money or kind, shall remain after the payment of my debts aforesaid, I give and be-

queath the same to my son James, his heirs and assigns forever."

294 The testator gives to Thomas Steptoe the proceeds of *the sale of a tract of land near New London containing about four hundred acres; and also twenty-one slaves, and his stock of cattle, hogs, &c.; and he gives to his grandson James S. Penn six slaves.

In relation to the sale of the eight slaves, it appears, that a sale of the property embraced in the trust deed was made on the 10th of January, 1828, at which Thomas Steptoe and William Langhorne were present. After all the other negroes were sold, and when these negroes were put up, Callohill Minnis observed to the company, "Gentleman, we have now sold property enough to pay all Captain Steptoe's debts; we now put up some negroes which the widow wishes to purchase. I shall make but one bid for her; if anybody bids over me, I shall not make a second bid." A negro boy was then put up, and Minnis made a bid for him; there was another bid, but upon a conversation by the son of the bidder with him, this bidder withdrew his bid, and Minnis got the negro at the first bid, as he did all the rest; and they were sold at a great sacrifice. It does not appear that either Thomas Steptoe or Langhorne was present or heard the proclamation of Minnis, though they were on the ground. It was insisted in this court, that Minnis was the agent of Thomas Steptoe in the sale; and that this was apparent from the language he used; and from the fact as shown by the commissioner's report, that on the next day Thomas Steptoe paid him a fee of fifty dollars, "in the trust transactions."

In May, 1838, the court directed a commissioner to settle the accounts of the trustee and the administrators of James C. Steptoe; also to take an account of the real estate received by the widow and heirs of James C. Steptoe from his estate; and also of the outstanding and unsatisfied debts of said Steptoe, designating the grade and character of said debts.

295 *The commissioner made his report, which was excepted to by the plaintiffs and defendants, and in October, 1845, it was re-committed with instructions to the commissioner, in settling the trust account of Thomas Steptoe, to make annual rests, and to charge interest on the balance from the end of the year. He was directed to ascertain and report what the eight slaves purchased by Catharine Steptoe and her daughter would have brought at the sale at which they were disposed of, had there been competition in bidding, taking into consideration the prices at which the other negroes sold at the same time, brought, as well as any other evidence that may be produced by the parties; and also the amounts and values of the property received by Thomas Steptoe and James S. Penn, respectively, under the will of James Steptoe deceased; and also the amount of the debts of James Steptoe paid by James C. Steptoe in his lifetime, and by his trustee and

administrators since his death; and the amount and value of the property of every description received by James C. Steptoe or by his said trustee or administrator, under the will of James Steptoe. Other accounts were ordered which it is not necessary to state.

The commissioner made his report in 1846. He made annual rests in the trustee's account, and charged interest on the balances from the end of the year. Nearly the whole trust fund which he sold or collected was received prior to the year 1833. In 1834 he made a payment on a judgment, and there were some small collections and payments afterwards. The balance on that account against the trustee was of principal \$3,056.38, and of interest \$2,370.22, up to January 1, 1845. The plaintiff insisting that the trustee kept the funds in his hands an unreasonable length of time, and that he ought to be charged interest somewhat as debtor and creditor, the commissioner returned a special statement upon that

296 view *of the case, making the balance as of the same date, of principal \$4,077.91, and of interest \$1,751.51.

He reports that no evidence was produced before him by any of the parties as to the eight slaves, and taking the prices of the other slaves as the criterion, the eight ought to have brought \$2,798; and deducting the amount for which they were sold, viz: \$645, there was to be accounted for \$2,153. He does not charge this in either the trustee's or the administration account.

The administration account is brought down to April 1, 1837, when there is found to be due to the administrator, of principal, \$1,327.96, and of interest \$168.13, or if calculated to January 1, 1845, \$765.56.

The commissioner reports that he was unable to ascertain what debts, if any, of James Steptoe were paid by James C. Steptoe in his lifetime, nor did it appear how much had been received by him from the collection of debts or sale of the trust fund. The debts paid by Thomas Steptoe exceeded the amount of the property bequeathed by James Steptoe to James C. Steptoe, and which came to Thomas Steptoe's hands, by \$6,818.08.

The plaintiffs excepted to the report: 1st. That James C. Steptoe was only bound to pay the debts of his father James Steptoe, to the amount of the legacy received. 2d. That even if the legacy was conditional on the payment of the debts of his father, James C. could not bind himself to the prejudice of his creditors. 3d. That the deed of trust was fraudulent. 4th. That if the deed was not fraudulent in toto, it was fraudulent to the extent that it provided for the payment of the debts of the father. 5th. That Thomas Steptoe having acted with full knowledge of the large debt due to the plaintiffs, and having applied the trust funds to the payment of the debts of the father, was personally liable for this mis-

297 application of the trust fund. 6th. That the trustee *Thomas Steptoe ought to be charged with interest in

the mode stated in the special statement. There were other exceptions which it is unnecessary to notice.

Thomas Steptoe also excepted. But his exceptions do not refer to the statement of his accounts as trustee and administrator, except that he insists that some of the charges made in one account should have been made in the other. He objects to being charged with interest; or with the enhanced price of the eight slaves, or with the debts of James Steptoe, paid by him out of the trust fund.

In April, 1848, Benjamin A. Donald and Giels M. Noble, his sister, were admitted defendants in the cause. They claimed to be creditors of James C. Steptoe, as security of Christopher Clark, in his official bond as executor of their father Andrew Donald. In February, 1835, Benjamin Donald and George Noble and Giels his wife, obtained a decree in a suit in equity which they had instituted against the personal representative and trustees of Clark and his sureties, and Thomas Steptoe and William Langhorne as administrators with the will annexed of James C. Steptoe. This decree was in favor of Benjamin Donald for \$6,457.87, with interest on a part of it, and in favor of Noble and wife for a like amount. Under the decree of May, 1838, they and other creditors of James C. Steptoe had proved their debts before the commissioner. Before the filing of the petition, George Noble had died.

It does not appear that any execution was ever issued on this decree; and the plaintiffs objected the statute of limitations of ten years to a judgment.

The cause came on to be finally heard on the 14th of April, 1854, when the court held: That the deed of trust of James C. Steptoe was not fraudulent; that Thomas Steptoe ought to be charged with the difference between *what the slaves sold 298 by him and purchased by Mrs. Steptoe, brought at the sale, and the sum shown by the commissioner's report as that which they would have brought if fairly sold; but that neither Mrs. Steptoe nor Thomas Steptoe's sureties as administrator were liable for said difference; that James C. Steptoe was not bound personally for the payment of the debts of James Steptoe, but only as executor and to the extent of assets which came to his hands; but that Thomas Steptoe was not bound personally, either as trustee or administrator, for the excess of the debts of James Steptoe paid by him over the assets delivered to James C. Steptoe and to his estate from the estate of James Steptoe; but that the legatees of James Steptoe were bound for it. That the proceeds of the sales of the real estate in the hands of Thomas Steptoe were equitable assets, and his securities in his administration bond were not liable for them; but that the proceeds of the personal estate were legal assets, and for these the sureties were liable; and as to these legal assets, the plaintiff was entitled to priority, his judgment being the oldest; that the

decrees of Donald and Noble were not barred by the statute, and they were entitled to participate in the equitable assets; that the mode of charging interest against Thomas Steptoe, adopted by the commissioner in his first statement of his account as trustee, was correct; and that Thomas Steptoe and James S. Penn, the legatees of James Steptoe deceased, having received more than was sufficient to pay the claim of Harvey's administrator against James Steptoe's estate, for the payment of the debts of James Steptoe by Thomas Steptoe beyond the assets received from the estate, they were responsible for the amount so paid. And the decree was in accordance with the foregoing opinion. There were other subjects embraced in the decree which it is unnecessary to state; only so
299 much of the case and *the decree being stated as is necessary to show the points decided by this court.

During the progress of the cause the executors of Harvey having died, the suit was revived in the name of William W. Boyd, administrator de bonis non with the will annexed; and he applied to this court for an appeal, which was allowed.

Grattan, for the appellant.

Goggin and Kean, for Thomas Steptoe's sureties, appellees.

JOYNES, J. James Steptoe by his will bequeathed to his son James C. Steptoe certain property and debts, "as a fund out of which" he was to pay the debts of the testator; and gave him, for his own benefit, the residue thereof that might remain after payment of the debts. This was not a legacy upon condition of paying the debts of the testator. The bequest created a trust fund which James C. Steptoe was to apply to the payment of the testator's debts, and the acceptance of the bequest imposed no obligation upon him beyond the value of the fund. To the extent, therefore, to which the deed of trust of James C. Steptoe provided for the payment of debts of James Steptoe, beyond the value of the said fund, it was voluntary, and consequently void as against his creditors. It was valid, however, as against Thomas Steptoe, as the trustee and as the administrator of James C. Steptoe deceased, and he cannot, therefore, be held liable, in either character, for the amount paid by him, in pursuance of its provisions, upon the debts of James Steptoe deceased, though it exceeded the amount for which James C. Steptoe was bound. But as the payments thus made enured to the benefit of the legatees and devisees of James Steptoe deceased, they are liable to
300 *refund to the creditors of said James C. Steptoe deceased the amount paid by him and by the trustee on the debts of said James Steptoe deceased, over and above the value of the trust fund above mentioned.

Upon the death of James C. Steptoe, his quasi equity of redemption in the real estate conveyed by his deed of trust descended to his heirs at law; and his quasi equity of

redemption in the personal property and debts devolved upon his executors. Upon the renunciation of the executors and the qualification of the administrators with the will annexed, the latter interest became vested in them. By the will of said James C. Steptoe, he directed his executors to sell his real estate for the payment of his debts, so that the equity of redemption in the real estate descended to the heirs subject to this trust, the execution of which devolved, under the statute, upon the administrators. When Thomas Steptoe, who was sole acting trustee and sole acting administrator, sold the trust property, after the death of James C. Steptoe, it became his duty to pay to himself, as trustee under the will, so much of the surplus money remaining after the payment of the debts secured by the deed as arose from the sales of real estate, and to pay to himself, as administrator, so much of the said surplus as arose from the sales of personal estate or the collection of debts. Upon well settled principles, the amount thus payable to himself, as administrator, was assets in his hands as such, for which his sureties were responsible. *Morrow's adm'r v. Peyton's adm'r*, 8 Leigh 54. There was no need of any election on his part to make the transfer in order to fix the liability of the sureties. It was his duty to make it, and he could not lawfully refuse to do so after the purposes of the deed were satisfied.

When the same person is the representative of two estates, one of which is
301 debtor to the other, or when the *same person is representative of an estate and guardian of a legatee, the time at which the transfer of assets should be made will depend upon the condition of the debtor estate, and the state of the administration. Accordingly, in such a case, the court will not shift the responsibility from one set of sureties to the other, without some act or declaration on the part of the representative indicating an intention to transfer the assets. *Morrow's adm'r v. Peyton's adm'r*, ubi supra; *Myers v. Wade*, 6 Rand. 444.

But this case does not fall within the reasons which governed those decisions, as may be seen by reference to the opinion of Judge Tucker, in the case first cited. And even if the balance due from Thomas Steptoe as trustee to himself as administrator should not be considered as transferred by intendment and operation of law, upon the close of the trust to his account as administrator, the same result, in effect, would be reached in another way. For, according to the decision in *Morrow's adm'r v. Peyton's adm'r*, he and his sureties, as administrator, would be liable for a devastavit for his failure to account as administrator for the money so due from himself.

And this liability of Thomas Steptoe as administrator, and of his sureties, does not merely embrace the balance of the personal fund actually in his hands as trustee, but embraces the whole amount of said fund for which he was liable upon a proper settlement of his accounts. If as trustee he

wasted any part of the personal estate which came to his hands, he became liable for it, and he and his sureties must account for it, upon the principles above mentioned.

It appears from the evidence, that after most of the slaves had been sold, Callohill Minnis, who attended the sale as agent for the widow Mrs. Catharine Steptoe, made a

public announcement to the persons present, that enough *property had been sold to pay the debts of said James C. Steptoe, and that some slaves would then be sold which the widow wished to purchase. He further stated that he would make one bid for her, and that if any person should bid over him, he would not make another bid. The evidence is, that he said: "We have sold," &c. and "We will now sell," &c. from which it might be inferred that he was speaking on behalf of Thomas Steptoe, the trustee. But this is not important. It was the duty of Thomas Steptoe to be present at the sale, and to superintend and control it; and we must presume that he was present and heard the announcement. The result was, that nobody would bid, and that Minnis purchased eight slaves successively at his first bid. The eight were purchased for \$645; whereas they had been appraised at \$1,750, and would have produced \$2,798, according to the estimate of the commissioner, founded on the prices which the other slaves brought, compared with what they were appraised at.

Now it is palpable that this ruinous sacrifice was brought about by the appeal which Minnis made on behalf of the widow; and equally so that it was done with the connivance, if not through the agency, of Thomas Steptoe. If he did not hear the announcement publicly made by Minnis, which we must suppose, considering the object of it, was so made that everybody present could and did hear it, did he not discover that nobody bid over Minnis, though his bid was far below the value, and that he bought at his own price? Did this excite no inquiry? Could he see this go on, again and again, as each slave was put up in succession, and not suspect that there was some contrivance to prevent a sale at fair prices. The truth is that he seems to have thought his duty fulfilled by obtaining money enough to pay the debts provided for

in the deed, and to have felt himself at liberty to *favor his brother's widow at the expense of all other persons, by conniving at the plan adopted by Minnis, if not by expressly assenting to it. This was a breach of trust, and a waste of a part of the trust property that had come to his hands. He was bound to make good the loss thus occasioned to the parties interested, and for that purpose was liable to be charged, in the settlement of his accounts, with the fair value of the slaves, instead of the price they were sold for. His claim to be exempted from the payment of interest cannot be allowed. Nothing short of a charge against him of the value of the slaves will indemnify the parties interested in the fund, and for the

same reason that amount must bear interest as if the money had been received. This is the course always adopted by the court when a trustee has, by a breach of trust, wasted a part of the trust property that has come to his hands. *Hudson & als. v. Hudson's adm'r*, 5 Munf. 180; *Miller v. Holcombe's ex'or*, 9 Gratt. 665; *Miller & wife v. Jeffries*, 4 Gratt. 472; *Moore v. Hilton*, 12 Leigh 1; 2 Lomax Executors 476; *Hill on Trustees* 522-3.

Six of the slaves thus sacrificed were purchased for Mrs. Steptoe, and two for her daughter Mrs. Burwell. The purchase was made at the instance and request of Mrs. Steptoe, and she took the slaves purchased for her. She knew the prices at which they were sold, and that they were very far below their real value; and it is a reasonable presumption that she was aware of the means by which her agent obtained them at such a sacrifice. But whether that was so or not she accepted the benefit of the purchase and cannot repudiate the means by which her agent secured it for her. *Crum v. United States Mining Co.*, 7 Gratt. 352. Having thus participated in the breach of trust, and reaped the benefit of it to the extent of the difference between the value of the

six *slaves purchased for her and the price she paid for them, she is liable, to that extent, to indemnify Thomas Steptoe and his sureties as administrator. *Greenwood v. Wakeford*, 1 Beav. R. 576; *McGachen v. Dew*, 15 Eng. L. & Eq. 97; *Raby v. Ridehalgh*, 1 Jurist N. S. 363; *Barksdale v. Finney*, 14 Gratt. 338; *Lewin on Trusts* (ed. 1858) 392; *Ib.* 768.

Mrs. Burwell for whom the other two slaves were purchased, appears to have been an infant at the time of the sale. But as no claim is made against her on account of that purchase, it is not necessary to say anything more in reference to it.

The decrees in favor of Donald and Mrs. Noble are not barred by the statute of limitations, because the decree of May, 1838, directed the commissioner to take an account of all the outstanding and unsatisfied debts of James C. Steptoe deceased, under which they had a right to come in and prove their debts; as they did. By that decree the court took upon itself the administration of the assets, and it would have restrained those parties from proceeding afterwards by a separate suit to enforce their claim. *Stevenson v. Taverner*, 9 Gratt. 398. The statute of limitations, therefore, ceased to run against them from the date of that decree. *Stenndale v. Harkinson*, 1 Sim. R. 393. If the bill in this case had been a "creditor's bill," filed on behalf of the plaintiff and all other creditors, perhaps the statute would have ceased to run from the filing of the bill, as was held in the case last cited.

It appears from the accounts of Thomas Steptoe as trustee that the principal transactions of the trust were closed by the 1st day of January, 1832. The payments after that time were chiefly for expenses. But as it appears that there was a payment

upon a judgment in March, 1834, I think that the account should be
 305 *stated upon the principle of an executor's account, up to the 1st day of January, 1835. From that time it should be stated as an account between debtor and creditor, charging the disbursements against interest, and charging interest on the several sums received after the expiration of six months from the date of such receipt. In order to ascertain the proportion of the balance on the trust account, which is, to be regarded as arising from the real and personal funds, respectively, the debts paid under the deed should be apportioned ratably, according to the amount which came into the hands of the trustee from each fund, respectively.

The quasi equity of redemption in the real estate conveyed by the deed of trust is regarded in equity as an interest in the land (*Downe v. Morris*, 3 Hare's R. 394, and cases cited), and as such descended to the heirs of James C. Steptoe, as I have already said. If he had died intestate, the money arising from that interest, being the surplus proceeds of the real estate after satisfying the deed, would have been applied ratably to the payment of debts of James C. Steptoe by specialty binding his heirs, according to the decision of this court in *Jones v. Lackland*, 2 Gratt. 81. But as the will of said James C. Steptoe charged his real estate with the payment of his debts, this fund is equitable assets, to be distributed among all the creditors ratably.

Whether the quasi equity of redemption in the personal property and debts conveyed by the deed of trust, is, in like manner, to be treated as equitable assets, or whether it is to be treated as legal assets and paid to the creditors according to the dignity of their respective claims, is a question upon which there has been a diversity of opinion. As far as I am informed, this question has never been decided by this court. By most of the text-

writers it is laid down, that an equity
 306 of redemption *in personal property is equitable assets. The cases cited for that doctrine are, the case of Cox's creditors, 3 P. Wms. 341; and *Hartwell v. Chitters*, Amb. R. 308. The latter case assigns no reasons, but only follows the former as an authority in point. Both arose upon mortgages of terms for years. It would be tedious to go into a detailed examination of the grounds on which the former case was put; and it is not necessary for the present purpose. The grounds of the decision, as reported, are deficient in clearness and precision, and have been declared by a learned writer to be "either unintelligible or impertinent." In a note to this case, Mr. Cox refers to several previous cases in which it was held, that chattels, real or personal, mortgaged or pledged by the testator, and redeemed by the executor, are assets at law in the hands of the executor for so much as they are worth beyond the sum paid for their redemption, though recoverable only in equity. The

law must be the same in respect to the equity of redemption, which is regarded as a substantial interest in the property, the mortgagee having a mere incumbrance, and redemption by the executor, even after forfeiture, being matter of right and not of favor. In the argument of *Sharpe v. Earl of Scarborough*, 4 Ves. R. 538, Sir John Mitford said, that the cases in *P. Williams* and *Ambler* had been considered as overruled. These cases were relied on by Bayley, J., in *Clay v. Willis*, 1 Barn. & Crea. 364 (8 Eng. C. L. R. 103), as one ground of his judgment. But the mortgage in that case was in fee, and the equity of redemption was clearly equitable assets upon the other ground relied on in the judgment, namely, the devise for the payment of debts. This judgment is cited by Lord Tenterden in *Barker v. May*, 9 B. & C. 489 (17 Eng. C. L. R. 426), but the fund in that case was the proceeds of real estate devised to be sold for the payment of
 307 debts *and legacies, and was, therefore, equitable assets. In a learned work published in 1832, it is said that the cases in *P. Williams* and *Ambler* are at variance with superior authority (alluding to the cases cited in Mr. Cox's note), and with principle, too, and are of no value. *Meggison on Assets in Equity* 105. And Mr. Lewin regards them as of no authority in England at this day. *Lewin on Trusts* (ed. 1858).

There is much confusion and uncertainty in the books as to the criterion by which we are to distinguish whether assets are legal or equitable. In *Fonblanque's Equity* the rule is stated to be, that assets which go to the executor qua executor, virtute officii, though only an equitable interest, or recoverable by the executor only in a court of equity, are legal assets. *Fonb. Eq.* 578. The same rule is laid down by Judge Story. 1 Story's Eq. § 551. This rule was adopted by Vice Chancellor Kindersley, in *Cook v. Gregson*, 2 Jurist, N. S. 510, and in *French v. French*, 3 Ib. 482 and approved by Lords Campbell, Cranworth, Chelmsford and Wenleysdale in *Attorney General v. Bennwing*, 6 Ib. 1083, decided by the House of Lords in 1860. It may, therefore, be considered as fully established in England.

In *Cook v. Gregson*, the vice chancellor said, that when it is laid down in the books that assets are equitable which are recoverable only in equity, the meaning is, not that they can only be recovered in equity by the executor, but that they can only be recovered in equity by a creditor seeking payment out of them. He says further, that if a court of law, trying an issue upon a plea of plene administravit, will say that the assets were not received by the defendant as executor, and will not, therefore, take them into account, the creditor must resort to a court of equity to reach them, and they are equitable assets.

308 *Applying this criterion, there can be no doubt that an equity of redemption in personal property is legal assets.

The right of the mortgagee to the property, subject to the incumbrance of the mortgage, devolves upon his executor as such, by virtue of his office, and when the property is sold to satisfy the mortgage, he takes the surplus money in the same right. And accordingly, in *Cook v. Gregson*, above cited, the vice chancellor held an equity of redemption in personal chattels mortgaged by the testator to be legal assets in the hands of the executor. He expressed his disapprobation of the case of *Cox's* creditors, which, of course, could not stand with his decision, unless a distinction be made between an equity of redemption in chattels real, and one in chattels personal.

The principal ground, if not the only one, upon which an equity of redemption in chattels mortgaged by the testator has been supposed to be equitable assets, is, that after forfeiture, the estate of the mortgagee is absolute at law, and the mortgagee is driven into a court of equity.

But if any argument can be founded, in case of a mortgage, upon the fact that after forfeiture, the estate is absolute at law in the mortgagee, no such argument has any application to the case of a deed of trust.

In a deed of trust, though the legal title is in the trustee, his estate never becomes absolute, and the right of the debtor, or his executor, to redeem or to receive the surplus after a sale is recognized by the character of the instrument, if not by its terms. I am therefore of opinion, that so much of the surplus of the trust fund as arose from the sales of personal estate and the collection of debts, must be treated as legal assets in the hands of the administrator. I am aware that this view is in conflict with an opinion expressed by Judge Stanard in *Jones v. Lackland*, 2 Gratt. 81; but 309 that opinion was *only a dictum, the question not being involved in the case.

Some other points will be embraced in the decree which need not be noticed in this opinion.

The decree of the Circuit court being inconsistent in several particulars, with the views I have expressed, I am of opinion that it should be reversed.

The other judges concurred in the opinion of Joynes, J.

The decree was as follows:

The court is of opinion that by accepting the bequest made to him by the will of his father James Steptoe deceased, James C. Steptoe became liable to pay the debts of the said James Steptoe deceased, only to the extent of the value of the fund bequeathed to him, and that the deed of trust of said James C. Steptoe in the proceedings mentioned, to the extent that it provides for the payment of debts of the said James Steptoe deceased, beyond the value of said fund, is voluntary and therefore void as against the creditors of the said James C. Steptoe. But the court is of opinion that the said deed of trust is valid against Thomas Steptoe as the trustee, and also as the administrator of

said James C. Steptoe, and that the creditors of said James C. Steptoe have a right to subject the legatees and devisees of said James Steptoe deceased, for so much as the debts of said James Steptoe deceased, paid by the said James C. Steptoe in his lifetime, or by the said Thomas Steptoe after his death, in pursuance of the provisions of said deed of trust, exceeds the value of the fund bequeathed as aforesaid by the said James Steptoe to the said James C. Steptoe. And as it will be necessary to recommit the accounts heretofore taken, the court is further of opinion that leave should be given to any of the parties to produce 310 further *evidence as to the amount of debts of said James Steptoe deceased so paid, or as to the value of said fund.

And the court is further of opinion that Thomas Steptoe in his character of administrator of James C. Steptoe deceased, and his sureties as such, are liable for so much of the balance that may be found due from said Thomas Steptoe as trustee, as arose from the sales of personal estate and the collection of debts conveyed and assigned by the deed, but the said sureties are not liable for so much of said balance as arose from the sales of real estate. And in order to ascertain the portions of such balance which consist of the proceeds of the real and personal funds respectively, the debts paid under the said deed should be apportioned between the said funds ratably.

And the court is further of opinion, that in the settlement of the accounts of said Thomas Steptoe as trustee, he should be charged with the fair value of the eight slaves purchased by Callohill Minnis for the defendants Catharine Steptoe and Francis Burwell, instead of the sum for which they were sold; and that interest should be charged thereon in the same way as if the said amount had been actually received. And the court is further of opinion, that the said Catharine Steptoe is liable to indemnify the said Thomas Steptoe and his sureties as administrator, to the extent of the difference between the value of the six slaves purchased for her as aforesaid and the sum paid by her for them, with interest thereon; for which a decree may go against her in the first instance, if it can be done without subjecting the plaintiff and the other creditors of James C. Steptoe to undue inconvenience or delay, reserving the right to resort to the said Thomas Steptoe and his said sureties in case the decree against the said Catharine should prove unavailing in whole or in part.

And the court is further of opinion, 311 that the account *of said Thomas Steptoe should be settled upon the principles applicable to the accounts of an executor, until the 1st day of January, 1835. And that from that time they should be settled upon the principles applicable to an account between debtor and creditor, charging the disbursements against interest as far as it will go, and charging interest upon the several sums received from the

expiration of six months after they were respectively received.

And the court is further of opinion, that so much of the balance of the trust fund in the hands of said Thomas Steptoe as arose from the sales of personal property and the collection of debts, should be treated as legal assets, and applied to the payment of the debts of James C. Steptoe according to their legal priorities as the law was at the time of his death; and that so much thereof as arose from sales of real estate should be treated as equitable assets, and applied to the payment of the debts ratably and without regard to dignity, according to the principles applicable to equitable assets, &c.

Reversed, and sent back.

312

*Matthews v. Burton.

January Term, 1867, Richmond.

Prescription.—In Eastern Virginia, a party in possession of land, tracing back his title for upwards of seventy years, it is a presumption of law, that a grant has issued for the land, and it is not therefore subject to entry and grant as waste and unappropriated.

This was a writ of unlawful detainer brought in May, 1846, in the County court of Goochland, by William Burton against Edward Matthews, to recover twenty-three acres of land on the west side of Little Byrd creek. The case lingered in the County court until May, 1849, when it was removed to the Circuit court of Goochland county; and there it lingered until September, 1859. At that term of the court a jury was impaneled to try the case; but after hearing the evidence and arguments of counsel they were unable to agree; and this continuing for several days, it was agreed by the parties, by their counsel, to discharge the jury, and submit the cause to the decision of the court.

The plaintiff claimed the land under a patent from the commonwealth to himself, which issued to him on the 30th of May, 1843, for twenty-three acres of land on the west side of Little Byrd creek in the county of Goochland.

The defendants introduced a deed from James George to William Harrison, bearing date the 7th day of July, 1766, by which George conveyed to Harrison a tract of two hundred and twenty-three acres of

land lying on both sides of Little Byrd creek; a deed from Andrew Harrison to Wm. Harrison, dated the 14th of July, 1766, conveying to Wm. Harrison two hundred acres of land on both sides of the same creek; a deed from Wm. Harrison to Edward Matthews, dated the 19th of August, 1771, conveying to Matthews four hundred and twenty-three acres of land on

both sides of the same creek. There is no doubt that this last deed conveyed the land embraced in the two previously mentioned. The will of Edward Matthews, who was the grandfather of the defendant, was introduced by the plaintiff, but relied on by the defendant. This will was admitted to probate in the County court of Goochland, on the 17th of January, 1785. The testator gave to each of five of his sons two hundred acres of land; and in the last devise, that to his son Thomas, after giving the two hundred acres, he says, "which is the remainder of my tract called Lawson's." One of the devises is to his son William Matthews, and it is described as the land whereon he lives. The defendant also introduced a plat of William Matthews' land made by Elliot Lacy, the surveyor of the county, surveyed in April, 1787. This plat extends the tract to the west side of the creek, and purports to contain 226 acres. It is a long parallelogram, extending from what is called Lacy's road on the east to and beyond the creek on the west. He also introduced a plat made by George H. Brett, in January, 1811, and taken from that of Lacy; and he also introduced a plat made by Atkisson, a deputy surveyor of the county, made the second of March, 1811, embracing all the lands of Edward Matthews, amounting to one thousand and sixteen acres, and showing how it was divided among his five sons. The quantities are not equal in the several tracts, but they held them, as they were laid down. And this plat shows that this tract of William's and the one adjoining it, of Ben.

Matthews, embrace the lands conveyed by Harrison to Edward Matthews, and are the only lands of Edward Matthews which lay on both sides of the creek, or even touched it. The defendant then introduced a deed from the administrator with the will annexed of William Matthews, conveying to the defendant one hundred and sixty-four acres of William Matthews' land. This deed is dated the 29th of November, 1834, and is confirmed by six of the devisees, and the remainder of the tract is held by the others. The only lines mentioned in this deed are those which separate the land conveyed from the other part of William Matthews' land, and the other boundaries are designated by the adjoining proprietors; on the west it calls for the land of Benjamin Johnson, which is not designated on any of the plats.

It was shown by the books of the commissioner of the revenue for the county from 1790 to 1815, that William Matthews was charged with two hundred and twenty-six acres of land, and that the tax thereon for 1814 was paid. And it was proved by the surveyor of the county that he made a survey and plat of the land of William Matthews. He took the courses and distances from the plat of Atkisson and of Brett, though on one of the long lines of the survey on Atkisson's plat, it was too short to go to the creek, and he presumed that an out, as it is called, which is ten chains, was omitted, as was frequently the case,

*The principal case was cited in *Smith v. Cornelius*, 41 W. Va. 67, 23 S. E. Rep. 601.

See also, *Archer v. Saddler*, 2 H. & M. 370.

and he surveyed the line which is the long northern line on that supposition. He proved that there were two marked trees on the lines and corners west of the creek; that there was a hickory corner and pointers; though it was not proved when these trees were marked; but they are called for by the former plats.

The defendant also proved that in 1820 Ann Matthews, the widow of William 315 Matthews, cleared a part of *the land on the west of the creek, and at that time there was another part of the land which showed that it had been cleared years before; that the said land had been in possession of William Matthews in his lifetime, his widow after his death, and the defendant up to the time of trial.

Upon these facts the court was of opinion that the defendant had failed to prove that he or those under whom he claimed title, had within thirty years previous to the date of the plaintiff's entry or theretofore, paid any tax on the land in controversy, situated on the western side of the Little Byrd creek; and therefore held that the title of the plaintiff under his patent was valid; and gave him a judgment for the land. And thereupon the defendant applied to this court for a writ of error to the judgment, which was awarded.

Grattan, for the appellants.

Caskie, and Johnson & Guigon, for the appellee.

RIVES, J. The judgment for the plaintiff in this case rests on the single ground "that the defendant had failed to prove that he or those under whom he claimed title, had, within thirty years previous to the date of the plaintiff's entry, paid any tax on the land in controversy." It would seem, therefore, to have been supposed by the court that the defendant had no other rights, but those secured to him by the 40th sect. of chap. 86, of the Rev. Code of 1819, p. 330. That section declares, that "no entry or location on any lands within this commonwealth which have been settled thirty years, prior to the date of such entry or location; and upon which quit rents or taxes can be proved to have been paid at any time within the said thirty years, shall be deemed valid: and any title, which the commonwealth may be supposed to 316 have thereto *is hereby relinquished,"

&c. But the inability of the defendant to protect his title or possession by means of this special statutory provision, is not decisive of his rights. They spring from a higher source.

The record fails to disclose, with the absolute certainty that might be desired, the identity of the plaintiff's entry and survey of 9th September, 1842, with the plat of land claimed and held west of Little Byrd creek by the defendant. These parcels of land are not clearly shown to be one and the same. The diagrams of the different surveys, while dissimilar, are, however, so far coincident as to show that the patentee could not make his location without includ-

ing the land, or at least the greater part of it, claimed by the defendant on that side of the creek. Inasmuch, therefore, as it rests with the plaintiff to prove his right of possession, and in the absence of such proof, the finding must be for the defendant, it may be safely assumed that if this fact of identity did not exist, it would have been shown in evidence, and that whatever of doubt is left upon this subject by the comparison of plats, is due to the plaintiff's concession on the trial, that his patent conflicted with the defendant's claim. In corroboration of this view, the different surveys, those relied on by the plaintiff as well as the defendant, call in common for certain marked trees; namely, a hickory, white oak, and pointers west of the same creek. I think, therefore, we are justified by the record in assuming that the patent of the plaintiff embraces land held and claimed by the defendant.

This, then, brings us to a consideration of the defendant's title. That is traced back to July, 1766, when the deeds of James George and Andrew Harrison conveyed to William Harrison two tracts of land separately, which together made 423 acres, which were afterwards, to wit, on the 19th of August, 1771, conveyed by the said 317 *William Harrison to Edward Matthews (the grandfather of the defendant), and the ancestor, from whom the defendant derives his title. The inclusive survey of the lands of Edward Matthews, as they were parceled out under his will to his children, made on the 2d of July, 1811, by Thomas Atkisson, whose plat is in the record, presents, on the western boundary of the land in controversy, very nearly the same outlines with those of the plaintiff's location; from which fact we are authorized to infer that Edward Matthews in his lifetime held and claimed by the lines now asserted by his grandson.

Under this state of facts, this land, at the date of the plaintiff's location in 1842, cannot be regarded as waste and unappropriated land, and as such subject to grant by the commonwealth. On the contrary, where the possession has continued for such a great length of time, from 1766 to 1842, a legal presumption arises as against the crown and the commonwealth and claimants under them, that a grant had duly accompanied the first possession, and consequently avoids any subsequent patent. This principle was early settled in this state by the case of Archer, adm'r of Tanner, v. Saddler, 2 Hen. & Mun. 370. It was there settled that a patent or grant for lands, in case of a peaceable and uninterrupted possession of upwards of sixty years, together with the payment of quit rents or taxes, may be presumed to have formerly issued: but in that case, it was held to be the province of the jury, and not of the court, to make that presumption.

The court in that case relied on the authority of the cases there cited from Cowper; and evidently placed the doctrine on grounds of public policy in the settling titles

and quieting possession. Judge Tucker remarked with much significance, "presumptions, in favor of long and peaceable possession, that there has been a grant, must, at *no very long period hereafter, be absolutely necessary to be made, on almost all occasions, in consequence of the operation of our law of descents." Judge Roane in enumerating the grounds of such a presumption, specially notes "the improbability that at this time of day, lands in that part of the county (Chesterfield) are vacant." This decision was made in the early part of the century 1808; and it is manifest how much more the reason and necessity of such a rule is applicable to our present circumstances. I think now we might go further and adopt this presumption as a conclusion of law, and engraft it as a canon of the law of real property, and eminently just and serviceable in quieting possession, and establishing titles to lands, so long settled and enjoyed as those in the eastern part of this state. This has been done in the state of North Carolina. In the case of Bullard v. Barksdale, 11 Ired. Law R. 461, where a possession of forty-seven years was relied on for a presumption of title; and where there was reason, from the confession of the party, to believe that no actual grant had been made him, it was held to be error to submit the question to the jury on the evidence, as one of fact to be found by them according to the weight they might give to the circumstances, as evidence to their minds; but that on the contrary, the jury should presume a grant, and that, as a conclusion of law, and not a matter of fact.

Many instances of similar presumptions, springing from the lapse of time, the probable loss of evidence, and motives of public policy, are made in behalf of ancient deeds, missing links of title, &c. as in the cases of Caruthers v. Eldridge's ex'or, 12 Gratt. 670, and Goodwin v. McCluer, 3 Gratt. 291. These presumptions are eminently reasonable and salutary, and necessary to protect landed possessions from the designs of litigious speculators.

The same course of decisions exists in other states. In South Carolina, a presumption of a grant will arise from a possession for thirty and probably for twenty years; McClure v. Hill, 2 Const. L. R. 420; and in Tennessee, a possession for twenty years will avail to the same end. Gilchrist v. McGee, 9 Yerg. R. 455.

Tried by these principles, the case of the defendant does not rest, as the court below seemed to suppose, upon his ability to avail himself of the statute, to which the court had reference; but rather upon the fact that he was entitled by presumption of law to occupy the relation to the plaintiff of an elder patentee from the crown; that the title of the crown or the commonwealth was to be considered as divested in favor of the claimant whose title and possession, as far as traced, ran back for more than seventy years. While, therefore, if this were to be treated as vacant land, no time could bar

the commonwealth or its grantee; and even this possessory action could be maintained within three years of the date of the patent as against any occupier of such land, it is altogether different, when it is proven as here, that the land was not vacant, but had been held under claim of title in peaceable and uninterrupted possession for seventy years before the plaintiff's entry and location. This is virtually a contest between a junior grantee with his patent in his hand, and an elder grantee, whose title is not the less real and valid, because created by presumption of law, which stands in stead and fulfills all the purposes of an actual grant.

For these reasons, I hold the case on its merits to be for the defendant; and consider the plaintiff, under the actual circumstances of this long continued possession by the defendant, debarred from a resort to the writ of unlawful *detainer, which consisted only with his theory of this being vacant land. I am, therefore, of opinion that the judgment should be reversed, and entered for the defendant.

The other judges concurred in the opinion of Rives, J.

Judgment reversed; and entered for the defendant.

321 *Foster's Curator v. Rison & al.

January Term, 1867, Richmond.

1. *Statutes—Limitation of Actions against a Partner—Effect on Previous Statute.*—The act Code, ch. 149, § 5, in relation to the limitation of actions by one partner against another for the settlement of the partnership accounts, does not alter the act 1 Rev. Code of 1819, ch. 128, § 4, p. 488.

2. *Same—Same—Interpretation of.*—In the act Code, ch. 149, § 5, the words, "five years from a cessation of the dealings in which they are interested together," does not refer to the cessation of the active operations of the partnership; but when the affairs of the partnership are wound up.

3. *Same—Same—Partial Settlement.*—Though the time prescribed by the statute may not begin to run until the business of the partnership is wound

**Statute—"Dealings"—Interpretation of.*—In Smith v. Zumbro, 41 W. Va. 635, 24 S. E. Rep. 657, the court said: "Now, when we come to inquire what is meant by a 'cessation of the dealings,' we find the question has been passed upon in this state in the case of Sandy v. Randall, 20 W. Va. 247, in which SNYDER, J., delivering the opinion of the court, says: 'The courts of Virginia, in construing a statute identical with this, have decided that the word 'dealings' embraces any act done after the dissolution of the partnership, in winding it up,—such as the collection or payment of debts due to or by the firm. *Foster v. Rison*, 17 Gratt. 321. This we regard as the correct interpretation, and the necessary conclusion from it is that, in order to subject the suit to the bar of the statute, it must not only appear that there has been a dissolution of the partnership more than five years before the institution of the suit, but that there were no valid claims of debit or credit, against or in favor of the firm, paid or received or outstanding, within that time.'"

up, yet the parties may have a partial settlement of the partnership accounts before, or may bring a suit for such settlement.

4. **Partnership—Settlement—Laches.***—Though all the business of a partnership may not be wound up, there may be laches in bringing a suit for the settlement, which will not affect the party guilty of the laches; so that doubtful questions made so by his laches, must be solved against him.

5. **Same—Partial Settlement—Effect.**†—A partial settlement, to which there is no valid objection, is conclusive upon the parties to it as far as it goes, and leaves open only the unsettled portion of the account. And the statute begins to run from the time of the settlement as to that portion of the account embraced in it.

6. **Same—Authority to Partner to Make Settlement—How Implied.**—An authority by one partner to another to make a settlement with the third, who had been the acting partner, of the partnership accounts, may be implied from the relations and previous dealings of the parties, especially in reference to the subject of the settlement.

322 *7. **Same—Same—Effect of Unauthorized Deed.**—

If such a settlement is made by one partner acting for himself and another, it is not invalidated by the fact that it is accompanied by a deed which he was not authorized to execute for the other partner. The instrument may be void as a deed, and still be good evidence of the terms of the settlement.

8. **Same—Settlement—Conclusiveness.**—Partners having made a valid settlement of the partnership transactions, are concluded by the settlement as to any matters embraced therein.

9. **Same—Same—When Statute Begins to Run—Case at Bar.**‡—One partner, for himself and another, set-

***Laches—Lapse of Time.**—See the principal case cited in *Stamper v. Garnett*, 81 Gratt. 559; *Coles v. Ballard*, 78 Va. 149; *Wissler v. Craigh*, 80 Va. 29; *Chapman v. Persinger*, 87 Va. 586, 13 S. E. Rep. 549; *Cottrell v. Watkins*, 89 Va. 812, 17 S. E. Rep. 328; *James v. Life*, 92 Va. 707, 24 S. E. Rep. 275; *Persinger v. Chapman*, 93 Va. 351, 25 S. E. Rep. 5.

See also, *Bargamin v. Clarke*, 20 Gratt. 544, and *foot-note*; *Doggett v. Helm*, 17 Gratt. 96, and *foot-note*.

†**Partnership—Partial Settlement—When Statute Begins to Run.**—In *Roots v. Salt Co.*, 27 W. Va. 491, it was said: "Where the business has ceased and the accounts have been so adjusted that the party in whose favor the balance appears may bring an action at law thereon against the other party, then from the time such right of action accrues the statute of limitations will begin to run, and the period of five years from that time will bar any action or suit for such balance. Even in cases of a partial settlement, where a balance is thereby ascertained in favor of one of the parties against the other, although such settlement is not full and complete, the statute will run as to such balance and the portion of the account embraced in it. *Foster v. Rison*, 17 Gratt. 321; *Sandy v. Randall*, 20 W. Va. 244; *Boggs v. Johnson*, 26 *Id.* 321."

‡**Partnership—Dissolution of—When Statute Begins to Run.**—In *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. Rep. 929, the court said: "When the right of action accrues, so as to set the statute of limitations in motion, depends, as we have said, upon circumstances, and cannot be held, as matter of law, to arise at the date of the dissolution, or to be carried back by relation to that date. *Todd v. Rafferty's Adm'rs*, 30

ties the partnership accounts with the acting partner, and receives payments of money for himself and the other. As to the money so received, the statute of limitations will run from the time he received it.

10. **Same—Same—Same.**—Though, in such a case, it may be necessary to go into chancery to ascertain the portion which each of the parties is entitled to receive, yet the statute will run against the claim.

11. **Same—Same—Same—Effect of Ignorance.**§—The fact that the party was ignorant of the existence of the debt due from the partner who collected the money, until within five years before the institution of the suit, is not sufficient to repel the bar of the statute. To have that effect such ignorance must proceed from the fraud of the partner collecting the money.

In March, 1837, a verbal agreement was entered into between John W. Foster, Marsten Foster and their nephew William Rison, by which they entered into a partnership for conducting a mercantile business at Pittsylvania courthouse. The Fosters were to furnish the capital in equal shares, and Rison was to conduct the business; and they were to share profits and losses equally. This business was continued from that time until March, 1839, when it was stopped, and Rison formed a partnership with James L. Poindexter, to carry on a mercantile concern at the same place.

Both the Fosters lived in the county of Amelia, though John W. Foster had a store in Clarksville, in Mecklenburg county. It

does not appear that Marsten Foster 323 *ever visited Pittsylvania during the progress of the business of the partnership, or indeed afterward; but John W. was there twice during that time, and examined the books, &c., of the concern. In March, 1839, he was there, and he then, acting for himself and Marsten Foster, sold to Rison a part of the goods, amounting to two thousand dollars, for one-half of which sum Rison gave to him his bond, payable at twelve months; and for the other half he executed a like bond to Marsten Foster; and these bonds were paid by Rison to the respective parties, prior to the commencement of the year 1845. He also sold to Rison & Poindexter the remainder of the goods for \$1,862.72, and took their bond for the amount, payable to himself and Marsten Foster.

N. J. Eq. 254; Partridge v. Wells, Id. 176; Prentice v. Elliott, 73 Ga. 154; Hammond v. Hammond, 20 Ga. 556; Massey v. Tingle, 29 Mo. 437; McClung v. Capehart, 24 Minn. 17; Hendy v. March, 75 Cal. 566, 17 Pac. Rep. 702; Foster v. Rison, 17 Gratt. 321; Boggs v. Johnson, 26 W. Va. 321; Atwater v. Fowler, 1 Edw. Ch. 423."

§**Statute of Limitations—Effect of Ignorance.**—In *Bickle v. Chrisman*, 76 Va. 687, the court said it had been unable to find any authority to the effect that mere ignorance on the part of a creditor is sufficient to suspend the operation of the statute of limitations; but, on the other hand, that there are numerous authorities to the contrary. The court then cites the principal case, among others, as authorizing the proposition.

In March, 1845, John W. Foster went again to Pittsylvania courthouse, when, professing to act for himself and Marsten Foster, he had a final settlement with Rison of the partnership transactions. In the statement made out on that settlement there is, first, a statement of the money advanced by the Fosters as capital. The first item, which was handed to Rison by John W. Foster in Richmond, on his way to the north to buy goods, in March, 1839, is \$1,860. This is stated as if advanced by both, and there is no doubt Marsten Foster paid a part of it; but whether one-half or less is uncertain. The other items state when and by which of the Fosters they were advanced. Then follows two items of merchandise put in by J. W. Foster from Clarksville. These are without date; the first put at \$975, and the second at \$474.29. Inclusive of half of the first item of \$1,860, the amount stated to have been put into the concern in money by John W. Foster, is \$4,403.41, extending down to November, 1838; and, inclusive of the half of the first item, the amount stated to have been put in by Marsten Foster, is \$2,327.04. The statement then gives the payments made to John W. Foster, which includes the payment made to him of Rison's bond of \$1,000, and of the bond of Rison & Poindexter for \$1,862.72; making in all \$4,723.53; and the payments to Marsten Foster, including Rison's bond to him of \$1,000, amounting to \$1,494.66. Interest is charged on the balance of the capital from March 7, 1839, to the time of the settlement; and Rison is allowed for two-thirds of board for self and horse from the same date for two years, in winding up the concern. This statement was in the handwriting of Rison.

At the same time that the above mentioned statement was made, an agreement under seal, dated March 12th, 1845, was executed, purporting to be made by John W. and Marsten Foster of the one part, and William Rison on the other, which purports to be executed for Marsten Foster by John W. Foster; which recites that "John W. Foster and William Rison have this day had a full settlement of the late concern of William Rison & Co., and upon such settlement the said Rison has executed his bond, payable twelve months from to-day (with interest from to-day), for the sum of \$575.75, which is in full of all demands of every kind which the said John W. and Marsten Foster have against the said William Rison on account of the said firm of William Rison & Co.," except two small sums named, one due to John W. and the other to Marsten Foster; "in consideration of which bond the said Fosters have transferred a parcel of debts to said Rison due to the said firm, amounting to \$897.21, per statement signed by John W. Foster and Marsten Foster, by John W. Foster, which he takes without recourse on the said Fosters; the said Rison hereby agreeing to release and discharge the said Fosters of all debts due by the said firm of William Rison & Co., which have been

created by the said Rison, he having the entire management of said firm, and taking the payment of the same upon himself. A parcel of debts due the said firm, amounting to some \$1,532.70, which are considered as insolvent, are to be left with the said William Rison for collection, which when collected, or any portion thereof, are to be divided equally between the said Fosters and the said Rison; that is, one-third to each;" the expenses of collection to be borne equally.

In December, 1856, William Rison filed his bill in the Circuit court of Pittsylvania county, against John T. Foster, curator of the estate of John W. Foster and Marsten Foster, in which, after setting out the partnership and the conduct of the business substantially as hereinbefore stated, he states that the business did not result profitably, and at the time of the close of its operations there remained not only considerable sums of money due from the firm, but also a large amount of debts due the firm and unsettled, many of which were doubtful and insolvent. That since that time he had used his best endeavors to close the business, but owing to the doubtful solvency of much of the indebtedness to the firm, his progress had been unavoidably slow. That he had at various times paid large sums in discharge of partnership liabilities, and in re-payment to his partners of their capital contributed; principally out of the assets of the firm, but partly out of his own means; and that nearly all the solvent debts due to the concern had been collected and appropriated by him.

He further states that no settlement of the partnership transactions had been made between himself and his partners. That in the year, 1845, a settlement was attempted to be made between himself and John W. Foster, undertaking to act for Marsten Foster and himself, on which settlement he had executed his bond to the Fosters for

\$575.75, in full of all demands against him on account of the firm; they undertaking, through John W. Foster, to transfer to him certain debts then due to the firm, amounting to about \$807.21. That within the last twelve or eighteen months John W. Foster had died; since which event the plaintiff had been informed by Marsten Foster, and therefore believes and charges, that John W. Foster was wholly unauthorized to represent Marsten Foster in any such settlement; that the said settlement was without his knowledge; and that therefore it is not binding upon any of the parties thereto. That he had made payments to John W. Foster upon said bond, amounting to about \$518.39.

He further states that he is unadvised as to the proportions in which the capital of the firm was contributed by the said John W. and Marsten Foster; and that he is therefore wholly unable to apportion the repayment of their capital according to their respective rights or with safety to himself. And making John W. Foster's curator and Marsten Foster parties defendants, he calls

upon them to answer all the allegations of the bill; and prays for a settlement of the partnership accounts, and a disposition of the effects of the firm according to the rights of the parties, and for general relief.

On the 5th of January, 1857, Marsten Foster filed his answer at rules. He admits the agreement for the partnership, and alleges that in the early part of the year 1837 he furnished to John W. Foster the sum of \$930 in cash as his part of the capital with which to commence the business, John W. Foster agreeing to furnish a like sum; and it being further agreed that they would from time to time contribute such further sums in cash as they might think requisite, to be invested in said partnership. That having the most entire confidence that this money would be properly credited to him on the books of the partnership, he took no receipt for the said sum of \$930,

327 *so far as he remembers. Shortly after this he was again called on for money for said concern, and on the 5th of April, 1837, he paid to John W. Foster \$615.25, and on the 31st of May the sum of \$294.33; in proof of which he exhibits the receipts of John W. Foster. These two items not appearing in the statement made out in March, 1845, are subjects of controversy in this case. He sets out other sums which he contributed to the capital of the firm, which do appear in that statement; making, as he insists, his contributions to the capital of the firm \$3,236.72. He says he lived in Amelia county, and had no knowledge of the business save that derived from his brother, who occasionally visited Pittsylvania for the purpose of looking into it.

He further says, that in the early part of the year 1839 he was informed that the business had been unfortunate and that the greater part of the capital was lost; that John W. Foster had sold out all the goods belonging to the partnership to a new firm in which the plaintiff was a partner; and that in the fall of 1839 he had received the sum of \$500, and in 1839 or 1840 he had received from Rison his bond for \$1,000, which he understood was for his interest in the goods sold as aforesaid; which was all he ever received. He understood there was a large amount of debt due to the partnership, much of which it was supposed could not be collected, and that the firm owed many debts that it was supposed might be discharged out of the assets in the hands of Rison.

He says he never had any settlement with his co-partners, and never authorized his brother to make one on his behalf. That he was ignorant of the settlement made in March, 1845, and never knew of the terms of that settlement until after his brother's death in 1855; and that he had received no part of the money paid by Rison on the bond executed by him on that settle-
328 ment; *and he did not know until since the death of John W. Foster that he had collected of Rison any money on account of his interest in the partnership

since 1840. He insists he is not bound by the settlement, never having authorized it, or assented to it after it was made; and that one half of the money received by John W. Foster from Rison under that settlement, should be paid to him, with interest from the time of its receipt; and that as to this money John W. Foster should be regarded as a trustee for him.

He has been informed that a large part of the loss of the partnership arose from an old and unsaleable stock of goods from Clarksville, which John W. Foster put into the concern at a sum greatly beyond their value. That he never assented to this; that by the terms of the partnership the capital was to be advanced in cash; and he insists he shall not bear any part of the loss on this old stock of goods.

John W. Foster's curator also answered the bill. He says he has no personal knowledge of the transactions, or the condition of the business of the firm of Rison & Co. That he has no personal knowledge of the settlement; but insists if it was made his father John W. Foster was fully authorized to act. That his estate is amply responsible to Marsten Foster, if there be liability to any one, but he is not in any way responsible to the plaintiff. He thinks it strange that Marsten Foster should have remained quiet for ten years, when he was in frequent intercourse with the plaintiff, and should never have discovered until the death of John W. Foster, that he had, without any assignable motive and altogether without authority, made the settlement spoken of. That Marsten Foster is a man of limited means and a large family; whereas John W. Foster died possessed of

a considerable estate, and there was
329 no reason why *Marsten should have allowed him to retain his money for ten years. And he insists that it is asking too much of the court, after the lapse of ten years, when the only person who could explain the transaction is dead, and when no such intimation is heard before, to allow the plaintiff and Marsten Foster to set up the claim alleged in the bill. And he asks that if the complainant's bill is entertained every book and paper of the concern shall be placed before the commissioner for a full and complete settlement.

The cause came on to be heard in June, 1857, when the court directed one of its commissioners to take an account of the partnership of William Rison & Co., showing particularly the standing of each partner with said concern, and the sums to be paid by each to the other, to make them equal on the settlement of said account. And the parties were directed to appear before the commissioner to be examined on oath by him; and all the books and papers of the concern were directed to be laid before the commissioner.

In October, 1858, whilst the accounts were before the commissioner, Marsten Foster having died, his executor filed a cross-bill in the cause. After stating the proceedings in the first suit, and the contributions to

the capital by Marsten Foster, as stated by him in his answer, and the sale of the goods by John W. Foster in 1837, and the two sums Marsten Foster had received from Rison, he says, that from information derived from John W. Foster, the said Martsen was induced to believe that he had received all his share of the assets that remained after payment of the debts, unless something further should be collected from the claims in the hands of Rison; and consequently the said Marsten made no further investigation of the partnership affairs until after the death of John W.

330 Foster, which occurred in 1855. *That some time in the year 1856 the said Marsten was informed that there had been a settlement made by Wm. Rison, and that John W. Foster had taken upon himself to act for Marsten Foster; upon which settlement Rison had executed his bond for \$575.53. And he filed as exhibits copies of the settlement and agreement hereinbefore given. He denies the authority of John W. Foster to make the settlement; he charges that long prior to the settlement John W. had obtained, wrongfully and without the knowledge of Marsten, much the greater part of the partnership assets from Rison; that after the settlement he had collected the greater part if not all of the bond of Rison; and that he had failed to account to the said Marsten for any part of said effects or bond, and wholly concealed all his aforesaid acts and receipts from Marsten Foster.

He charges that the settlement is erroneous, because it omits to credit Marsten Foster with the sum of \$615.25 and \$294.43, hereinbefore mentioned, as contributions by him to the capital of the partnership, and because it credits John W. Foster with \$975 for goods sent from Clarksville, which it was insisted were sold by John W. Foster to Rison & Poindexter; and he insists that John W. Foster shall account to complainant for one-third of the debts transferred to Rison.

He charges further that the conduct of the said John W. in thus secretly and wrongfully obtaining possession of much the greater part of the partnership effects, and concealing the same from the said Marsten, and failing to render any account therefor, was, to say the least, grossly unjust and inequitable. He does not doubt that Rison acted in good faith in making the settlement, and he does not desire to hold him responsible for his acts, which were done in consequence of his confidence in

John W. Foster, who thus abused the
331 confidence of Rison in order *to possess himself of assets for which he failed, through accident or forgetfulness, as complainant hopes, to account to Martsen Foster; and it was only within the past two months that complainant had learned that John W. Foster had received more of the partnership funds than he was justly entitled to; and that he had failed to have Marsten Foster credited by his due share of the capital. He charges that the settlement

with Rison was erroneous; and that the losses of the firm were not one-half as much as they had been supposed to be.

And making John W. Foster's curator and Rison parties defendants, he called upon them to answer all the allegations of the bill, and prayed for an account of the partnership transactions, showing the amount of capital put in by each of the parties, and the amounts received by John W. and Marsten Foster of the said Rison or any other person on account of the capital of said concern; for a decree against John W. Foster's estate for the amount received by him to which Marsten Foster was entitled; and for general relief.

The answer of Rison is but a substantial repetition of the bill, and an explanation of the mode in which he alleged the mistake as to the credit for \$975, in the settlement, had occurred. John M. Foster's curator answered, insisting upon the settlement of March 12th, 1845; and denying every allegation of the bill charging error in it; and he relied on the statute of limitations of five years, and the lapse of time, as a bar to the suit.

In May, 1859, the commissioner returned his report. In it he charged John W. Foster with the two sums of \$615.25 and \$294.43, with interest. For these sums John W. Foster had given receipts; which were in substance alike. The first is as follows: "Received of Marsten Foster six hundred and fifteen dollars and twenty-five cents, the 5th of April, 1837; which amount
332 is to *be allowed at that time on a credit to him in the concern of William Rison & Co. of Pittsylvania." Marsten Foster subsequently made three payments towards the capital of the concern. The receipts for these payments are given by Rison, and the two last state that the money is received through the hands of John W. Foster.

The commissioner also rejected the item of \$975, for goods furnished from Clarksville. This was done on the ground that the charge in the settlement was for the same goods which, having arrived at Pittsylvania courthouse after Rison & Co. had stopped business, were sold by John W. Foster to Rison & Poindexter, and had been paid for by them. Rison was allowed a commission of two per cent. upon the receipts from the dissolution of the concern to the date of the report, as compensation for settling up the concern, and in lieu of expenses.

John W. Foster's curator excepted to the report:

1st. Because every item in the account allowed by the commissioner is barred by the statute of limitations.

2d. Because there was a full settlement of all the partnership transactions in the year 1845, as rendered by agreement in writing, filed before the commissioner.

3d. Because the credit of \$975 was not allowed.

4th. Because the two sums before mentioned were charged to John W. Foster.

5th. Because of the allowance to Rison for collecting the debts of the concern.

John W. Foster's curator having recovered a judgment against Rison for the balance unpaid upon his bond for \$575.75, executed on the settlement in 1845, he obtained an injunction to the judgment.

The three causes came on to be heard together in June, 1860, when the court sustained the fifth exception of John W. Foster's curator to the report, and overruled all the others; and the report having
333 been corrected accordingly, "showing an amount due from John W. Foster's estate to Rison of \$764.72, and to Marsten Foster's estate of \$2,427.32, with interest from the 1st of January, 1859, the court made a decree in their favor, respectively, for these sums, and interest, to be paid out of the assets of John W. Foster's estate; and perpetuated Rison's injunction. From this decree John W. Foster's curator obtained an appeal to this court.

Crump, for the appellant.

Giles, for Marsten Foster's ex'or.

Marr, for the appellee William Rison.

MONCURE, P., delivered the opinion of the court:

Two cases have been decided by this court, which have a material bearing on the one now under consideration, viewing it as a suit in equity for the settlement of a partnership account, and without reference to the effect of the settlement, which will be presently mentioned. Those cases are *Coalter v. Coalter*, 1 Rob. R. 79, decided in 1842, and *Marsteller v. Weaver's adm'x*, 1 Gratt. 391, decided in 1845. In the former it was held, first, that an action of account by one partner against his co-partners for a settlement of the partnership accounts, must be commenced within five years next after the cause of action accrued, and unless so commenced will be barred by the statute of limitations—1 R. C. 1819, ch. 128, § 4, p. 488; for such accounts do not concern the trade of merchandise between merchant and merchant, and therefore are not embraced by the exception to the statute; and secondly, that a suit in equity between such parties for such a settlement, being a substitute for the action of account, should, like that action, be brought within five years, and if not brought within that time,
334 will be barred by the statute of limitations. In the latter it was held that in such a suit the plea of the statute of limitations cannot be sustained where it appears that there were good debts due to the firm outstanding within five years before the suit was brought.

The business of the partnership in this case commenced in March, 1837, and ended in March, 1839. The original suit for the settlement of the account was brought in December, 1856, and would have been barred by the statute of limitations according to the case of *Coalter v. Coalter*, but for the fact that there were debts due to the firm outstanding within five years before the

suit was brought, one or more of which appear to have been good; and it appears also that during that period one or two debts due by the firm were paid; under which circumstances it seems that, according to the case of *Marsteller v. Weaver's adm'x*, the suit would not be barred by the statute, at least as it stood in the Revised Code of 1819.

How far does the change made of that statute by the Code of 1849, ch. 149, § 5, affect this case? The Code provides that an action by one partner against his co-partner, for a settlement of the partnership accounts, may be brought until the expiration of five years from a cessation of the dealings in which they are interested together, but not after. The time prescribed by the statute does not begin to run as to any of the partnership dealings until there has been a cessation of all of them. But what acts are comprehended in the word "dealings" in the meaning of the Code, may be a question of some doubt. Is the word confined to the active operations of the partnership during its continuance, or does it embrace also any act done after its dissolution in winding it up; such as the collection or payment of outstanding debts due to or by the firm, and even good debts due to the firm, outstanding when the
335 suit is "brought? I think the word should be construed in the latter and extended sense; otherwise no action or suit could be brought for a settlement of a partnership account after the lapse of five years from the dissolution of the partnership, although its business may not have been wound up for a long time thereafter. I therefore think that the cases of *Coalter v. Coalter*, and *Marsteller v. Weaver's adm'x*, apply to the statute of limitations as it now stands in the Code of 1849, as much as they did to the statute as it stood in the Revised Code of 1819.

The statute of limitations not being a bar to the suit, it seems to follow, as a necessary consequence, that laches and lapse of time constitute no such bar; but they may, notwithstanding, have a material effect in deciding upon particular claims which may be asserted in the course of the settlement of the partnership account. Of course I do not mean to say that laches and lapse of time constitute no bar in any case in which the statute does not constitute one. When the statute is a bar there is no need of any bar from laches or lapse of time. The latter bar peculiarly applies where the former does not. What I mean to say is, that if the cause of action be one to which the statute applies, but the lapse of time since it accrued be not such as to bring the case within the statute, laches and lapse of time cannot in themselves constitute a bar to the suit. Though the time prescribed by the statute may not begin to run until the business of the partnership is wound up, yet the parties may have a partial settlement of the partnership account before, and may bring a suit for such a settlement. It is not necessary that a suit for a settlement

of the partnership account should be delayed until all the debts due to the firm have been collected, and all due from it have been paid. Circumstances may delay the collection of a debt until long after all the

336 other business of the partnership *has been wound up. Such delay may result from the gross negligence of the partner charged with the duty of winding up the business. In such a case, although a suit for a settlement, even by the partner guilty of such negligence, may not be barred by the statute of limitations until five years after the collection of all the good debts due to the firm, yet it is the duty of a partner, claiming that a balance will be due to him upon a settlement of the partnership account, to have such a settlement as far as possible, and if necessary to bring a suit for that purpose before the lapse of time and loss of evidence and death of parties render it impossible or difficult to have a just settlement; and if he fail to do so, he must abide the consequences of his laches, and bear the loss resulting therefrom. Doubtful questions, made so by his laches, must be solved against him.

Where there has been a partial settlement of a partnership account, and there is no valid objection to the settlement, it is conclusive upon the parties to it as far as it goes, and leaves open only the unsettled portion of the account. The time prescribed by the statute of limitations begins to run at the time of the settlement against the cause of action arising therefrom, but the transactions not embraced in the settlement remain unaffected by the statute, as if the settlement had never been made.

In this case there was a settlement on the 12th day of March, 1845, between John W. Foster, acting for himself and Marsten Foster, and William Rison, witnessed by an agreement in writing under the hands and seals of the parties, and described in said agreement as "a full settlement" of the partnership: upon which settlement said Rison executed his bond for the sum of \$575.75, in full of all demands which said John W. and Marsten had against said Rison on account of said partnership, except a certain acceptance due said 337 John W. and a certain *balance due said Marsten, as mentioned in said agreement; in consideration of which bond, the said Fosters transferred a parcel of debts to the said Rison due to the said firm, amounting to \$897.21, which he agreed to take without recourse to the said Fosters; and he further agreed to release and discharge the said Fosters from all debts due from the said firm, "which have been created by the said Rison, he having the entire management of said firm and taking the payment of the same upon himself; a parcel of debts due the said firm, amounting to some \$1,532.70, which are considered as insolvent, are to be left with the said William Rison for collection, which when collected, or any portion thereof, are to be divided equally between the said Fosters and the said Rison; that is one-third to

each; any costs attending the collection of any of such last referred to debts, shall be deducted from any amounts collected, or be paid by the parties equally."

This agreement, if valid, was a full and final settlement of the partnership account, at least as between said Fosters and Rison, except as to the parcel of debts due the said firm which were considered as insolvent. And in order to succeed in this suit for a general settlement, William Rison and Marsten Foster, or his representative, must therefore, in some way, get rid of the said agreement.

How do they seek to get rid of it? On two grounds: First, on the ground that it was not authorized by Marsten Foster, but made without his consent or knowledge; and secondly, on the ground that material mistakes and omissions were made in the settlement to the prejudice both of Marsten Foster and William Rison.

I will examine these objections in their order; and, first, that the agreement was not authorized by Marsten Foster. If it is charged, it certainly is not proved, that J.

W. Foster was guilty of any fraud in 338 making the settlement. *To justify his conviction of such a fraud it ought to have been expressly charged and clearly proved. He made the settlement in behalf of himself and his brother, with his nephew. In making it with his nephew he was dealing with one who was the only acting partner of the concern; had kept and was still in possession of all its books and papers, and was better informed about its affairs than any other person. The two brothers lived in Amelia county, and the nephew at Pittsylvania courthouse, where the business had been conducted, where the settlement was made, and where the books and papers were at the time of the settlement. Every circumstance of the case repels the idea of fraud. The question then is merely one of authority. Was J. W. Foster authorized by Marsten Foster to make the settlement? It was made under hand and seal, and there is no evidence of any authority under the hand and seal, or even the hand of Marsten Foster to make it. It is not probable that any such authority was in fact given. Nor was it necessary. J. W. Foster had no right to execute a deed for Marsten Foster without authority by deed; but he had a right to make a settlement for him under a parol authority if he had such authority, and such a settlement, if made, would not be invalidated by any instrument purporting to be a deed with which it might be accompanied. The instrument might be void as a deed and still be good evidence of the terms of the settlement. Nor was it necessary that the authority to make the settlement should have been express. It may have been implied from the relations and previous dealings of the parties, especially in reference to the subject of the settlement.

(The judge then proceeded to consider the evidence on the subject; and then proceeded as follows:)

I am therefore of opinion that J. W. Foster had authority from Marsten Foster, 339 expressed or implied, to make *the settlement, and that after so great a lapse of time and so much laches on the part of Marsten Foster, and after the death of J. W. Foster, it would be against the policy of the law to disturb it on the ground that it was made without authority. If it can be clearly shown that there were any mistakes or omissions in the settlement, and that they can now be corrected without doing injustice to any party, they ought to be corrected accordingly. But that can and ought to be done without disturbing the settlement further than may be necessary for the purpose of such correction. In that way Marsten Foster will get the full benefit of the correction without losing the benefit of the settlement, and William Rison will get all the benefit he is entitled to; for in no view of the case can he object to the settlement except on the ground and to the extent of such mistakes or omissions, so far as his interest may be affected by them. And this brings me to the next enquiry, which is,

Secondly—Were any mistakes or omissions made in the settlement to the prejudice of Marsten Foster and William Rison, or either of them?

It is a curious fact, that neither in the original bill nor in the answer of Marsten Foster thereto, is there any complaint of any such mistake or omission. In these the settlement is impeached only on the ground of want of authority, as before stated. In the cross-bill filed in October, 1858, after the death of Marsten Foster and by his executor, errors in the settlement are, for the first time, charged, and the charge is repeated in the answer of Wm. Rison to the cross-bill.

(The judge then proceeded to consider the first error in the settlement alleged to have been made. This relates to the two sums of \$615.25 and \$294.43, which it was claimed should have been credited to Marsten Foster. He then proceeded as follows:)

340 *But if J. W. Foster did receive these two sums from his brother to be paid to Wm. Rison on account of the firm and failed to make such payment, the firm is not accountable for them to Marsten Foster; but his only recourse is against J. W. Foster individually. Whether J. W. Foster is liable for them or not is a question not in issue in this cause.

The next error alleged in the settlement is, that John W. Foster was credited with \$975 as for merchandise put in by him from Clarksville.

(The judge then proceeded to consider the evidence in relation to that alleged error. He then proceeded as follows:)

It is possible, after all, that the account given of this matter in the examination of Wm. Rison is the true one, and that the credit of \$975 given to J. W. F. in the settlement was in fact given by mistake. But whether the fact be so or not, I think it is not proved by that degree and amount of

evidence which ought to be required under the circumstances, and that in attempting to correct such supposed mistake, there would be danger of doing injustice to the estate of J. W. Foster. Ten years elapsed after the settlement was made and before the death of J. W. Foster, during which time nothing was said about any mistake in the settlement, nor until more than a year thereafter when the original bill was filed. Had the suit been brought in his lifetime he might have explained the transaction as he was a party to it, and probably knew, or had the means of showing, all about it. At all events he would have had the benefit of his answer. I am therefore of opinion that it would be against public policy and the principle of our decisions on the subject to afford relief in such a case, at least without the strongest evidence to sustain the claim. As was said by Allen,

J. (with whom the rest of the court 341 *concurred), in *Caruther's adm'r's v. Trustees of Lexington*, 12 Leigh 610, 619, "no particular period is fixed by the cases as limiting the demand for an account. If from the delay which has taken place, it is manifest that no correct account can be rendered, that any conclusion to which the court can arrive must be at best but conjectural, and that the original transactions have been so obscured by time and the loss of evidence, and the death of parties, as to render it difficult to do justice, the court will not relieve. It is the duty of the plaintiff in equity, as well as at law, to establish his title to the relief sought for by satisfactory proof; it will not answer to show a probable title to something. He must satisfy the court that it can extend relief without the hazard of doing injustice to the defendant."

The only remaining error alleged in the settlement is as to the charge to Wm. Rison of \$220.65 and \$347.31 for interest on the balance of capital not returned to his partners. It is a sufficient answer to this objection that the matter was agreed in the settlement, and is concluded by it if the settlement be valid and binding, as I think I have shown that it is; at least as between the Fosters and Rison. The exception of Rison to the commissioner's report, which was overruled by the court below, rests on the same principle with the objection just disposed of. The court below sustained the appellants' fifth exception to the commissioner's report, "because the commissioner has allowed to the said Wm. Rison the sum of \$503.08 commission for collecting the debts of said concern of Wm. Rison & Co.;" and the counsel for Rison complains that this was error. The same answer may be made to this objection as to the one just disposed of, that the subject of it is concluded by the settlement.

I have now fully considered the case so far as Wm. Rison is concerned, and so 342 far as it is affected by the *settlement.

But Marsten Foster's executor contends that the settlement was only of the partnership account as between the Fosters

and Rison, and not as between the Fosters inter se; and that the estate of John W. Foster is largely indebted to the estate of M. Foster on account of money received by the former from the latter, to be applied to the credit of the latter in making up the capital of the concern but not so applied; and on account of money received by the former out of the partnership assets over and above the proportion to which he was entitled. The object of the cross-bill was to ascertain and recover the amount of this claim and to have the proper account settled for that purpose. I will now proceed to consider this part of the case.

The only money charged to have been received by J. W. Foster from M. Foster, on account of the partnership, was the two sums of \$615.25 and \$294.43 received in April and May, 1837, which have already been the subject of observation in this opinion. And in regard to those two sums of money, as well as any money which John W. Foster may have received from William Rison for Marsten Foster on account of the latter's interest in the partnership assets, Marsten Foster, to the extent of any just claim he may have had thereto, had a legal remedy for the recovery thereof, which has been long since barred by the statute of limitations. There was no partnership between John W. and Marsten Foster; so that the account between them does not stand on the footing of a partnership account, though it may be composed of items for money received by one on account of the interest of the other in the partnership assets. The case stands upon the same footing with any other case in which money is had and received by one party for and at the instance and request of another. I have already, I think, shown, that

343 whatever money *may have been received by John W. for Marsten Foster on account of the latter's interest in the partnership assets, was received by his authority, express or implied. Nor is this a case in which an action of account would lie, and to which, therefore, the legal limitation to that action applies, even though the suit be in equity. It is not even such a case as to give jurisdiction to a court of equity on the ground of mutual account. The account consists altogether of items on one side, for money alleged to have been received by one party for another. A portion of this money, to wit: the two sums of \$615.25 and \$294.43, is alleged to have been received in April and May, 1837, more than twenty-one years before the cross-bill was filed, in October, 1858. Another portion is alleged to have been received in 1840, when payment was made for the goods sold by W. Rison & Co. at the time of their dissolution to Rison & Poindexter, more than eighteen years before the cross-bill was filed. Nothing was ever received by John W. Foster on account of the partnership assets, for himself or any other person, after the settlement of March, 1845, except on account of the bond for \$575.75 taken upon that settlement, which was made more

than thirteen years before the cross-bill was filed. And nothing has been received on account of that bond but \$406, which was paid in March, 1846, more than twelve years before the filing of the cross-bill. This was the last payment made to John W. Foster on account of the assets of the partnership, on which can be founded any pretense of a right of action against him or his personal representative, for money had and received to the use of Marsten Foster. This is not a case of trust which would give a court of chancery jurisdiction, and to which the statute of limitations does not apply. If it be said that a resort to a court of

chancery might have been necessary
344 to have an "account taken to ascertain the portion of the money received by John W. Foster on account of the partnership assets to which Marsten Foster was entitled; still that would not take the case out of the operation of the statute which applies to an action for money had and received. The equitable suit in such a case would be only incidental and ancillary to the legal demand, and would be barred by the statute which bars the legal demand. It would not be like an ordinary suit to settle a partnership account, which would not be barred by the statute, unless five years had elapsed after the "cessation of the dealings" in which the partners were "interested together" and before the institution of the suit. If a partnership, after the close of its active operations, be in a course of liquidation and settlement, and the acting partner, charged with the duty of winding up the concern, make a payment to another partner for himself and a third for whom he is acting, the third partner has an immediate cause of action for his part of the payment against the partner to whom the payment was made, and prima facie, they would be entitled to the amount equally. They might, under the circumstances, be entitled to it unequally, and an account might be necessary to ascertain their several portions; but they ought to proceed with due diligence to have the account settled, and a suit for such a settlement must be brought within the period limited by law for the bringing of an action for the money.

The settlement of March, 1845, was a full and final settlement of the partnership account between the Fosters who contributed the capital and Rison the only acting partner, with the single exception of the debts due to the concern, which were considered as insolvent, amounting to \$1,532.70, and which were left with said Rison for collection on the joint and equal account of the parties. They remained partners only

345 in regard to the matter of *that exception, as to which only an account between them may now be called for. If John W. Foster became indebted to Marsten Foster on account of, or in regard to, the partnership, it was for money had and received to his use; and the cause of action therefore arose at least as far back as the time of the settlement in March, 1845, and

so was barred by the statute of limitations when the cross-bill was filed in October, 1858, unless the bar of the statute can be repelled upon the ground of fraud or concealment upon the part of John W. Foster. The statute applies as well to a suit in equity for an account of such money as to an action at law for its recovery; and the bar of the statute cannot be prevented or affected by the fact that debts due to the partnership and included in the insolvent list at the time of the settlement, have since been or may hereafter be collected. Those debts have no connection with any debt of J. W. to Marsten Foster for money had and received to the latter's use as aforesaid.

Then the only remaining question is, was there any fraud or concealment on the part of J. W. Foster in regard to any money received by him for M. Foster on account of the partnership? If there was, and the effect of such fraud or concealment was to keep M. Foster in ignorance of the receipt of such money, or prevent him from suing for it, until within five years before the filing of the cross-bill, then the statute of limitations is not a bar to the suit. The mere fact that Marsten Foster was ignorant of the existence of any debt which may have been due to him by J. W. Foster until within five years before the institution of the suit, will not be sufficient to repel the bar of the statute. To have that effect, such ignorance must proceed from the fraud of J. W. Foster, which ought to be plainly charged by the pleadings, and clearly shown by the proofs. The charge of fraud

346 in this case *is not as plain as it might be. To be sure the said John W. is substantially charged in the cross-bill with "secretly and wrongfully obtaining possession of much the greater part of the partnership assets and concealing the same from the said Marsten and failing to render any account thereof," but the complainant expresses a hope that such failure to account was "through accident or forgetfulness." The cross-bill, too, was filed, not by Marsten Foster, but by his executor, who could have had no personal knowledge of the fact of fraudulent concealment therein charged. The answer to the original bill was filed by M. Foster himself, and contains no charge of fraud or concealment. But admitting the fact to be sufficiently charged, as it no doubt is, in the bill, it is certainly not proved, and there is no evidence in the cause which even tends to prove it. The case then stands upon a mere charge of fraud, made by a personal representative knowing nothing about the fact, and after the death of the party charged with the fraud, whose personal representative knows nothing about it, and without a particle of evidence to sustain the charge. In perfect consistence with all the evidence in the case, John W. Foster may have promptly and regularly communicated to his brother all his transactions on their joint account in regard to the partnership, and accounted with him for all the money received on his

account. Is not such a mere charge, unsupported by evidence, plainly insufficient to repel the bar of the statute? I think it is. Had the charge been made by Marsten Foster against John W. Foster in the lifetime of both, it might have been denied in the answer on oath of the latter; and it could then have been sustained only by at least two witnesses, or one and pregnant circumstances. The charge having been made after the death of both, in a suit between their representative having no personal knowledge of the transaction, it 347 ought to be sustained by *at least one witness to have any effect, especially after so great a lapse of time and so much laches on the part of Marsten Foster.

Something may be due: I might go farther and say that probably something is due from the estate of John W. to the estate of Marsten Foster on account of the transactions stated in the bill. But the possibility or even probability that something is so due, is not enough to entitle the plaintiff to an account. Independently of the bar of the statute, it would be a sufficient answer to his claim for an account, that one cannot be now settled with any reasonable expectation of doing justice to the defendant, and that the plaintiff's testator is in fault for not having sooner asserted and prosecuted his claim. It may be said that John W. Foster was also in fault, for not having himself rendered and settled an account. Non constat that he did not render and settle an account. He is not now here to speak for himself. But concede that he was equally in fault with the other partners, that is not enough to make him liable. In such a state of equality the condition of the defendant is better than that of the plaintiff. It may be further said, that Marsten Foster did not know that anything was due to him until shortly before the institution of the suit, and was led to believe the contrary. It certainly does not appear, as I have already shown, that John W. Foster led him to such belief, or did anything to conceal or cover up the transaction. Marsten Foster knew that he was a partner in the concern, and it was his business to enquire into it and inform himself of its condition. If he chose to depend upon another to do this for him, he must take the consequence of neglecting his own duty, and having lost his opportunity by delay he cannot excuse himself on the ground of want of information, unless it proceeded from the fraud of his adversary, which

348 must be proved. *Vigilantibus non dormientibus jura subveniunt*, is a favorite maxim in a court of equity. The principles which govern that court in this respect are beautifully set forth by Lord Camden in the often cited case of *Smith v. Clay*, 3 Br. Ch. R. 640. "Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. When these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced." Most of the English and American cases on this subject are

referred to in a note to 2 Story's Eq. § 1520. See also Carr's adm'r v. Chapman, 5 Leigh 164, and the cases therein cited. In Carr v. Chapman, Judge Carr says: "The principles deduced from the English cases are fully supported, if not advanced a step, by the spirit of our own decisions and of our legislation also." Id. 178. Our subsequent decisions on the subject or some of them are: Hayes v. Goode, 7 Id. 452; Atkinson v. Robinson, 9 Id. 393; Caruther's adm'r v. Trustees of Lexington, 12 Id. 610; Hillis v. Hamilton, 10 Gratt. 300; Crawford's ex'or v. Patterson, Id. 364; Doggett v. Helm, supra.

Upon the whole, I am of opinion that the decree should be reversed and all of the bills dismissed with costs; but without prejudice to any claim which the representatives of John W. and Marsten Foster or either of them may have for an account of the debts due to the firm of William Rison & Co., which were considered as insolvent and left in the hands of William Rison for collection at the time of the settlement of the 12th of March, 1845; and also without prejudice to any claim the representative of said Marsten may have to the balance or any part thereof due upon the bond for \$575.75 given upon the said settlement by the said Rison to the said John W. and Marsten Foster.

Decree reversed.

349

*Tebbs v. Duval & als.

January Term, 1867, Richmond.

1. **Wills—Construction—Case at Bar.**—C died leaving one daughter and two sons. By his will he says: I give the above recited land and negroes to my said daughter B during her natural life, and then to her child or children, if any, living at her death, to be equally divided; if none, then to my sons W and J for life, then to be equally divided between them or their children. He makes a similar provision for each son and his child or children, with the same limitation over to the daughter and son, and their children. W and J died without children. B died leaving children surviving her, and the children of others who died before her. **Held:** That on the death of W and J the whole property vested in B for life, and on her death passed to her children who survived her, to the exclusion of the children of her deceased children.
2. **Same—Same.**—Where a will affords no satisfactory clue to the real intention of the testator, the court must, from the necessity of the case, resort to legal presumptions and rules of construction.

***Wills—Construction.**—For the proposition that, where a will affords no satisfactory clue to the real intention of the testator, the court must, from the necessity of the case, resort to legal presumptions and rules of construction; but such rules must yield to the intention of the testator apparent in the will, and have no application where the intention thus appears, the principal case is cited and followed in the following cases: Couch v. Eastham, 29 W. Va. 798, 8 S. E. Rep. 28; Cresap v. Cresap, 34 W. Va. 315, 12 S. E. Rep. 528; Hurt v. Brooks, 39 Va. 500, 16 S. E. Rep. 358; Bradley

But such rules yield to the intention of the testator apparent in the will, and have no application where the intention thus appears.

3. **Compromise of Suit—Case at Bar.**—A life tenant and remaindermen compromise a suit in which they take a decree for less than half the amount of principal and interest reported to be due from the executor, and the decree directs the fund to be invested and the interest paid to the life tenant for her life, and then the fund to be divided among the remaindermen after the death of the life tenant, the whole fund will be considered as principal to be equally divided among the remaindermen.

4. **Compensation for Prosecuting Suit—Failure to Claim in Due Time—Effect.**—One of several parties interested in a suit, attends to its prosecution and devotes much time and labor to it. Not having pressed his claim for compensation for a long time, he will, under the circumstances, be considered as having abandoned it.

350 *William Carr of the county of Prince

William, died in 1790, leaving a widow and three children. His daughter Betsey Tebbs was married at the time and had children; his two sons John and William were minors. By his will he, in the first place, gave to his widow during her natural life, the land on which he lived, with the negroes, stock, &c., upon it. He then, in successive clauses, gave land and slaves to his daughter and each of his sons for life, and as is therein stated. These clauses are given in the opinion of Judge Joynes. He then gave all the remainder of his estate, real and personal, to Robert Luttrell, Simon Luttrell and Thomas Chapman, in trust for his three children, to be equally divided, &c. The principal debts due on goods, bonds, and land not devised to be kept untouched, and nothing but the rents and interest used until his two sons come of age; then the land and bonds to be divided, that each child may know their part. But the principal to be retained by the trustees or laid out in land and negroes, by them

v. Zehmer, 82 Va. 689; Withers v. Sims, 80 Va. 661; Moon v. Stone, 19 Gratt. 261, and *note*.

In Vaughan v. Vaughan, 97 Va. 528, 83 S. E. Rep. 608, it is said: "The word 'children,' in its legal as well as in its ordinary and popular sense, means the immediate offspring of a man or woman, and does not include grandchildren or more remote descendants. The term is never used to include grandchildren or other persons than immediate descendants, in the absence, as in this case, of something showing a contrary intent. 2 Jarman on Wills (Bigelow's Ed.) 147; 5 Am. & Eng. Enc. Law 1085; Radcliffe v. Buckley, 10 Vesey 195; Moon v. Stone, 19 Gratt. 180; Tebbs v. Duval, 17 Gratt. 349; Morris v. Owen, 2 Call 520; James v. McWilliams, 6 Munf. 302; Thomason v. Andersons, 4 Leigh 118; Smith v. Chapman, 1 H. & M. 240; Adams v. Law, 17 How. 417."

Upon the question of the construction of wills, see in addition to the above authorities, Smith v. Smith, 17 Gratt. 286, and *foot-note*; Randolph v. Wright, 81 Va. 612; Shelton v. Shelton, 1 Wash. 53; Kennon v. M'Roberts, 1 Wash. 99; Wootton v. Reed, 12 Gratt. 196; Hatcher v. Hatcher, 80 Va. 169.

and the executors; "to the use of his said children for life, and to go as the other estate devised to them."

By a codicil to his will, which bears the same date with it, the testator says: "Should all of my dear children die without issue of their bodies, my dear wife living, one half the life estate to go to my dear wife during life, the other half to Thomas Chapman, Simon and Robert Luttrell and Thomas Chapman's children (naming them) during their lives, and then to their children, if any; and after the death of my dear wife the whole of what she has for life, in the last clause, to Thomas Chapman, in trust for the forementioned children." Simon Luttrell and Thomas Chapman qualified as executors of the will.

In 1801, William Carr, jr. died, leaving a widow, but no children; and she marrying Wm. Smith, they filed a bill claiming that she was entitled to dower in the

351 real estate left to him by his father. This case is reported in 1 Hen. & Mun. 240, under the name of Smith & wife v. Chapman & others. John Carr died in 1880, also without children.

In May, 1836, a decree was made in the Superior court of law and chancery for the county of Spottsylvania in a case then pending therein, and which had been pending for upwards of twenty years, in which Betsey Tebbs and Mary F. Spence, executrix of John Spence deceased, were plaintiffs, against Thomas Chapman's administrator and the sureties of Chapman as executor and trustee of William Carr deceased, and executor of John Carr. This was a compromise decree. It recited that it appeared from the commissioner's report made in the cause, there was due by the executor of the estate of William Carr, sen. on the 1st of March, 1838, the sum of \$33,545.82; and appointing Samuel J. Tebbs trustee in the place of Thomas Chapman; it decreed that there should be paid to him by the heirs, legatees and representatives, of each of the four sureties of Chapman, the sum of \$3,750, and one-sixth of the costs incurred in the cause. And it was further decreed that the trustee Samuel J. Tebbs, out of the said several sums of money decreed to be paid to him, should pay the expenses of the plaintiffs incurred in the suit, and the expenses of the trust. That he should put out the balance of the money on interest on good personal security, with deeds of trust on unincumbered real estate, to secure the payment thereof; and should pay annually to the plaintiff Betsey Tebbs, the interest on the money during her life, and at her death should distribute the principal between those who might be entitled thereto according to the will of William Carr deceased.

Mrs. Betsey Tebbs died in 1852, having had seven children; four of whom died in her lifetime. The survivors

352 were, Ann F. the wife of John P. Duval, Mary F. Spence and Samuel J. Tebbs, the trustee. And in February,

1854, Duval and wife instituted a suit in equity in the Circuit court of Fauquier county, which was afterwards removed to the Circuit court of Culpeper county, against Samuel J. Tebbs, the trustee, Mrs. Spence and the representatives of the deceased children of Betsey Tebbs, calling for an account and distribution of the trust fund.

Samuel J. Tebbs answered the bill. He says that Chapman, the surviving executor and trustee, having been removed, Dr. John Spence, the husband of the defendant Mary F. Spence, qualified in 1822 as administrator de bonis non with the will annexed upon the estate of William Carr, and continued to act until his death in 1829. That after his death his account as administrator was settled, and a large balance was found against him; and he insists that his representative should be made a party. That in February, 1845, Betsey Tebbs executed a deed which had been duly recorded, by which she conveyed to him all her interest of every kind whatever in the estate of her father William Carr, sen. That the decree of 1836 was obtained in a great measure through his exertions; and he insists he is entitled to receive, in addition to the commissions usually allowed to fiduciaries, compensation for his trouble, expenses, loss of time, and for his services in bringing so long and litigious a controversy to so favorable a termination. That whilst he was prosecuting the suit of Tebbs v. Chapman, he was defending in the Court of Appeals, as the personal representative of William Carr, a very expensive suit, involving a very large sum of money, and in which he finally succeeded about the year 1834. That in this case he necessarily incurred heavy expenses, and paid large fees to counsel,

353 for all of which he insists the funds received by him under the decree of 1836 are liable in his hands. He insists that he has accounted with Betsey Tebbs to her satisfaction, for the interest upon the trust fund up to her death. And he submits to the court the question whether the amount received by him under the decree of 1836, after deducting costs and charges, is to be treated entirely as principal of said Carr's estate, or whether a part of it is to be considered as interest which, at the date of the decree, had accrued upon the original indebtedness to Carr's estate, and which by the will belonged to Betsey Tebbs, and by her deed passed to him. He states that three of the parties had paid to him the \$3,750 which, by the decree of 1836, they were directed to pay to him. The estate of the fourth party proved to be insolvent, and nothing was made out of that party. The death of John P. Duval was suggested at the June term, 1855, and the cause coming on to be heard, the court held that it was not necessary to make Spence's representative a party; and directed a commissioner to take an account of the trust fund in the hands of Samuel J. Tebbs. The commissioner made his report, in which he allowed the trustee ten per cent. upon the amount of his receipts, as compensa-

tion and expenses; and to this allowance the plaintiff excepted.

The cause came on again to be heard on the 17th day of June, 1858, when the court held that, as to the original third of the trust fund which Betsey Tebbs was directly entitled to for life, under the will of her father, her three surviving children were entitled to it; but as to the two-thirds to which she became entitled upon the death of William Carr, jr., and John Carr, all her seven children were entitled to share it. And sustaining the plaintiff's exception to the allowance of ten per cent. upon the receipts to the trustee, the court re-committed

the account with instructions to state
354 it according to the *principles declared in the decree; and in stating the account the trustee was to be allowed a commission of not less than five per cent. on the fund, as might appear reasonable to the commissioner upon the evidence then in the cause, or which might afterwards be submitted. And in the accounts with the respective parties the trustee was to be allowed any payments he may have made them on account of the trust funds.

The commissioner made his report, in which he distributed the fund as directed in the foregoing decree; and he continued the allowance of ten per cent. to the trustee; and he returned with his report to the deposition of John P. Philips. He was one of the counsel in the case of *Tebbs v. Chapman*, for one of the sureties. He says he had an opportunity, during the progress and pendency of that suit, to know that Samuel J. Tebbs was diligent and zealous in the management of the case, and that it occupied a great deal of his time. It was a very troublesome case to manage. It kept Samuel J. Tebbs very much occupied to attend the commissioner's office, the courts, the taking of the depositions and other matters connected with the suit, and he finally effected a compromise, which resulted in the decree of the 20th of May, 1836. Witness thought a commission of ten per cent. on the amount of the recovery would be a reasonable charge. Witness said that Samuel J. Tebbs had a letter from R. C. L. Moncure, written not long after the decree of May, 1836, upon the subject of said Tebbs' commission on the fund recovered by that decree. The letter was handed witness by Tebbs, with a request that on his then expected visit to Fredericksburg, he would show it to Thomas B. Barton, who was also counsel in the case of *Tebbs v. Chapman*, and get him to express his opinion on the subject of said commission. Witness handed the letter to a son of

Mr. Barton, in the absence of his
355 father, with a request *that he would write to Mr. Tebbs on the subject; and witness had since understood from Mr. Barton that the letter was lost or mislaid. The purport of the letter was that Mr. Moncure having been counsel in the case, and thereby being acquainted with the trouble incurred by Mr. Tebbs in managing the case, considered that ten per centum

was a reasonable commission for him to charge.

The plaintiff excepted to the report for the allowance of more than five per cent. commission. The defendant Samuel J. Tebbs excepted to the report. First—Because the whole fund is divisible among the three surviving children of Betsey Tebbs. Second—Because the fund for distribution is not the balance of principal and interest in the hands of Carr's representative at the death of Betsey Tebbs, but only so much thereof as was the principal or corpus of the fund. That under the deed of Mrs. Tebbs to him in 1845, he was entitled to all but the principal of the fund. Third—Because the amount due by Mrs. Spence to the estate of Carr is not brought into the distribution and charged to her, nor the said Tebbs allowed to retain her share on account of said indebtedness. There were other exceptions which it is not necessary to state.

The court sustained the exception of the plaintiff to the report, and overruled those of the defendant Tebbs; and the report having been corrected, the cause came on to be finally heard on the 16th of June, 1859, when a decree was made in favor of each of the seven children of Betsey Tebbs, for the amount reported by the commissioner. And thereupon Samuel J. Tebbs obtained an appeal to this court.

Tucker and Green, for the appellant.

Steger and Sands, for the appellees,

356 *JOYNES, J. I think that the court did not err in treating the whole of the fund realized under the decree of 1836 as capital. For it was expressly provided by that decree, that the appellant should invest the sums decreed to be paid to him, after deducting expenses; pay to Mrs. Tebbs for life the interest of the money so invested; and distribute the principal sum, after her death, among the parties entitled. This arrangement, though injurious to Mrs. Tebbs, may have been sanctioned by her for the benefit of her children. But whether it was or not, it was embodied in the decree to which she was a party, and which is binding upon those who claim under her.

And I think the court did not err in refusing to allow the appellant an extra commission, as compensation for his services in relation to the case of *Tebbs v. Chapman*. It would have been proper to assert that claim in the case of *Tebbs v. Chapman*, when the court was adjusting the rights of the parties in respect to the fund recovered. The facts, too, were then recent, parties now dead were then living, and the merits of the claim, depending upon the character and value of the services, and the circumstances under which they were rendered, could have been more fully ascertained and better understood, than they can be now.

Perhaps, however, it would be going too far to hold the appellant precluded by his failure to assert this claim in that cause, because he settled no account in that cause,

and was not required by the decree to make a report as to the collection and investment of the fund. It is a circumstance, however, which deserves to be considered along with others which I will now advert to.

It appears from the deposition of Phillips, that the appellant contemplated the assertion of this claim soon after the decree of 1836, and took steps to collect the
 357 *opinions of gentlemen who had been counsel in *Tebbs v. Chapman*, as to the commission which ought to be allowed him. He obtained a letter from one gentleman, and made an effort to get one from another, the result of which does not appear; and whilst it appears that the letter which he did get was lost, it does not appear that another was obtained to supply its place. But it does not appear that anything else was done. It does not appear that the claim was presented to the parties, and, if presented, it was certainly not allowed; nor does it appear that the appellant entered any charge for these services in his accounts. The first time we hear of the claim again is in 1854, when it is advanced by the appellant in his answer in this cause. These circumstances, of themselves, afford strong ground for the presumption, that this claim was abandoned by the appellant; and other circumstances greatly increase the force of this presumption. The appellant was himself a party interested in the fund to be recovered in *Tebbs v. Chapman*. It does not appear that his services in reference to that case were rendered upon any promise of compensation by the other parties. It must be supposed that his actual expenses out of pocket were retained, as he had a right under the decree to retain them. The other parties were his mother, brothers and sisters, to whom he might have been willing to render a gratuitous service, or, at any rate, to surrender his claim, in consideration of the sacrifices to which they had been subjected by the compromise, and especially as his services, however great and however meritorious, had proved, by the result, to be in a great measure fruitless. But however all this may have been, which it may now be impossible to ascertain, we can see, in these various circumstances, abundant reasons why the appellant may have been willing to abandon his claim against the other
 358 *members of his family, on account of services rendered for the common benefit.

The main ground of objection to the decree is, that it admits the representatives of the children of Mrs. Tebbs, who died in her lifetime, to a participation, along with those who survived her, in the two-thirds of the fund which accrued from the deaths of William and John Carr.

The fund in controversy arose under the residuary clause of the will of William Carr, the elder, deceased. By that clause, the property embraced in it was, upon his sons' attaining full age, to be divided equally between the testator's three children, Betsey Tebbs, William Carr and John Carr, "that

each child may know their part." But the will directed that the principal should be retained by the trustees, to whom the residuum had been given, or laid out in land and negroes, "to the use of my said children for life, and to go as the other estate devised to them." The "other estate" here alluded to consisted of land and negroes, the latter being real estate as the law then was, and was devised by three several clauses in preceding parts of the will, which, omitting the description of the property, are respectively in the following words:

1st. "I say I give the above recited land and negroes to my said daughter Betsey Tebbs during her natural life, and then to her child or children, if any living at her death, to be equally divided; if none, then to my sons William and John for life, then to be equally divided between them and their children." * * *

2d. "I say I give the aforesaid land and negroes to my dear son William Carr during his natural life, and after his decease to his child or children; if none, to my son John Carr and my daughter Betsey Tebbs for life, and then to be equally divided amongst their children." * *

359 *3d. "I say I give the above related lands and negroes to my son John Carr during his natural life, and then to his child or children, if any living at his death; if none, to my daughter Betsey Tebbs and my son William Carr during life, and then to their children to be equally divided."

The rights of the parties in this case depend therefore on the proper construction of these clauses. And nothing turns upon the character of the residuary fund, as real or personal, if that would make any difference in the construction, because by the express terms of the residuary clause, all the property embraced by it, real and personal, is "to go as the other estate," which was devised by the clauses just quoted.

At the date of the will Betsey Tebbs was married and had children. William Carr survived the testator, and died in 1801, never having had a child. John Carr died in 1808, never having had a child. Betsey Tebbs died in 1852, leaving the appellant S. J. Tebbs, and two other children surviving her, and having had four other children who died in her lifetime.

It was contended on behalf of the appellant S. J. Tebbs, by one of his counsel, that upon the death of John Carr the moiety of William's original share, which, on his death, passed to John under the will, was undisposed of and passed as property of the testator, in respect to which he had died intestate, the real estate to the heirs at law of the testator, and the personal estate to his distributees, because the latter being part of the residuum, would not fall into the residuum, as decided in *Frazier v. Frazier's ex'or*, 2 Leigh 642. Following out this theory the counsel presented a statement of the distribution of the fund in controversy, showing that after the death of John Carr,

one-third of the fund was held by
 360 Mrs. Tebbs for life, remainder to *her child or children living at her death, and that the other two-thirds were held by her absolutely. These last were claimed as belonging to the appellant, under the deed from Mrs. Tebbs, dated February 18th, 1845.

I do not concur in this view. I think it impossible to read this will without perceiving that it was the purpose of the testator to control the disposition of the entire property in all the events contemplated and provided for by the will. This is apparent from the structure of the several clauses above quoted, which are identical in meaning and effect, though not identical in words, and were so regarded in the argument on both sides. And this view is confirmed by the second codicil, to which I shall allude in another connection.

I hold, therefore, that the entire property passed by the will, in all the events contemplated and provided for by it, and that there was no intestacy as to any part of it in any of those events. To effectuate this purpose cross remainders for life must be implied between Mrs. Tebbs and her brothers, subject to the limitations over to their children, the character of which will appear hereafter. Upon this subject it will be sufficient to refer to the cases collected in 2 Jarman on Wills 457-480, and 3 Lomax Digest 257-263, from which it will appear that this construction is fully authorized by the language of the will. It follows that, upon the death of John Carr, the whole of the property in question became, by virtue of the will, vested in Mrs. Tebbs for life, subject to the limitations in favor of her children.

In respect to the original shares of Mrs. Tebbs, the language is explicit, that it shall pass upon her death to her child or children then living, if any. And accordingly it was not controverted in the argument, that this share passed to such of the children of Mrs. Tebbs as were living at her death in exclusion of the representatives
 361 *of those who died in her lifetime.

But in respect to the shares which accrued to Mrs. Tebbs for life by the death of her brothers, the language is not equally explicit, the limitation being to her "children" generally, and not to such as might be living at her death.

The counsel on both sides have contended, that the construction of this clause may be ascertained by the application of certain general rules of law, which have been laid down in the construction of wills. But I do not think it necessary to consider these general rules, or their application to the present case. General rules of this sort often serve as guides for the court when none can be found in the will. Where the will affords no satisfactory clue to the intention of the testator, the court must, from the necessity of the case, resort to legal presumptions and rules of construction. But such rules yield to the intention of the testator apparent in the will, and have no

application where the intention thus appears. It seems to me that the intention of the testator, in the present case, may be ascertained from the will, without any resort to technical rules.

We do not know the motives which led the testator to give the original shares of his children to such only of their children as should happen to survive them. He may have had a reason for it, good or bad, or it may have been the result of mere whim and caprice. But still there was a motive of some kind, and whatever it was, it must, as far as we can see, have been applicable equally to the derivative shares to accrue from the death of the testator's other children. The testator was providing for bringing the original shares together, as any of his children should die without a child or children surviving, and it was natural that he should have the same purpose in reference to the shares after they had been thus increased in amount and value,

as he had in reference to them in
 362 *their original state. If a distinction had been intended, it would have been most natural to express it by words which would indicate clearly, that while he intended, in respect to the original shares, to exclude such of his grandchildren as should die before their parent, he had a different intention in respect to the accrued shares.

As already alluded to the original shares are limited, in the former part of the several clauses under consideration, to the children who may be living at the death of their parents, while in the latter part, the accrued shares are limited to children, generally. But this change of phraseology does not indicate any difference of intention. The testator was, in these several clauses, making provision, in the future, for the same general class of objects (his grandchildren), with reference to the same events (the death of his own children), and he was making it out of property which he had bound up together by cross limitations, in case any of his own children should die without child or children surviving. Having in the first part of the clause, defined precisely the class of his grandchildren for which he meant to provide, out of the original share, he would naturally have in his mind the same intention in reference to what was to be added to that share, or to go along with it, under the provision in the latter part of the clause, and he might, by a very natural process, have dropped, in the latter part of the clause, the terms of description he had used in the former, without really intending any distinction. And this view is the stronger from the fact, that the expressions we are considering are in such close connection with one another, being found in the same brief clause, and almost in the same line.

If it could be clearly shown that the word "children" is used in other parts of the will, or in any part of it, in a general sense, as comprehending all the children which *the testator's children
 363 might at any time have, there would

be more foundation for an argument founded on the omission in the latter part of these clauses, of the terms of description used in the former. For it might then be said that the testator had marked the distinction, by speaking of children generally, when he intended to include all, and adding terms of description when he intended to include only a part. But this cannot be done. On the contrary, the testator has, more than once, dropped the terms of description, "living at the death," &c., when his meaning clearly embraced them. Thus, in the clause in reference to William Carr, his original share is given, after his death, to his "child or children," in general terms, not saying, as in other clauses, "if any living at his death." Yet the meaning was obviously the same, and it was so regarded by this court in *Smith & ux. v. Chapman & al.*, 1 Hen. & Mun. 240. We have another instance in the second codicil, where the terms of description were dropped, though the meaning was evidently the same as if they had been added. There the testator speaks of the contingency of all his children dying "without issue of their bodies," in general terms, where the meaning was "without issue of their bodies" [children] living at their death, as was held by this court in the case just mentioned.

The strength of the argument on behalf of the representatives of the deceased children, lies in the presumption, which, it is insisted, must be made, that the testator intended an equal benefit to each one of his grandchildren. The court is always inclined to make such a presumption, because it is in accordance with the natural affections, and the motives by which men are usually governed, and is, in most cases, therefore, in accordance with the intention of the testator. But the will now before us affords conclusive evidence that 364 the testator did not intend to confer an equal benefit upon each one of his grandchildren, for as to the original shares he expressly excludes such as shall happen to die before their parents. When we thus find that the motives and views upon which such a presumption is founded, did not control this testator in respect to the original shares of his own children which were certainly to come to their children, if any, we cannot, with any propriety, suppose that they controlled him in reference to the shares to accrue contingently upon the death of his other children. However natural and just it may be to make such a presumption in most cases, it cannot be made in this, and to act upon it would only lead us away from the real intention of the testator.

I have already shown that there is nothing in the language of these clauses inconsistent with the construction which restricts the word "children," in the latter part of them, to children living at the death of their parent. So far from it, the language in the latter part of these clauses, seems to indicate that the testator in providing for children, had reference to a class of objects who should be in existence at the death of the parent. The testator, in each clause,

gives property to one of his own children for life, and then, that is, upon the death of the tenant for life, to his or her child or children, if any then living, and if none, to the testator's other children for life, and then, that is, upon the death of said children, "to be equally divided among their children." This language seems to contemplate the children provided for, as a class of persons to be in existence at the time of the division, so as to be able to participate in it. And it has been held that where there is no gift to the objects, except in a direction to divide the subject among them upon the happening of a particular event, only such can take as answer the description at the period of division, unless

a contrary intention can be collected from the will. *Leake v. Robinson*, 2 Meriv. R. 363; *Jones v. Mackilwain*, 1 Rus. R. 220. Vide, 2 Redfield on Wills 621.

If any doubt remains as to the right of the children of Mrs. Tebbs who survived her, to the whole fund in controversy, it will be removed by considering the provisions of the second codicil. That codicil, according to the construction placed upon it by this court in *Smith & ux. v. Chapman & al.*, makes a disposition of the property which, by the will, the testator had given to his children for life, in the event of their all dying without leaving a child or children surviving. It was as if the testator had said: "I have, by my will, disposed of the whole of this property in the event that my children, or any of them, should have a child or children surviving, but not having disposed of it, or of any part of it, in the event that all my children should die without leaving a child or children surviving, I now proceed to dispose of the whole of it in that event."

If Mrs. Tebbs had survived all her children, and had died in the lifetime of the testator's widow, the contingency would have happened in which the whole property was to go over, under the codicil, one-half to the widow, and the other half to Thomas Chapman and others. Yet in that case, according to the argument of the counsel for the appellees, two-thirds of the entire property would have been vested absolutely in the representatives of the deceased children of Mrs. Tebbs.

I am of opinion, therefore, that the children of Mrs. Tebbs who survived her were entitled to the whole of the fund in controversy, and that the decree is consequently erroneous, and should be reversed.

The other judges concurred in the opinion of Joynes, J.

Decree reversed.

366 *The Orange & Alexandria Railroad Company v. Fulvey, for Cowherd.

Same v. Cowherd.

April Term, 1867, Richmond.

(Absent, RIVES, J.)*

1. Judgments—Erroneous—Correction of.—Where plaintiff who has recovered a judgment which, as

*He was a stockholder in the company.

rendered, is clearly erroneous, seeks to avoid a reversal by striking out a part of the judgment, it is incumbent on him to satisfy the court either by materials in the record or by fair presumption, that this can be done without injustice to the defendant. If he cannot do this the defendant is entitled to have the erroneous judgment reversed.

2. **Same—Specific Performance.**—A court of law cannot render a judgment that defendant shall deliver to plaintiff so many shares of stock. Upon a contract to deliver stock in payment of a debt or otherwise, a court can only award damages for the failure to deliver it.

3. **Contracts—Delivery of Stock—Breach—Damages.**—Upon a contract to deliver stock the damages for the failure to deliver it, is the value of the stock at the time it ought to be delivered.

4. **Judgments—Presumption—Case at Bar.**—Judgment for a certain sum of money; but it may be discharged by the transfer and delivery, within six months, of certain stock at par. The stock not having been delivered within the time, on motion for execution on the judgment, the court cannot presume that the sum stated in the judgment is the amount the plaintiff was entitled to recover, and rejecting the latter part of the judgment as surplusage, award execution thereon for the money.

These two cases were heard together in the Circuit court and in this court.

367 The question in both is the same, *and the facts are almost identical. They are motions founded on judgments rendered by the Circuit court of Culpeper at a special term of the court held on the 25th day of July, 1857. The judgment in the first case is as follows:

This day came as well the plaintiff as the defendant by his attorney, and agreed that the fact and the law in this case, so far as they are concerned therein, shall be determined by the court without the intervention of a jury, and the said parties being fully heard, and Richard Chapman, Daniel Fulvey and Peter Mack alleged to be claimants of the subject matter of controversy in this suit, having been duly summoned to appear here and assert their claim, and being solemnly called and not appearing, it is considered by the court that the plaintiff is the party entitled to recover in this cause of the defendant, for the use and benefit of Coleby Cowherd, the sum of five hundred and thirty-eight dollars and two cents, with interest thereon at the rate of six per centum per annum from the 1st day of January, 1853, until paid, and the costs expended by the plaintiff in prosecuting this suit. But this judgment may be discharged at any time within six months from this date, by the payment to the plaintiff of the costs aforesaid in money, and transferring to him in due form of law, stock of the Orange & Alexandria railroad company at its par value, to the amount of five hundred and thirty-eight dollars and two cents, and by paying over to him the dividend declared on said stock, or the scrip issued in lieu of said dividend, with interest thereon to that amount, since the 1st day of January, 1853; and the court declares that the

said Richard Chapman, Daniel Fulvey and Peter Mack shall be forever barred of any claim in respect to the subject matter of this suit against the Orange & Alexandria railroad company.

368 *The judgment in the second case was like the foregoing, except that it was for \$448.41, with like interest.

On the motion of the plaintiffs in these judgments made at the July term 1858, of the Circuit court of Culpeper, it was ordered that the defendant be summoned to appear on the first day of the next term, to show cause, if any he can, why the plaintiff should not be allowed to sue out executions of fieri facias, or such other process as he was entitled to have, to enforce satisfaction of the judgments. These summons having been served, the motions were heard at the special term of the court held on the 23d day of December, 1858, when the court entered the following judgment in the first case:

This day came the parties, by their attorneys, and being fully heard, and the defendant having failed to show cause against what follows, it is considered by the court that D. Fulvey, for the use of Coleby Cowherd, be allowed to sue forth on the judgment referred to in this rule, his execution of fieri facias, or any proper process of execution which he may be advised to sue forth, in order to have satisfaction of the judgment in the proceedings mentioned and referred to; and that the plaintiff recover against the defendant his costs by him about his motion in this behalf expended.

There was a similar judgment in the second case, except as to the name of the plaintiff.

At the instance of the defendant the court certified that the only evidence introduced by the plaintiff was the rule and the sheriff's return thereon that it was executed, and the judgment in the proceedings mentioned; and the only evidence introduced by the defendant was the letter and affidavit of A. R. Freeman, which is given, and proves a tender to Cowherd on the 27th of March, 1858, of the railroad stock at par and the money and scrip which was authorized by the court to be delivered *in satisfaction of the judgment. From these judgments the Orange and Alexandria railroad company obtained a writ of error from this court.

Though the papers above mentioned alone constitute the record of the causes, there were sent up to the clerk, with these records, copies of the records of the suits in which the judgments were rendered, and a statement of the proceedings in these cases seems to be necessary to an understanding of the cases.

It seems that Peter Mack was the original contractor to do the excavation on the 86th section of the Orange and Alexandria railroad, under a contract by which twenty per cent. on the estimates for the work done was to be retained until the whole was done, and was then to be paid in the stock of the company. Mack transferred his contract to

Daniel Fulvey, who proceeded to do some of the work, and according to the bill of particulars filed, which purported to be a statement by the engineer and general superintendent of the company, there was due to him when he transferred his contract in July, 1853, to Cowherd, \$538.02, on account of the twenty per cent. retained. And this was transferred to Cowherd. After the transfer of the contract to Cowherd, he proceeded to finish the work on the section, and by the bill of particulars in the second case, which purported to be a statement furnished by the same officer, it appeared that there was due to Cowherd, in cash, \$259.97, and on account of the twenty per cent. retained on the work done by him \$448.41.

In November, 1855, the defendant pleaded "non assumpsit" in both actions; but in June, 1856, it was agreed in the case of Cowherd that the plea should be withdrawn, and by consent a judgment was entered for the plaintiff for \$259.97, with interest from the 22d of September, 1854,

till paid; and in both cases there was
370 *an entry that the company was ready to pay the residue of the plaintiff's demand, viz: so much as was payable in stock to whomsoever it was justly payable; and the defendant was informed that it was claimed by Daniel Fulvey, Coleby Cowherd, and Richard Chapman, as trustee of Peter Mack. And a summons was issued to these parties to appear at the next November term of the court to maintain or relinquish their claim to the stock. This summons was served upon the parties, and at the special term of the court held on the 25th of July, 1857, the judgments were entered which have been hereinbefore given.

Green, for the appellant.

William J. Robinson, for the appellee.

JOYNES, J. The judgment in this case, as it stands, is undoubtedly one which the court could not lawfully render. As a court of law, it could not render a judgment requiring the company to transfer and deliver so many shares of stock to the plaintiff. Upon a contract to deliver stock in payment of a debt, or otherwise, it could only award damages for the failure to deliver it, which would be the value of the stock at the time it ought to have been delivered. But by the contrivance adopted in this case, the court, in effect, gave judgment for the stock, with an alternative judgment for money in case the stock should not be delivered. This judgment was not merely informal and irregular—it was essentially erroneous and illegal.

The judgment must therefore be reversed, unless the errors can be corrected, or unless it can be shown that the company has no right to complain of the errors. It is contended that the error consists only in the provision allowing the company to
371 discharge the judgment for *money by the delivery of stock. This, it is contended, may be rejected as surplusage, and, more over, the error is in favor of the

company, and so cannot be complained of by it.

It may be conceded that the privilege of paying in stock was for the advantage of the company, and does not, of itself, afford a ground of complaint to the company, and also that, by rejecting that part of the order, there will remain a judgment for money in sufficient legal form. But can we hold that judgment to be right in substance? In other words, can we say that the sum of money for which the judgment was given, was the value of the stock which the company was bound to deliver to the plaintiff? It is contended that we must presume this in support of the judgment upon the general ground applicable to judicial proceedings. But I do not think we can make such a presumption. In the first place the court has only decided that the plaintiff will be entitled to the sum of money mentioned, provided the company does not, within six months, transfer the stock. This is the substance though not the form of the judgment. I do not see how we can presume from this that the plaintiff was entitled to this sum at once, and without any condition?

Besides, it appears distinctly from the proceedings, that the stock was the only subject of controversy. At June term 1856, there was a judgment for the plaintiff for \$259.97, with interest, which seems to have been a part of the plaintiff's demand which was payable in money. At the same time the company made a declaration, which was entered of record, of its readiness to pay the residue of the plaintiff's demand, to wit: so much thereof as was payable in stock, to the party who might be justly entitled to demand it; and caused certain parties, al-

leged to be claimants of the stock, to
372 be *summoned to appear and assert their claims, by way of interpleader. After these parties had been duly summoned, the court proceeded to render the judgment complained of, at the end of which was added an order, that the other claimants should be forever barred of all claim against the company in respect to the subject matter.

It is apparent that the only claim upon which the court intended to decide, was the claim to the stock; and that it undertook, by the judgment that was rendered, to compel the delivery of the stock. How it arrived at the sum of money for which it gave judgment, does not appear. It may, for anything that appears, have been fixed upon arbitrarily, as a penalty. I do not think this probable, however, and I presume the fact is, that it gave judgment for the sum of money appearing by the account to be due to the plaintiff for the twenty per cent. retained on his estimates, and which was to be paid in stock; and this may have been done upon the supposition that the company was bound to pay this sum in money, if it did not choose to pay it in stock. There are papers in the transcript which show that the sum for which judgment was given, was the twenty per

cent. retained, but they do not belong to the record, and cannot be made a ground of decision. Under these circumstances, if they stood alone, I do not think we would be authorized to presume that the sum of money for which judgment was given was the value of the stock. This case may be illustrated by the case of a bond in a penalty, to be discharged by the performance of a collateral act. If the court should render a judgment for the sum named in the penalty, with a proviso that it may be discharged by the performance of the collateral act, within a time limited, could we presume, in support of the judgment, that the court assessed damages for the 373 non-performance of the *collateral act, at a sum just equivalent to the penalty, and that the sum mentioned in the judgment represented the damages thus assessed? I think not. Other considerations seem to show that this sum was not fixed upon as the value of the stock. The sum for which judgment was given was \$448.41, with interest from January 1, 1853, till paid. If it was the value of the stock, it was its value on the 1st January, 1853. The court gave the company the privilege of paying this sum in stock at par value, at any time before the 25th January, 1858. Now upon the supposition that the money represented the value of the stock on the 1st day of January 1853, there could not be a greater injustice than this privilege to the company. It allowed the company to pay off the value of stock on the 1st day of January 1853, by a transfer of stock, at par value, five years afterwards, though it might have greatly depreciated in the interval. We are not at liberty, upon a mere presumption, to attribute such injustice to the Circuit court. Moreover, after the company had made default in not delivering the stock, and damages to the value of the stock had been awarded for it, it had no right, legal or moral, to pay in stock, and the plaintiff could not be compelled to accept stock. And so, after accepting a judgment for damages, the plaintiff had no right, legal or moral, to demand stock, if he preferred it to the money.

We cannot suppose that the Circuit court disregarded such obvious principles of law and justice. It would, therefore, be at war with every reasonable presumption, to hold that the sum of money for which the court gave judgment represented the value of the stock which the company was bound to deliver to the plaintiff.

It follows from what has been said, that we are not authorized to reject that part of the order which gives the company the privilege of paying in stock, and 374 affirm the *residue which gives judgment for the money. That could only be done in case the record showed, or afforded reasonable ground to presume, that the judgment for money was correct. Where a plaintiff who has recovered a judgment which, as rendered, is clearly erroneous, seeks to avoid a reversal by striking

out part of the judgment, it is incumbent on him to satisfy the court, either by the materials in the record, or by fair presumption, that this can be done without injustice to the defendant. If he cannot do this, the defendant is entitled to have the erroneous judgment reversed.

These views render it unnecessary to consider many questions which have been raised in the argument.

The judgment should be reversed, and the case remanded for a new trial.

MONCURE, J., concurred in the opinion of Joynes, J.

Judgment reversed.

375 *The City of Richmond v. Long's Adm'rs.

April Term, 1867, Richmond.

[94 Am. Dec. 461.]

1. **Public Officers—Performance of Public Duties—Liability for Negligence of Subordinates.**—Public officers of the government, in the performance of their public functions, are not liable for the misconduct, negligence or omissions of their official subordinates.

2. **Municipal Corporations—Governmental Duties—Liability.**—Municipal corporations, in the exercise of their political, discretionary, and legislative authority, are not liable for the misconduct, negligence or omissions of the agents employed by them.

3. **Same—Ministerial Duties—Liability.**†—Municipal corporations, in discharge of ministerial or special

***Municipal Corporations—Governmental Duties—Liability.**—In *City of Charleston v. Beller*, 45 W. Va. 48, 30 S. E. Rep. 154, the court said: "In its governmental capacity, a municipality is strictly a branch of the state government, within the extent of its limitations, both as to territory and powers granted. And in the discharge of their duties, governmental and discretionary, its officers are public officers, for whose acts the municipality is in nowise liable. *Gibson v. City of Huntington*, 38 W. Va. 177, 18 S. E. Rep. 447; *Brown's Adm'r v. Town of Guyandotte*, 34 W. Va. 299, 12 S. E. Rep. 707; *Thomas v. Town of Grafton*, 34 W. Va. 282, 12 S. E. Rep. 478; *Mendel v. Wheeling*, 28 W. Va. 233; *Orme v. City of Richmond*, 79 Va. 86; *City of Richmond v. Long's Adm'rs*, 17 Gratt. 375; *Barnes v. District of Columbia*, 91 U. S. 540."

For the above proposition the principal case is cited and approved in the following cases: *Brown v. Town of Guyandotte*, 34 W. Va. 299, 12 S. E. Rep. 707; *Mendel v. Wheeling*, 28 W. Va. 242; *Jones v. City of Williamsburg*, 97 Va. 724, 34 S. E. Rep. 883; *Wilson v. City of Wheeling*, 19 W. Va. 833; *Gibson v. City of Huntington*, 38 W. Va. 177, 18 S. E. Rep. 448; *Terry v. City of Richmond*, 94 Va. 546, 27 S. E. Rep. 429.

For collection of authorities to sustain the above proposition, see discussion in 4 Va. Law Reg. 333, and 622, where the principal case is cited. See also, *note* to *Maia v. Eastern St. Hospital*, 5 Va. Law Reg. 543, collecting the authorities and citing the principal case. See, in accord, *Harman v. City of Lynchburg*, 33 Gratt. 87.

†**Same—Ministerial Duties—Liability.**—For the proposition laid down in the third headnote of the principal case that a municipal corporation is liable for

fled duties assumed in consideration of the privileges conferred by their charter, are liable for the misconduct, negligence or omissions of their agents; and this though there be the absence of special rewards or advantages.

4. **Same—Loss of Slave from City Hospital—Liability.**—

The city of Richmond is not responsible for the loss of a slave admitted into the city hospital, on the ground of the negligence of its agents at the hospital.

This was an action in the Circuit court of Richmond, brought by C. C. Long, and on his death revived in the name of his administrators, against the city of Richmond, to recover the value of a slave, who it was alleged had lost his life through the carelessness and negligence of the agents of the city. The declaration alleged that in April, 1855, a slave named Ben, the property of the plaintiff, was duly admitted into the hospital of the city, to be cared for and treated for the disease of small-pox or varioloid, in pursuance of the ordinance of the city, &c. And that the city had carelessly and negligently suffered and permitted the said slave to escape from the hospital and wander off, whereby he lost his life.

376 *On the trial the defendant demurred to the evidence. It appeared that the physician having pronounced the slave to be laboring under incipient small-pox, application was made to the proper city authorities, and an order was given for his reception into the hospital. He was accordingly received there late in the night, being then in a state of delirium, and was placed in a room in the second story of the building, and a male nurse of the hospital was appointed to attend on him. In the morning the door of the room was found locked on the outside, but on entering the room the slave was gone, and the window was raised: this window was some twenty feet from the ground. He was soon afterwards found dead some miles from the hospital; and the inquest found that he came to his death by exposure to cold; being insane. By the ordinance of the city the expenses of patients in the hospital were to be paid by them or their masters.

The jury having found a verdict for the plaintiff for \$516.50, damages, subject to the demurrer to evidence, the court gave a judgment in his favor, for that sum; and thereupon the city of Richmond applied to

the omission and neglect of its agents in the discharge of a ministerial duty, the principal case is cited as authority in the following cases: *Noble v. City of Richmond*, 81 Gratt. 279, where the city was held liable in damages for negligence in not keeping the streets in proper repair. *Clay v. City of St. Albans*, 48 W. Va. 547, 37 S. E. Rep. 370; *Gibson v. Huntington*, 88 W. Va. 178, 18 S. E. Rep. 448; *Orme v. City of Richmond*, 79 Va. 89; *Petersburg v. Applegarth*, 28 Gratt. 344; *DeVoss v. City of Richmond*, 18 Gratt. 344; *Sawyer v. Corse*, 17 Gratt. 230, and *note*, where there is a collection of cases on this point. See, in accord, *Smith v. Alexandria*, 33 Gratt. 208; *Chalkley v. City of Richmond*, 88 Va. 402, 14 S. E. Rep. 330; *Stearns v. City of Richmond*, 88 Va. 992, 14 S. E. Rep. 847; *note* to principal case 94 Am. Dec. 461.

this court for a writ of error which was awarded.

Daniel, for the appellant.

Cannon, for the appellees.

RIVES, J. It is usually unsafe and hazardous to seek to classify adjudicated cases upon any complex question of law, and to extract from them rules of general application. So much of the reasoning in such cases is due to their diversities, that error is likely to creep into any generalization of them, and vitiate the results of an analysis that would ambitiously seek to reduce them to a system, and tempt the cautious inquirer to overlook the differences of fact that modify and control their application.

377 *It is, therefore, wiser in the main to investigate and decide each case upon its own peculiar state of facts, than by too general statements or deductions to incur the risk of being betrayed into too abstract reasoning. Still it is possible and advisable to sift the reasonings of judicial decisions, and eliminate from them leading principles to guide and control us in legal investigations, provided we fail not to weigh and estimate essential distinctions between them; and admit the discriminations, which the change of facts requires.

So numerous are the cases upon the liability of official superiors for the misconduct or tortuous neglect of their subordinates, that while perfectly sensible of the danger of generalizing upon them, I deem it best to approach the examination of this record by an attempt to classify the more important of these cases upon certain broad and general principles, that must be clearly understood and established and applied in the decision of this appeal.

I shall avoid any minute analysis, and shall pursue the ramifications of this interesting doctrine no farther than it shall seem to me necessary to the ends of this cause. In this way I propose to escape the mischiefs to which I have pointed, and to procure valuable guides in the conduct of the argument.

The doctrine of liability in such cases has been tersely stated by Ld. Brougham, in the following simple language: "The rule of liability and its reason I take to be this; I am liable for what is done for me and under my orders by the man I employ, for I may turn him from that employ when I please; and the reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does being one or my benefit and under my direction, I am responsible for the consequences of doing it." It is thus seen that this principle is distinctly predicated of the relation

378 of principal and agent or master and servant; but where this relation does not exist, and a contractor intervenes, it is held to be a case of independent, substituted responsibility intercepting legal recourse against the superior. The application, however, of this distinction has been found a matter of great nicety and perplexity; and as it has no bearing that I perceive

upon this record, I am saved the necessity of referring to or descanting upon the numerous cases that cluster upon this point. Confusion dwells upon it; and it must be left to future decisions to shed light upon it and dispel the uncertainty in which it is held.

Another exemption from this liability, exists in behalf of all public officers of the government in the performance of their public functions, including all grades of officers, whose trust proceeds from and whose responsibility is due to the government. Their immunity from all liability for the misconduct, negligent and omissions of their subordinates, rests upon motives of public policy, the necessities of the public service and the perplexities and embarrassments of a contrary doctrine. Still, these officers are held responsible for their own acts in the abuse or transgression of their authority, or in default of proper and reasonable care in the choice of their agents or in the superintendence of them in the discharge of their allotted duties. But it is now firmly established that the doctrine of respondeat superior does not apply to them. *Lane v. Cotton*, *Ld. Raym. R. 646*; *Whitefield v. Lord Le Despencer*, *Cowp. R. 754*; *Dunlop v. Monroe*, *7 Cranch's R. 242*; &c., &c.

A kindred exemption, and one directly relevant to the present issue, is extended, by virtue of the same principle, to municipal corporations, as constituting a part of the government of the country. This proposition in its terms points to an important distinction. The functions of such municipalities are obviously two-fold; first, political, discretionary and legislative, being such public franchises as are conferred upon them for the government of their inhabitants and the ordering of their public officers, and to be exercised solely for the public good rather than their special advantage; and secondly, those ministerial, specified duties, which are assumed in consideration of the privileges conferred by their charter. Within the sphere of the former, they are entitled to this exemption; inasmuch as the corporation is a part of the government to that extent, its officers are public officers, and as such entitled to the protection of this principle; but within the sphere of the latter, they drop the badges of their governmental offices and stand forth as the delegates of a private corporation in the exercise of private franchises, and amenable as such to the great fundamental doctrine of liability for the acts of their servants. This distinction might seem at first sight fanciful and shadowy; but when pursued through the different cases, it will be found to be real and substantial. Wherever it can be said that distinct duties are imposed upon a corporation, purely ministerial and involving no exercise of discretion, the same liability attaches as in the case of private persons owing the same service under the law. To this second class belong numerous cases of recovery against corporations for the torts of negligences of their servants; among which it is only

necessary to cite some of the more recent; such as *Scott v. Mayor &c. of the City of Manchester*, *2 Hurl. & Norm. Exch. R. 204*; *Bailey v. The Mayor of the City of New York*, *3 Hill's N. Y. R. 531*; *The Mayor of the City of New York v. Furze*, *3 Id. 612*; *Weightman v. Corporation of Washington*, *1 Black's U. S. R. 40*; *Chicago City v. Robbins*, *2 Black's U. S. R. 418*; and a very late case from the House of Lords, *The 380 Mersey Dock Harbor Board v. Penhallow & others*, reported in the *Jurist* for 1866, part 1, p. 571, containing a review and comparison of English adjudications upon this subject. These decisions proceed on the ground, that where a municipal corporation acts in the exercise of powers or the discharge of duties, in nowise discretionary or governmental, but purely ministerial in their character, it incurs, like a private person, the common law liability for the acts of its servants; and that it does not matter, as was once intimated, if there be the absence of special rewards or advantages, it being considered and allowed that such gratuitous function is to be regarded as a burthen accepted under the charter in consideration of its privileges.

But these cases do not conflict with the first class, under which this immunity pertains to municipal corporations within the sphere of their political functions. On the contrary, this is explicitly conceded in the case of *Bailey v. The Mayor of the City of New York*, *3 Hill's N. Y. R. 531*. *Nelson, Ch. J.*, in delivering the opinion of the court in this case, says: "The distinction is quite clear and well settled; and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, quoad hoc, is to be regarded as a private company."

Let us now consider briefly some of the leading authorities for the exemption of municipal bodies, or statutory boards of commissioners from the doctrine of respondeat superior. The leading case upon

this subject is *Hall v. Smith*, *2 Bing. R. 156*, *9 Eng. C. L. R. 357*. The judgment of Lord Chief Justice Best in this case has never been doubted, and is now recognized as authority upon this point. *Story on Agency*, ch. xii, § 321, and note. It places this exemption on grounds of public policy lest the public service should suffer by subjecting public officers to a responsibility for subordinates, whom they must employ, and who are seldom under their immediate control. The distinctions, by virtue of which this indulgence is extended to corporations in their public, sovereign franchises, is stated and approved in *Moodalay v. The East India Company*,

1 Bro. Ch. R. 469. The master of the rolls admitted that no suit would lie against a sovereign power for anything done in that capacity; but he denied that the defendants came within the rule. "They have rights," he observed, "as a sovereign power; they have also duties as individuals; if they enter into bonds in India, the sums secured may be recovered here. So, in this case, as a private company they have entered into a private contract to which they must be liable."

Ch. J. Parsons in *Riddle v. Proprietors of the Locks and Canals on the Merrimac*, 7 Mass. R. 1869, 545, makes the distinction between quasi corporations for public purposes and corporations created for the benefit of the corporators themselves, and holds the former irresponsible in a civil action. The same ground was taken in a later case of *Mower v. Inh. Leicester*, 9 Mass. 247. In *Morey v. The Town of Newfane*, 8 Barb. R. 645, Selden, J., approved this distinction and said: "To subject these quasi corporations, whose duties are imposed exclusively for the benefit of the public, for a mere non-feasance, to a multitude of private suits, would, I think, be a great and unnecessary hardship." In the case of *Fowle v. Common Council of Alexandria*, 3 Pet. U. S. R. 398, Chief Justice Marshall denied that "a legislative corporation, 382 established as a part of the government of the country, was liable for losses by a non-feasance, by an omission of the corporate body to observe a law of its own, in which no penalty was provided."

This question has also passed under review of the courts of Alabama, Louisiana, and Kentucky, and has been settled upon the principle already announced. The case of *Dargan v. Mayor &c. of Mobile*, 31 Alab. 469, and the case of *Stewart v. The City of New Orleans*, 9 La. Ann. R. 461, are identical, being actions against the municipal corporations for the loss of slaves killed by police officers, &c. The actions were defeated, and on this very distinction between the liability of municipal corporations for acts of its officers in the exercise of powers which it possesses for public purposes and which it holds as a part of the government of the country, and those which are conferred upon it for private purposes. To the same effect as the case of *Prather v. City of Lexington*, 13 B. Monr. R. 559; in which it was determined that "the officers of a city are quasi civil officers of the government, although appointed by the corporation. They are personally liable for their malfeasance or non-feasance in office; but for neither is the corporation responsible."

I have thus reviewed and harmonized the authorities, so far as they seem to me to bear upon the question we have to decide in this case. The recovery here was for the value of a slave, alleged to have been lost by neglect of proper custody and attendance while in the hospital of the city, to which he had been committed for the small-pox, and from which he escaped and soon died by reason of such neglect and exposure.

To ascertain whether such a recovery is sustainable, we must first look into the charter of the city to fix the character of the corporation, and then into the ordinance 383 establishing the "hospital, to ascribe to it its true character and function. It was well said in the case of *The Mersey Docks and Harbor Boards v. Penhallow and others*, "that in every case, the liability of a body created by statute must be determined under a true interpretation of the statutes under which it is created."

The charter of the city, it will be seen, creates a local government for its inhabitants; a council for its legislature; a court of hustings for its judiciary, and a mayor for its executive and head of police. It ordains the election of these officers, and, by the 23d section, declares "all the estate, rights, titles and privileges, and all the funds, revenues and claims of the city, shall be under the care, management, control and disposition of the council; and all the corporate powers, capacities, franchises and immunities of the city, shall be exercised by the council or under its authority, unless it be otherwise expressly provided." The charter then proceeds, by special enumerations, to vest the council with powers over gas and water works, streets, wharves, landings and docks; schools, libraries and Athenæum; nuisances; regulations for weighing, measuring and gauging; general police in suppression of riots and unlawful assemblies; taxation and licenses; borrowing money and providing a sinking fund for its redemption; subscriptions to public works, &c., &c. The legislature of the state has thus chosen to impart to this corporation the highest attributes and functions of political sovereignty, so that it is 'imperium in imperio,' and may be aptly termed in the language of Judge Marshall already quoted, "a legislative corporation, established as a part of the government of the country." It cannot be denied that it is as well a municipal government as a municipal corporation.

We come next to inquire in what sense we are to regard "the ordinance concerning health and the city "hospital," 384 under which the responsibility of the city is said to arise. Was it the exercise of a discretionary legislative power, as much as the establishment of a police, and thereby saving the city from accountability for the misconduct or neglects of its subalterns, as in the actions against the cities of Mobile and New Orleans already cited? or was it the fulfilment of a legal ministerial duty and the exercise of a private franchise subjecting the corporation, as a private one, to the general liability of a superior? It does not seem to me to admit of a doubt as to which category this ordinance belongs. It is in pursuance of a statute, ch. 86 of the Code, providing against the spread of contagious diseases, and arms the counties and towns of the state with large powers to attain this end, rightfully subordinating to the public safety the usual immunities of persons and property. In the

passage of this ordinance, then, the council, with whom are lodged all corporate powers and franchises, was legislating, by directions of law, for the sanitary police of the city, and providing the usual accommodations and public charities for the care and cure of the diseased. Under such a state of facts to require the city to answer for the negligence or misconduct of the superintendent, matron, nurses or attendants of the hospital, would seem to me to subvert the fundamental doctrines of the law, as I understand and have sought to expound them. Analogy, I know, is a dangerous resort in argument; yet I cannot forbear saying that, if this recovery could be made, I do not perceive why, by parity of reason, the state should not be held liable, through its public functionaries, in civil actions at the suit of individuals, for losses or torts occurring in the management of its departments, and public institutions under its immediate control and supervision. It cannot be denied that in the municipal government of this city, the council occupies, towards its hospital, relations quite similar to those of the general assembly towards its asylums for the insane, the blind, and deaf mutes.

I am, therefore, of opinion that the demurrer to the evidence in this cause should have been sustained, and judgment given for the defendant. Having disposed of the case on this leading ground, I am saved the necessity of saying anything as to the questions of pleading and practice made by this record.

The other judges concurred in the opinion of Rives, J.

Judgment reversed.

386 *Vaughn & als. v. The Commonwealth. Two cases.

April Term, 1867, Richmond.

1. **Official Bonds—Execution of—Record of Court Conclusiva.***—The record of the County court states that F. a sheriff who had been required to give a new bond, "this day appeared in court and executed and acknowledged such new bond, and the security thereto being considered sufficient by the court, the same is ordered to be certified. In the absence of fraud, this record is conclusive that the bond was properly executed; and evidence will not be admitted to contradict it.

***Official Bonds—Execution of—Court Record Conclusiva.**—See the principal case cited and approved in *Calwell v. Com.*, 17 Gratt. 386. See also, monographic note on "Official Bonds" appended to *Sangster v. Com.*, 17 Gratt. 194.

Court Record—Parol Evidence Inadmissible to Contradict.—In *Calwell v. Com.*, 17 Gratt. 387, the principal case was approved as to the proposition that parol evidence, in contradiction of a court record, is not admissible, unless it has a tendency to establish fraud. See also, the principal case cited as to this point, in *Quinn v. Com.*, 20 Gratt. 144; *Stuart v. Com.*,

These were motions in the Circuit court of the city of Richmond, by the Commonwealth, against the sureties of Dennis Fielder, late sheriff of Grayson county, in the one case to recover the land, property and September license taxes for the year 1857, and in the other to recover the capitation taxes of the same year. The facts are stated by Judge Joynes in his opinion. Judgments having been rendered in favor of the Commonwealth, the defendants applied to one of the judges of this court for a writ of error, which was awarded.

Cook, for the appellants.

The Attorney General and Tucker, for the appellee.

JOYNES, J. Each of these cases is a motion by the Commonwealth against the plaintiffs in error as sureties of Dennis Fielder, as sheriff of the county of Grayson, and each presents the same question. That question relates to the validity of the bond on which the motion was founded and arises on the following state of facts. At July term 1857, of the County court of Grayson, an order was made on motion of a security of Dennis Fielder, as sheriff of Grayson county, requiring him to give a new bond at the ensuing August term. At the August term the following entry was made upon the minutes of the court: "Pursuant to an order made at the July term of the Grayson County court, requiring Dennis Fielder to execute a new bond with good and sufficient security, as high sheriff of Grayson county, the said Dennis Fielder this day appeared in court and executed and acknowledged such new bond, and the security thereto being considered sufficient by the court, the same is ordered to be certified as the law directs."

On the hearing of the motion the original bond on file in the clerk's office was produced by the clerk, signed by said Fielder and by the plaintiffs in error and others as his sureties, dated 24th August, 1857, at the foot of which are these words, "signed, sealed and acknowledged in presence of the court. Teste, William R. Dickey, C. C."

After the case of the Commonwealth had been closed the defendants offered in evidence the deposition of Wm. R. Dickey, which it was agreed might be offered with the same effect as if there had been an issue

91 Va. 155, 21 S. E. Rep. 246; *Burley v. Weller*, 14 W. Va. 278.

In *State v. Vest*, 21 W. Va. 800, the court said: "It is certainly a rule invariably recognized by the courts, that a record imports such absolute verity, that no person against whom it is pronounced will be permitted to aver or prove anything against it. This rule is well established, and we now here refer to but a few of many cases, in which this doctrine has been held. See *Rex v. Carlile*, 2 Barns. Ad. 971; 23 Eng. Ch. R. 226; *Reltzenberger v. Braden*, 18 W. Va. 286; *Carper v. McDowell*, 5 Gratt. 212, 226; *Harkins v. Forsyth*, 11 Leigh 204; *Taliaferro v. Pryor*, 12 Gratt. 277; *Vaughn & als. v. The Commonwealth*, 17 Gratt. 386; *Quinn & als. v. Com.*, 20 Gratt. 138."

on a plea of non est factum. The evidence was objected to as inadmissible, but the court allowed it to be read, and, upon the whole case gave judgment for the commonwealth. The defendant excepted, and in the bill of exceptions set out the order of the court and the bond as above referred to, and the deposition of Dickey and the Commonwealth in the same bill, reserved the question as to the admissibility of that deposition.

The substance of Dickey's testimony was, that the bond was signed in blank, containing, when accepted by the court as a sheriff's bond, nothing but the signatures and seals of the obligees, and that the
388 witness, who was *the clerk of the court, wrote the bond out after the adjournment of the court; and that neither of the obligors was present when he did so, or gave him authority to do so, or subsequently acknowledged the bond.

It does not distinctly appear whether the Circuit court regarded this evidence as admissible. It may have thought it best to receive it, upon the ground that as the whole case, both as to law and fact, was before the court for decision, the reception of the evidence, even if inadmissible, could do no harm. But upon the supposition that the evidence was considered to be admissible, the effect of the judgment of the court upon the whole case was, that while admissible it was not sufficient to sustain the defence. And this may have been held on the ground that the minutes of the County court, and the official certificates attached to the bond by Dickey as clerk, were entitled to greater credit upon the question of fact, than the testimony of Dickey as a witness. And upon this view perhaps we might affirm the judgment without inquiring into the admissibility of Dickey's testimony. But the case ought not to be put upon this ground, because it does not properly involve any such comparison of evidence upon the question of fact, in reference to the execution of the bond.

The law under which this bond was taken, authorized and required the County court to take the bond of the sheriff, to fix its penalty, and to judge of the sufficiency of the security. The bond might, by the terms of the law, either be acknowledged or proved before the court. Code of 1849, ch. 49, § 5; Id. ch. 13, § 8; Acts, 1852, p. 12. The law made it the duty of the clerk of the court to record the bond, and to transmit a copy of it to the auditor. Code of 1849, ch. 13, § 8; Id. ch. 49, § 9.

The entry made upon the minutes of
389 the court at *August term 1857, declares what the court did, in the exercise of these functions in the present instance. It distinctly imports that the bond was duly executed by Fielder and by his securities. As to Fielder, it declares, in so many words, that he "executed and acknowledged" the bond in presence of the court. It declares that "the security thereto" was deemed sufficient, which evidently implies that the bond had been exe-

cuted by the securities. And the court, moreover, in effect declared the bond to be complete and perfect by directing it to be certified as the law directs.

It is clear that the evidence of Dickey did not show, or have a tendency to show, that a fraud had been committed upon the plaintiffs in error, for it was undoubtedly their intention to become bound as the securities of Fielder. And the real question in the cause is, whether the record of the County court in reference to the execution of the bond is not conclusive, and the evidence offered to contradict or impeach it inadmissible. I think the record conclusive and the evidence inadmissible. The law confides to the County court the duty of taking such bonds and certifying their due execution, and it would be inconsistent with its intention and policy, and productive of great mischief, if the official record of the court as to what it has done in the discharge of this duty, should, in the absence of fraud, be liable to be assailed by parol evidence. Instead of the certainty which the law intends to secure by entrusting to the court the duty of taking such bonds, the question of their due execution would be left to depend, at any distance of time afterwards, upon the "uncertainty and frailty of parol evidence with all the mistakes, prejudices, imperfections and hazards that attend it." Upon this subject, however, I think it sufficient to refer without comment to the cases of *Harkins v. Forayth*, 11 Leigh 294; *Carper v. McDowell*, 5
390 Gratt. 212; **Taliaferro v. Pryor*, 12 Ib. 277; *Grove v. Zumbro*, 14 Ib. 501.

I think, therefore, that the Circuit court did right in giving judgment for the Commonwealth. If it is to be considered as holding that the evidence of Dickey was admissible, the error was in favor of the plaintiffs in error, and cannot be complained of by them.

The judgment in both cases should be affirmed.

Judgment affirmed.

391 *Calwell v. The Commonwealth. Two cases.

April Term, 1867, Richmond.

1. *Official Bonds—Execution of—Court Record Conclusive.**—Upon the qualification of a sheriff the record of the County court after reciting his election, states, "that he appeared in court and took the several oaths prescribed by law, and entered into and acknowledged a bond in the penalty of \$50,000 with (naming ten persons) his securities, conditioned, &c. In the absence of fraud the record is conclusive that the bond was properly executed by the parties whose names are to it.

2. *Same—Same—Same—Case at Bar.*—Upon issue on the plea of *non est factum*, by C. one of the parties to such bond, proof that his name is not in his handwriting, but in that of H. another party; that

*See the principal case cited in *Board of Supervisors v. Dunn*, 27 Gratt. 608. See also, *Vaughn v. Com.*, 17 Gratt. 386, and *foot-note*.

C was not at the courthouse the day the bond was taken, but was at his home ten miles off; that on the day before the bond was taken he asked H who would sign it, and being told that D with others would sign it, he told H if D signed it H might sign it for him, but D did not sign it, is not sufficient to outweigh the record, and sustain the defence.

These were motions in the Circuit court of the city of Richmond, by the Commonwealth, against Edward S. Calwell, as one of the sureties of John E. Lewis, sheriff of the county of Greenbrier, the one for the balance of land, property, capitation and September license taxes of 1854, and the other for the balance of June license taxes for 1855.

Calwell appeared and pleaded non est factum, and the Commonwealth replied generally; on which the issue was made up. The parties dispensed with a jury and submitted the whole case to the decision of the court. On the trial the defendant

filed two exceptions to opinions of
392 *the court admitting testimony. The first was to the admission of the record of the County court upon the qualification of Lewis as sheriff; and the second was to the admission of the record of the same court upon a motion of E. S. Calwell to require Lewis to give a new bond. Lewis qualified in June, 1854; and in May, 1855, Calwell gave him notice that at the May term of the court he would move the court to require him to give a new bond in lieu of the present one on which Calwell stood as one of his securities. At the June term of the court, the court made the order, and Lewis executed a new bond with sureties.

The Commonwealth also objected to the reading of three depositions offered by the defendant, one of which was by the clerk of the County court of Greenbrier, on the grounds—1st. That it is not competent by parol testimony to attempt to contradict the averments and statements of a record of court. 2d. That it is not competent to contradict such record by the clerk of the court, whose duty it was to make the entries therein and to keep them. But the court allowed the depositions to be read subject to the exceptions; and the Commonwealth excepted. There was a judgment for the Commonwealth, in one case for \$4,893.92, with interest and costs, subject to a credit of \$78.03, and in the other for \$1,073.86, with interest and costs.

After the judgment had been rendered, Calwell applied to the court for a new trial, which was refused. He thereupon excepted; and all the evidence being in writing, except one fact which was agreed, it was set out in the bill of exceptions.

The only question in dispute was the execution of the bond of the sheriff by Calwell. The Commonwealth introduced the record of the qualification of Lewis, which is as follows:

393 *At a court continued and held for the county of Greenbrier, at the courthouse thereof, on the 26th of June, 1854,

John E. Lewis having been elected sheriff of this county on the 25th day of May, 1854, for two years from and after the 1st day of July, 1854, appeared in court and took the several oaths prescribed by law, and entered into and acknowledged a bond in the penalty of \$60,000 with (naming ten persons, of whom Edmund S. Calwell is one) his sureties, conditioned according to law; therefore the said John E. Lewis is authorized to execute the office as aforesaid. The bond is in the regular form and has the name of E. S. Calwell attached to it, and the copy introduced by the Commonwealth is attested by Joel McPherson, clerk. The Commonwealth also introduced the record of the proceedings in the County court upon the motion of Calwell to require Lewis to execute a new bond.

On the part of the defendant it was admitted by the plaintiff that the defendant's residence in 1854, at the date of the execution of the bond, was, and has been ever since, ten miles from Lewisburg. It was proved by two of the witnesses whose depositions were introduced by the defendant, that the name of E. S. Calwell was not in his handwriting; and one of them, McPherson the clerk, expressed the belief that it was in the handwriting of John A. Hawver, who was one of the securities. It was also proved by one of these witnesses that Calwell was at home all the day the bond was signed. The third witness, Gillespie, says, "I was at Mr. Edward Calwell's house the night before the bond was signed, when Mr. Calwell asked John A. Hawver who would become John E. Lewis' security as sheriff; Mr. Hawver mentioned the names of Mr. John Holly, David Tuckwiller, and several others, who would sign it. Mr. Calwell then remarked that if

David Tuckwiller signed it, then Mr.
394 Hawver *was authorized to sign it also for him." The name of Tuckwiller was not signed to the bond.

On cross-examination McPherson stated that he had a conversation with E. S. Calwell at the White Sulphur Springs, after the execution of said bond, in which he stated that he had become uneasy as one of the securities of John E. Lewis as sheriff.

Upon the application of Calwell, writs of error to the judgments were awarded.

R. R. Johnston, for the appellant.

The Attorney General and Tucker, for the Commonwealth.

JOYNES, J. These cases are motions by the Commonwealth upon the bond of John E. Lewis, sheriff of Greenbrier, and the material question involved in each is, whether Calwell is bound by the bond on which his name appears as one of the securities. Calwell filed a plea of non est factum, upon which the Commonwealth took issue, and, a jury being dispensed with, the whole matter of law and fact was submitted to the court, which gave judgment for the Commonwealth.

The bond was taken by the County court on the 26th of June, 1854, and the record

states that Lewis appeared in court and "entered into and acknowledged a bond in the penalty of sixty thousand dollars, with Samuel Tuckwiller" [and others named] "and Edmund S. Calwell, his securities, conditioned according to law," &c. The bond purports, on its face, to be signed by Lewis and the securities enumerated, including Calwell. On the trial sundry exceptions were taken, and after the judgment had been rendered, the defendant moved the court to set it aside, and to give judgment for him. The court overruled this motion, and in the bill of exceptions 395 certified "all the evidence in the cause, the whole of which was in writing, with the exception of a single fact agreed between the parties.

Sundry errors are assigned in the petition, the first of which is, that the court erred in rendering judgment for the Commonwealth upon the whole evidence. This presents the whole merits of the case, and a decision upon it will involve every material question raised in the other assignments of error.

The entry on the minutes of the County court does not state, in so many words, that the securities acknowledged the bond before the court, or that its execution by them was proved to the court, either of which would have been sufficient under the law. Code, ch. 13, § 8. But reading the language of the entry, as we must, according to its plain and natural sense, and without reference to mere verbal criticism, it seems impossible to misunderstand its meaning. It would not have been true, as stated in the entry, that Lewis entered into and acknowledged the bond, with certain persons as his securities, unless it appeared to the court, either by acknowledgment or proof, that the bond had been executed by the securities.

If nothing more had appeared, this record of the County court would have been conclusive to establish the due execution of the bond by all the parties whose names appear upon it, as we have just held in the cases of *Vaughn v. Commonwealth*. To rebut the effect of this record, however, and to show that he is not bound by the bond, the defendant offered the depositions of several witnesses. These were objected to as inadmissible, on the ground, mainly, that they tended to contradict the record; but the court allowed them to be read, subject to the objection. It may be conceded that these depositions, if admissible, and 396 not outweighed by the record, *were sufficient to establish the following facts: 1. That the name of Edmund S. Calwell signed to the said bond is not in his handwriting, but in that of John A. Hawver. 2. That Calwell was not at Lewisburg, where the court was held, on the day the bond was taken, but was at his residence, which was admitted to be ten miles distant. 3. That in a conversation at Calwell's residence the night before the day on which the bond was taken, Calwell asked John A. Hawver who would become security for Lewis as sheriff; that Hawver mentioned David Tuckwiller and others who would

sign the bond, when Calwell said that if David Tuckwiller signed it, Hawver might sign it also for him. David Tuckwiller did not sign it.

Now, if it should be conceded that all these facts are true (and they are all the material facts which the evidence can be said to prove), they do not impeach the verity of the record of the County court. For though Calwell's name was signed by Hawver and not by himself, yet the signature was binding upon him, if made in his presence and by his request, and there is nothing in the case to show that such was not the fact. 2 Greenl. Evid. § 295; *Gardner v. Gardner*, 5 Cush. R. 483. Though Calwell was not present at court, the execution of the bond by him may have been proved to the court by a witness, which, as I have already said, would have been sufficient. And though Calwell, the night before, intended not to become security for Lewis, unless David Tuckwiller should do so, and authorized Hawver to sign his name only in that event, non constat that he did not afterwards change his mind, and have his name affixed to the bond by Hawver in his presence. It may well be inferred that he did so, from the conversation proved by McPherson, in which Calwell said, after the execution of the bond, that he had become uneasy as one of Lewis' securities, and from the steps which he took in 397 1855 to "obtain relief, by requiring Lewis to give a new bond. In the absence of explanation, he must be understood to have admitted thereby that he was duly bound as one of Lewis' securities. And I think the fair conclusion from the whole case is, that everything was done with Calwell's full assent and in conformity with his real intention.

It does not distinctly appear whether the Circuit court regarded the evidence offered by Calwell as admissible. As we have held in the cases of *Vaughn v. Commonwealth*, parol evidence in contradiction of the record, in such a case, is not admissible, unless it has a tendency to establish fraud. It may be that the fact that the name of Calwell was not signed by himself, afforded such ground of suspicion, as to make it proper to receive evidence of it, and of the other facts contained in the depositions. But it is not necessary to decide this question, because, upon the whole evidence, the judgment was right.

The other assignments of error require no particular notice.

I am of opinion to affirm the judgment in both cases.*

Judgment affirmed.

*Note by JUDGE JOYNES.—Since this case was decided, I have learned that the same question, as to Calwell's liability, arose in the case of *Virginia Central Railroad Company v. Calwell & als.*, decided by this court at Lewisburg in August, 1860, and that the court held that he was liable. The opinion of the court was delivered by JUDGE ALLEN, all the other judges being present and concurring. I have made an effort, without success, to obtain from Wheeling a copy of this opinion.

398 *Barnum & als. v. Frost's Adm'r
& als.*

April Term, 1867, Richmond.

1. **Guardians—Personal Liability for Support of Ward.**—A guardian is not personally responsible for the support and education of his wards unless he consents to become bound for them.
2. **Guardian and Ward—Support and Education of Ward—Liability of Ward's Estate.**—A guardian placing his ward with a third person, to be supported and educated, though he may undertake to pay the ward's expenses does not thereby relieve the ward's estate, but the person with whom the ward has been placed may proceed in equity to subject the profits of the ward's estate to the payment of her expenses.
3. **Same—Bonds for Ward's Expenses—Liability of Ward's Estate.**—Bonds executed by the guardian, as guardian, showing on their face that they are given for the ward's expenses, and which at the time he promises to pay out of the profits of the ward's estate as soon as he can collect them, will not relieve the ward's estate from liability for these expenses.
4. **Same—Same—Waste—Liability of Guardian on Official Bond.**—If the condition of the guardian's bond is as prescribed by the statute, and the guardian wastes the profits of his ward's estate, a creditor for the support of the ward, though she has taken the bonds of the guardian for the same, not thereby intending to release the ward's estate, may proceed in equity against the guardian and his sureties, and subject them to the payment of the amount due her.
5. **Same—Necessaries—Substitution of Creditor to Rights of Ward upon Official Bond.**—The condition of the guardian's bond is to pay and deliver to the ward her estate, when thereto required by the justices. A creditor for necessities furnished to the ward, may be substituted to the rights of the ward, upon the bond, against the guardian and his sureties, for the payment of her debt.

In December, 1836, Larkin Litchfield with Thomas James, and two others as his sureties, entered into a bond before the County court of Mathews county, as
399 *guardian of the six children of Charles Atkinson deceased, of whom one was Mary L. Atkinson, at that time about five or six years old. The condition of the bond was to pay and deliver to the said orphans all such estate as then was or might afterwards appear to be due to the said orphans from the said guardian, when thereto required by the said justices of the said court; and to keep the said justices harmless.

In June, 1842, upon the order of the County court, Litchfield with Elijah Barnum, Robert Billups and John H. Diggs, entered into another bond before said court

to the former sureties, with condition to indemnify them against any loss or injury already sustained by them, or which might thereafter be sustained by them, as sureties in the first bond.

Soon after his qualification as guardian Litchfield placed his ward Mary L. Atkinson with Mrs. Ann Frost, of the city of Norfolk, to be boarded, educated and provided for generally. He paid to Mrs. Frost the expenses of his ward up to 1839. In 1840 and 1841 he executed to Mrs. Frost his acknowledgment under seal, signed by himself as guardian, that there was due January 1st, 1840, to Ann Frost on settlement of Mary L. Atkinson's account, \$74.06, and on January 1st, 1841, there was due to her on like settlement, \$59.93½. In 1843, he executed a bond by which he bound himself and his heirs to pay to Mrs. Frost the sum of \$200.26½, it being for the board of Mary L. Atkinson for the years 1841 and 1842, and other expenses.

In March, 1845, Ann Frost filed her bill in the Circuit court of Mathews county against Litchfield and his sureties in the first bond, in which she set out the foregoing facts, except as to the execution of the second bond. She states the continued residence with her of Mary L. Atkinson up to the filing of the bill, and that there was
400 *due to her on account of the board,

&c., of the said Mary L. Atkinson for the year 1843 and up to the 1st of September, 1844, the sum of \$226.99. That when the bonds were executed Litchfield represented to her he had not been able to collect the interest on his said ward's estate, but as soon as he could do so, he would pay to her the said bonds, and that he and the said ward would be bound to her for them; and at his request she gave him receipts on the accounts, as well as receipts for articles purchased for the ward.

She charges that Litchfield had not paid the board, &c., for which the bonds were executed; that he is insolvent, and although he has receipts on the accounts, yet as the accounts show they were receipted by his bonds, and as they had not been paid, he should not be allowed to use them as a credit against his ward, until they have been paid, and that Mary L. Atkinson, having received the consideration in board and necessities, the said debts should be paid out of the profits of her estate.

She charges that Litchfield had never settled his guardian account with his ward; that the profits of the ward's estate are greatly more than sufficient for her support; that he had wasted it, and upon a settlement will be found largely indebted to his ward. The prayer of the bill is for a settlement of the guardian's account; for the payment of the debts due to the plaintiff out of the estate of the ward in the hands of her guardian and securities, and for general relief.

In June, 1845, the plaintiff filed an amended bill, bringing the sureties of Litchfield in the second bond, before the court. At the rules in September, 1845,

*For monographic note on Guardian and Ward, see end of case.

See principal case cited in Gayle v. Hayes, 79 Va. 540; Carter v. Edmonds, 80 Va. 61; Reed v. Hedges, 16 W. Va. 196; Wallis v. Neale, 43 W. Va. 586, 27 S. E. Rep. 230; 1 Min. Inst. (4th Ed.) 474. See generally, monographic note on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 134.

the bill and amended bill were taken for confessed as to all the defendants; and at the October rules the cause was set for hearing. At the October term of the court the guardian ad litem of Mary L. Atkinson filed her answer; *and at the same term the court, without deciding any principle in the cause, referred it to a commissioner, with directions to report what was due to the plaintiff on account of the board, maintenance and education of Mary L. Atkinson, including the three sums mentioned in the bonds aforesaid; what was the annual profit or clear income of her estate during the respective years embraced in the account; and whether the board, maintenance and education furnished by the plaintiff to the ward, was suitable to her estate and condition in life.

In March, 1852, the commissioner reported that there was due to the plaintiff for the board, tuition, &c., of Mary L. Atkinson, up to September 1st, 1844, with interest up to January 1st, 1845, \$601.65; of which \$576.26½ was principal. That the annual clear income of the estate during the period covered by the plaintiff's accounts, was \$2,005.62; and the disbursements of the guardian for board, tuition, &c., was \$1,037.43; so that the income exceeded the expenditures by \$968.19. This statement of disbursements is taken from the report of the commissioner in the case of John B. Atkinson, another of his wards, against Litchfield. In this account Litchfield seems to have been credited with the receipts given to him by Mrs. Frost. And he reports that the expenditures were suitable to her estate and condition.

It was proved by the person who took the bonds from Litchfield, that he promised Mrs. Frost at the times of the execution of the several bonds, that as soon as he could collect the funds of the estate that he would settle them. He gave them as guardian, and assigned as the reason for giving them, that he had been unable to collect the hire of the negroes belonging to the estate of Mr. Atkinson.

In April, 1853, Elijah Barnum and Robert Billups answered the bill. They say that Litchfield was the *guardian of Mary L. Atkinson; that the board was furnished by the plaintiff on the credit of the guardian, as was shown by the fact that she took his bonds and gave him receipts for the bonds, which have been allowed him in the settlement of his guardian's account of said infant, and therefore the plaintiff has no longer any claim against her, and never had any claim against the respondents, who happen to be the securities of Litchfield as guardian of said infant.

The plaintiff having died, the suit was revived in the name of her administrator, and came on to be finally heard on the 12th day of October, 1858, when the court confirmed the report of the commissioner, and holding that Litchfield and his sureties in his bond as guardian were liable to the estate of Mrs. Frost for the amount reported by the commissioner, made a decree against

them for the amount, with interest and costs. And thereupon Barnum and Billups applied to this court for an appeal, which was allowed.

Peachy, for the appellants.

Wise, Steger & Sands, for the appellee.

RIVES, J. The facts of this case are simple and uncontested. In December, 1836, Larkin Litchfield having qualified and given bond with security as guardian of Mary Atkinson, placed her, being then of tender years, with her relative Mrs. Ann Frost in the city of Norfolk, for education and support. He defrayed her charges to the year 1839; and afterwards gave three several bonds on settlements, respectively, of the 27th August, 1840, 18th February, 1841, and 14th day of April, 1843. The balance of Mrs. Frost's demands consists of an open account, extending to August, 1844, and amounting to the sum of \$226.99.

403 In March, 1845, Mrs. Frost *having failed to receive payment of these claims, brought suit in equity against the guardian and his securities, alleging his promise to pay her out of the profits of his ward's estate; the sufficiency of those profits; the insolvency of the guardian; and concluding with a prayer for the settlement of the guardian's accounts, and a decree for her debt against him and his securities out of any balance that might be found due to his ward aforesaid. Afterwards, in June, 1845, she amended her bill to make new parties of the appellants Barnum, Billups and Diggs, who had, on the 13th of June, 1842, become bound as counter securities for any loss or injury that had accrued or might afterwards accrue to the sureties of his first official bond.

On the 11th day of October, 1851, the said original and amended bills were taken for confessed, and the court directed an account of what was due to the plaintiff, and required of the commissioner a report of the annual income of the estate of the ward, and the suitability to her estate and condition in life, of the plaintiff's charges for her maintenance and education.

In compliance with this interlocutory order, the commissioner reported in March, 1852, a balance due the plaintiff from the said guardian, of \$601.65; a statement showing the annual income of the ward in excess of the charges; and lastly, his opinion that these charges were suitable to her estate and condition in life. The materials of this report, so far as it concerned the ward's income and estate, seem to have been derived from another cause pending in the same court against said guardian in the name of another of his wards, John B. Atkinson.

The appellants, Barnum and Billups, obtained leave of the court on the 12th day of April, 1853, to file their answer; and in that answer, they set up the following defences: that the ward's estate was not 404 liable; that the *claim was by interment of law against the guardian; that his credit and liability had been

accepted in discharge of his ward's estate; that plaintiff's acceptance of the guardian's notes, and receipts of the accounts, on which they were based, already credited in the settlement of his guardian accounts, acquitted the ward's estate and the respondents of all further liability therefor, and ousted the plaintiff of any recourse against the trust funds in the hands of the court for the payment and indemnity of said guardian's creditors and securities; and that on the ground of equal equities and a special lien under said trust deeds, the plaintiff should lose her debt rather than devolve it upon the respondents.

There was no exception taken to the commissioner's report. The cause was finally heard on the 12th day of October, 1858. In the meantime Mrs. Frost had died. The cause was then revived in the name of Edward Sale, her personal representative; the commissioner's report confirmed; and "decree rendered in favor of the appellee for the sum reported by the commissioner, first against Litchfield's administrator, and then against appellants Barnum, Billups and Diggs' administrator."

I presume no question can be made of the jurisdiction of equity in this case. The liability of the ward's estate, if it exist at all, can only be asserted in a court of chancery. This court has, for a long course of years, reckoned among the subjects of its original jurisdiction, the care of infants and the protection of their rights and estates. Guardians are but the ministers and agents of these courts in the administration of these functions; and are subject to their instructions, in the use of the profits or capital of the estate of their wards. While the common law admits of a suit against an infant for necessities, it is the peculiar province of a court of equity to give relief to a creditor as against

the estate of such infant. *So far, then, as this bill seeks a discovery of the infant's income, a settlement of the guardian's accounts, and a satisfaction of the plaintiff's claim out of the ward's estate, for which the guardian's securities are responsible, it is peculiarly and exclusively a case of equitable resort; nor has any question on this head been raised by demurrer to the bill or otherwise.

At common law, a contract of the guardian is deemed personal, and the liability cannot be shifted to the infant. Thus, where necessities were furnished by permission of the guardian and charged to him, although the credit was given on the ward's estate, the infant was not personally liable; but had the guardian taken credit for the account in his settlement, it might be otherwise. *Simms v. Norris & Co.*, 5 Alab. R. 42.

But where there is no ground to assert or imply a personal contract of the guardian, and where the credit and reliance rest exclusively on the ward's estate, there is no reason or policy of the law that would forbid the assertion in a court of equity of such a claim upon the ward's estate in a

course of administration and settlement in such a forum.

The first inquiry, then, that arises in this case, is as to the nature of the agreement and understanding between the parties as to the support and charges of this infant. Did Jarkin Litchfield bind or intend to bind himself personally for his ward in this respect? Did Mrs. Frost accept such personal contract of the guardian in lieu of all claim on the infant's estate? Both of these questions must be answered in the negative, upon the pleadings and evidence in this cause. The bill sets up the guardian's undertaking to pay out of the profits of the ward's estate; the bonds of the guardian in terms repel the theory of his personal liability, because they recite that they are for the board of the ward or for the settlement of ward's accounts, and are signed by him as guardian; and finally, the testimony establishes the undertaking of the guardian at the time of executing his several bonds aforesaid, that "as soon as he could collect the funds of the estate, he would settle them."

The guardian rejects the idea of personal accountability; the custodian of the ward neither invites nor insists on it; but by mutual agreement they both refer the liquidation of the accounts for maintenance to the ward's income. Mrs. Frost had been, doubtless, advised that her accounts could not be permitted to encroach on the capital, but must be satisfied out of the profits of the ward's estate: hence, she is put off by the guardian on the pretext of his not collecting the annual revenues; and consistently looks to that source for payment. Perhaps she might have enforced a personal liability on these bonds against the guardian at law, where his addition would be treated as a mere "descriptio personæ," especially if the bonds stood alone, without the opposing proofs: but it is otherwise in equity, which regards the substance rather than the form, and explores the acts of the parties to give effect to their intentions.

I might cite many analogous cases to show that the liquidation by bond of an agent or trustee should not be allowed to extinguish the primary demand against the principal or the trust, where such clearly existed, upon equitable principles. Thus, where a saw gin had been sold to a husband, who was the ostensible owner of the plantation on which it was operated; credit given to him and his note taken therefor, sued on and prosecuted to insolvency; but when it was afterwards ascertained that the husband was only the manager, and the estate belonged separately to the wife, the trust estate was held liable for the debt. *Cater v. Eveleigh*, 4 Dess. R. 19. So, again, a trust estate was held liable

for supplies, *though charged personally to the husband, and his note taken therefor. *James v. Mayrant*, 4 Dess. R. 591. In the case of *Douglass v. Fraser*, 2 McCord Ch. R. 105, testator's estate was held liable for testator's and executor's dealings for benefit of his estate, although

executor gave his note for both accounts; and it was said, "the mere circumstance of the executor having liquidated the demand cannot exempt the estate from the payment of a debt otherwise chargeable upon it." But where the trustee's note was received as an investment upon interest, it was considered, as to the trust estate, a complete payment and discharge. *Pettebone et al. v. James*, 25 Miss. R. 495. In view of these authorities, I cannot see how it can be successfully contended that the giving of these notes by the guardian, under the circumstances, can be held to extinguish the appellee's claim upon the infant's estate, if such claim is properly cognizable in equity.

Now, the question arises, to whom are those who support minors, to look for the payment of their charges? Certainly not to the guardian in the absence of express contract. By virtue of his office as guardian, he incurs no personal liability to any one for their support and maintenance. But clearly the remedy for those who furnish necessities to minors under guardianship having property, is against their estate in the hands of the guardian, and not against the guardian personally, unless he enters into a contract on which he can be held liable individually. *Spring v. Woodworth*, 4 Allen's R. 326. A person furnishing necessities to a ward cannot recover, in action of assumpsit, of guardian as upon an implied assumpsit for maintenance and support. The only remedy against the guardian who neglects his duty in discharging the proper debts of the ward, or claims for necessities furnished for the ward, is an action on the probate

408 bond. **Cole v. Eaton*, 8 Cush. R. 587. The condition of such bond in Massachusetts (Rev. Stat. ch. 79, § 10) is fourfold—1. to make and return a true inventory; 2. to dispose of and manage, &c., and faithfully discharge his trust in relation thereto and to the custody, education and maintenance of the ward; 3. to render an account on oath in one year and when required; and 4. at the expiration of his trust to settle his accounts and pay over and deliver, &c.

Our present law, as well as the act of 1819, under which Litchfield qualified and gave bond, prescribes the condition to be for "the faithful execution of his office." This is as comprehensive, doubtless, as the Massachusetts statute, and as clearly embraces the duty of the guardian to pay the debts out of the property of the ward as far as the assets will suffice; so that to the extent of those assets, a failure to pay the debts is a violation of his duty, and of course a breach of the condition of the bond, as was decided in the case of *Conant v. Kendall*, 21 Pick. R. 36. Therefore, if Litchfield's bond had been legally conditioned, Mrs. Frost might have sued directly on his official bond, assigning as a breach his failure to pay her debt, although the ward's income was sufficient for the purpose.

But the condition of Litchfield's bond is not for "the faithful execution of his office," as prescribed by law. But it is not, therefore, void except as to any condition imposed beyond what the law requires, and it is good so far as it is in conformity with the act; as was decided in the case of *Pratt v. Wright et als.*, 13 Gratt. 175. In that case, the condition of the guardian's bond was identical with the condition of Litchfield's first bond: it follows a very ancient form under the act of 1748 directing the courts to "take good security of all guardians by them appointed for the estates 409 of the orphans to them *respectively committed." It was held in that case, that the condition to indemnify the justices, was void; but that the condition to pay over and deliver all such estate as shall hereafter appear to be due to the wards when they attain lawful age, or when thereto required, was good, and bound the obligors to that extent, although it comprised only a part of the duty of the guardian, and was not as extensive as the statute requires. It is also material to remark that it was also held in this case that "the right to sue at law on the bond was not in exclusion of the jurisdiction of chancery to hold the guardian to an account, and his securities with him, to the payment of any balance found due to his ward."

Litchfield's securities cannot be held liable beyond the scope of their express undertaking; and that was to "pay and deliver unto the said orphans all the estate due them from said guardian, when thereto required," &c. Now the amount due them is clearly what remains after the payment of the debts and expenses properly chargeable against the wards. Let us suppose that Mary Atkinson had proceeded against her guardian and his securities for an account of the guardianship, and a decree for her share; would it not be competent for her to allege that charges against her were outstanding and unpaid by her guardian, and should be provided for by the account and decree designed to ascertain and adjudge her dues? The securities could not object, because if such outstanding debts were discarded from the guardian's accounts the balance in favor of the ward would be enlarged to that extent; and it would be immaterial to them whether to that amount they paid creditors or the ward. Why may not the creditor of the ward be subrogated to the ward in such case, and be entertained in a court of chancery upon an independent bill against the guardian and his securities preferring claims against the ward's 410 estate, and asking "for their payment out of it, before the balance be adjudged to the ward? In like manner the securities cannot be prejudiced, because to the extent of the decree against them for the creditor's demand; the balance in favor of the ward is abridged; and vice versa, so far as released from the creditor their liability to the ward is enhanced. It is admitted by the respondents in this case, that they have got the benefit on the settlement

of the guardian accounts of the receipts given by the complainant to the guardian. Nevertheless, it is proven that these receipts were nominal rather than real; and that it at least savored of a fraud, if it was not a fraud, to allow the insolvent and derelict guardian to avail of these fictitious credits to shield himself and his securities from proper accountability. Whether these credits were allowed the guardian, after they were distinctly challenged by the plaintiff's bill in 1845, does not appear here, though it doubtless did to the court below, before whom the guardian accounts were settled in the case of John B. Atkinson v. Litchfield, mentioned in the commissioner's report. The bill charges that there had been no settlement of the guardian account; and it is in the answer only, filed on the 12th April 1853, we are for the first time informed that these credits had been given for the complainant's receipts; so that it is probable the guardian and these securities availed of these nominal and apparent credits with the full knowledge that they were not truly allowable. Surely, it would be inequitable to admit this relief of the securities as against the larger balance, which would be found against them, if these credits were disallowed; and would be wholly without injury to them, to subrogate the ward's creditor to the rights of the ward, who can only be entitled in equity to receive the fund due her after the discharge of the rightful liabilities attached to it.

From this view of the cause, I conclude that the remedy *of Mrs. Frost was not against the guardian personally; but against the ward's estate in his hands; that she could only pursue it in a court of chancery against the ward's income; that inasmuch as the ward's eventual share can only be ascertained after the allowance of all rightful charges, it was the right of the ward, and by substitution, of the ward's creditor, to demand of the obligors in the guardian's official bond the discharge of the ward's estate of its liabilities, legal or equitable; and that in this way no injury can result to the securities, while a meritorious demand upon the ward's estate is satisfied by them.

For these reasons, I am of opinion to affirm the decree.

JOYNES, J. As this is a case of the first impression, and as the court is divided in opinion, I propose to state briefly the grounds upon which I have come to the conclusion that the decree of the Circuit court ought to be affirmed. It is well settled that an infant who is supplied with necessities by his parent or guardian cannot incur a personal liability to pay for articles supplied to him, though such as would, under other circumstances, fall under the description of necessities. For the infant being already supplied by the parent or guardian, the articles are not necessities. But this case involves no question as to the personal liability of the infant.

Laying out of view for the present, the

bonds which Mrs. Frost subsequently took from the guardian, let us inquire what was the legal effect of the contract which the guardian made with her for the maintenance of his ward. We do not know the precise terms of that contract, nor whether there was any special or formal contract at all. But it may be assumed that the guardian entered into a contract, express or implied, which bound him personally to pay for the maintenance of his ward. This contract imposed no personal liability on the

ward, and an *execution founded upon it could not be levied on the property of the ward. This has been held in numerous cases. Bac. Abr. Infancy and Age, 1; 5 Miss. R. 299; 6 Id. 58; 5 Alab. R. 42; 4 Watts & Serg. R. 118; 2 Strobh. R. 2. See also, 2 Conn. R. 386; 11 N. Hamp. R. 51; 1 Hill S. C. R. 279; 6 Watts & Serg. R. 82; 1 Bailey's R. 344; 4 Allen's R. 326.

It is contended on the part of the appellants, that a contract by a guardian to pay for maintenance furnished to his ward, gives to the person with whom it is made only a right to enforce this personal liability of the guardian, and gives him no claim, at law or in equity, against the estate of the ward, except such as he may make by substitution to the right of the guardian to apply the profits of the ward's estate to the payment of the debt.

According to this view, the right of the guardian to apply the profits of his ward's estate to pay the expenses of his maintenance, is nothing more than a privilege to the guardian, for his own benefit only. He is regarded as under no obligation to do so, because if he is under such an obligation, the person furnishing the maintenance would have a right to claim its fulfillment for his benefit. It follows also from this view, that where the profits of the ward's estate have been wasted by the guardian, his securities cannot be made liable to the person who furnished the maintenance.

For as the guardian himself could make no claim against his securities, the creditor claiming by substitution to him and standing in his shoes, would be equally unable to do so.

I do not concur in this view of the rights of the parties. It seems to me that the law places the guardian under an obligation to provide for the maintenance of his ward out of the profits of his ward's estate; and that a person who furnishes maintenance to the ward under a contract with the guardian, but who does not give exclusive credit to *the guardian, has a right, which a court of equity will recognize, to have those profits so applied for his benefit. The creditor in such a case, in addition to his claim at law against the guardian, upon his personal contract, has a direct and original claim in equity, and not merely a claim by substitution to the guardian, to be paid out of the profits of the ward's estate.

The cases referred to above were, all of them, actions at law. They determine that, at law, the contract of the guardian to pay

for the maintenance of the ward, binds him and him alone; but they do not affect the question of the right of the party who furnishes the maintenance to claim payment of his debt, in equity, out of the profits of the ward's estate. This right seems to me to result from the general doctrines of equity in reference to infants. Where an infant, with no father living, has estate yielding profits, the policy of the law is that these profits shall defray the expense of his maintenance. This principle is applied according to the circumstances of the particular case, so as to promote the welfare of the infant, and to compensate those who supply his wants. Accordingly, the profits will be applied to provide for future maintenance, and when justice requires it, they will be applied to pay for past maintenance. If the infant has a guardian, the guardian may, if he chooses, incur a personal liability by contract, express or implied, to pay for the maintenance. The guardian may, in such a case, apply the profits to the payment of the debt in the first instance, or he may apply them to reimburse himself after he has paid the debt out of his own pocket. If he does neither, or if he refuses, as he may, to incur a personal liability, I apprehend that the person who supplies the maintenance still has his claim against the profits of the ward's estate. If the guardian dies, or resigns, or is removed from his office, and so does not receive the

414 *profits which should pay the debt, the court will see that they are applied, though received by his successor, either to his reimbursement or to the satisfaction of the creditor, according to the circumstances of the case. And so if the guardian wastes the fund and becomes insolvent, it seems to me that the law will carry out its policy and secure the ends of justice, by holding his securities responsible to the creditor for his breach of duty, in failing to apply the profits of the ward's estate, to his maintenance, if the condition of their bond covers that duty.

The liability of the profits of an infant's estate to pay the expenses of his maintenance has long been recognized by statute in this state. And the present Code, embodying the substance of former laws on this subject, expressly recognizes the obligation of the guardian to apply the profits of the ward's estate to his maintenance. It provides that the guardian "shall have the custody of the ward, and the possession, care and management of his estate, and out of the proceeds of such estate shall provide for his maintenance and education." Code of 1849, ch. 127, § 7.

Thus it seems to me that the law recognizes an original liability on the profits of a ward's estate to defray the expenses of his maintenance, and an obligation on the guardian to apply them to that object, the benefit of which may be claimed by a person who furnishes maintenance to the ward without relying exclusively on the credit of the guardian. Indeed the law itself is the real guardian of the infant. The person

who is denominated guardian is only the agent and instrument of the law, deputed, from necessity, to carry out the principles and policy established by it for the care and protection of the infant and his property. And this being so, the law will not suffer its policy to be defeated by any act or default of its instrument.

415 *This view of the subject, which it appears to me to result from the general principles and policy of the law, is necessary for the welfare of the infant, and the only one that would be just and convenient in practice. If the guardian alone is responsible to the person who furnishes the maintenance, see how it would work in practice. The guardian must, in every case, pledge his own credit, or pay his money in advance, or the person who maintains the ward will have no security. If the guardian has neither money nor credit to advance, or if he refuses to incur a personal liability, how is the infant to be maintained? Some benevolent friend may be sometimes found, willing to "take the chances" of getting paid, but the infant will not always be so fortunate. Thus serious inconvenience and injury to infants might be the consequence of such a doctrine. On the other hand, if the profits of the ward's estate are held to be directly liable to the creditor, his debt will be secure in every case, whether the guardian is honest or dishonest, solvent or insolvent, and the infant's estate, if it yields enough for the purpose, will always ensure the supply of his wants.

No injustice can result from the doctrine which I maintain. It will hold securities liable for what came to the hands of the guardian, but for no more. Justice will be done to the person who furnishes the infant with maintenance, by paying his debt, and no injustice will be done to the infant, who will only pay for what he gets, and out of the fund especially appropriated by law to the purpose. The gross injustice of the other doctrine is well illustrated by the present case. If that doctrine should prevail, the person who maintained the infant would not get a dollar, though the infant's income was ample, and the securities would escape liability by sinking, in the hands of the guardian, an amount

of profits equal to the debt due for 416 *the maintenance. This would be done by means of a credit given to the guardian for money which has not been paid and never can be, because he was insolvent and dead before the date of the decree. The effect would be to render the guardian's bond of no avail, to the extent that he has wasted the fund, and for the very reason that he has wasted it, though the wasting of the fund is the exigency for which such a bond is intended to provide.

It has been contended on behalf of the appellants that it would operate as a fraud upon them if they should be held liable in this case after the guardian has obtained credit in the settlement of his accounts for the amount of Mrs. Frost's claim. So far

from this being true, it would operate as a fraud upon Mrs. Frost to allow the securities to escape liability on the ground that this credit has been allowed. They were made parties by the amended bill filed in 1845, at which time the guardian accounts had not been settled. These accounts were subsequently settled in a suit to which Mrs. Frost was no party. The securities knew, therefore, when this credit was given and when they relied upon it in their answer in 1853, that the money for which it was given had never been paid, and never would be, as the guardian was insolvent.

The principles I have been considering apply to the case of Mrs. Frost. There is nothing to show that she agreed or intended to rely exclusively upon the personal liability of the guardian. On the contrary, the bill which was taken for confessed by the guardian and the securities, alleges expressly that the guardian promised to pay her out of the profits of the ward's estate; and she seems, from first to last, to have looked to these profits as the fund from which she was to receive payment, through the guardian. Her claim to subject the profits of the ward's estate to the payment of her debt rests, therefore, not merely on the general grounds already discussed, but *on the additional ground also of an express agreement of the guardian to apply them to that object.

I have thus far laid out of view the bonds which Mrs. Frost received from the guardian after the several accounts fell due. It remains to inquire whether her claim against the profits of the ward's estate was destroyed by the acceptance of those bonds.

It is clear that those bonds, supposing that they bound the guardian personally, did not operate as a merger of this claim, which was collateral to the personal contract of the guardian. The taking of these bonds could only affect Mrs. Frost's claim against the profits of the ward's estate, if at all, in case she agreed to relinquish that claim and to accept the bonds in satisfaction. That she had no intention to do so, is apparent from the form of the bonds, and from the proof as to what passed when they were executed. The receipts given upon the accounts at the same time, imported, as stated in the bill, that they were settled by bonds. The bill was taken for confessed, while this allegation, if not true, could have been disproved by the defendants by the production of the receipts themselves.

I have thus far been considering the claim of Mrs. Frost against the profits of the ward's estate, as between her and the guardian. I come now to consider the case in respect to the securities, who can, of course, only be held liable on their bond. If the bond had been in the form provided by law, that is to say, with condition that the guardian would faithfully execute his office, the failure of the guardian to apply the profits of the ward's estate to her maintenance, would have been a breach of the con-

dition, for which Mrs. Frost, as the party injured, would have been entitled to sue. And a court of equity would have had jurisdiction of the suit, because of the necessity of taking an account of the profits of the ward's estate applicable to the payment of the debt, and also because the right to subject the profits, upon the failure of the guardian to pay the debt is only an equitable right. But the condition of this bond is different. It is to pay the ward what shall be found due to her, and to indemnify the justices.

The ward was entitled to recover on this bond the whole amount of the profits which had accrued upon his estate during the guardianship, less such part thereof as had been properly paid away by the guardian, and such other part as he had a right to retain. But the guardian had no right to retain the amount of Mrs. Frost's debt, which he had not paid and was unable to pay. To allow him to do so, would be to enable him to make a profit to that extent by his default, and to discharge his securities for an amount never paid to any body. All that he or they could make any claim to would be that the debt to Mrs. Frost should be paid so as to release him from his personal liability for it. Besides, as Mrs. Frost's claim was against the profits of the ward's estate generally, in whatever hands they might be, she would be entitled to follow and to subject any profits which the ward might recover from the guardian. The ward had a right, therefore, in order to release the profits in her hands from the claim, to demand that the profits properly applicable to it should be applied to it by the guardian, or paid to her that she might so apply them. Inasmuch, therefore, as the ward would have been entitled to recover these profits from the guardian and his securities, and as they would have been liable when recovered, to the payment of Mrs. Frost's claim, she had a right in equity to be substituted to the ward, and to enforce payment of her debt, to the extent of those profits, from the guardian and his securities.

That the bonds taken by Mrs. Frost from the guardian did not affect her right to sue upon the guardian's official bond, see Hamlin's adm'r v. Atkinson, 6 Rand. 574.

419 *MONCURE, P. An infant can make no contract binding in law or equity except for necessities, and when he makes a binding contract for necessities, he is liable to be sued thereon at law, as if he were sui juris. His disability is intended for his benefit, and does not, when his interest requires that it should not exist. When it does not exist, there is of course no difference in this respect between him and any other person. His obligation is upon his person, and not by lien or quasi lien upon his estate, as in the case of a married woman having a separate estate with a right to charge it by her contracts. The separate estate is a creature of equity, and charges upon it can be enforced only in equity. The legal entity of a married woman is merged in that of her husband,

and the instances are extremely rare in which she can be sued alone at law. The general rule and exception thereto in regard to the disability of infants, are both well established at law.

An infant can make no binding contract even for necessities, when he is amply supplied therewith from other sources, and that fact is known to the person with whom he makes such contract. It is only in case of necessity, or a supposed necessity, to prevent his starvation or suffering, that he is competent to make a contract. He is not so competent when he has an ample estate in the hands of a guardian, whose duty it is to apply the profits which are sufficient for the purpose, to the support of the infant, and who is ready and willing to perform that duty. A person who deals with a guardian on credit for necessities furnished the ward, deals on the credit of the guardian, and not of the ward or the ward's estate. A contract by a person as guardian, is nothing more than a personal contract binding upon him. Persons who make such a contract with him may, and no doubt generally do, look to the estate

420 of the ward as the source from which the means of satisfaction are to be derived. But they are to be so derived by the agency of the guardian, and not by any direct claim to be asserted in law or equity by the creditors. A judgment cannot be rendered against a guardian for money to be levied of the estate of the ward, as in the case of a judgment against an executor de bonis testatoris. Even a promise by a guardian to pay money out of the ward's estate, is but a personal promise of the guardian, for breach of which he must be sued personally. Possibly, and I may even say probably, if the guardian in such case was personally unable to pay the debt, and had not received money enough to pay it, and applicable to such payment, out of the ward's estate, the creditor would be subrogated in equity to the place of the guardian and be decreed satisfaction out of the ward's estate. But if the guardian had received and wasted the ward's estate, or the profits thereof, to an amount equal to or exceeding the debt, instead of applying the same, as he ought, to the payment of the debt, certainly the creditor would have no right to relief in equity against the ward or his estate. He would have no ground for subrogation when the guardian himself had no claim against the ward or his estate.

The foregoing principles are sufficient to show that the creditor in this case, Mrs. Frost, has no right to recover against the ward, or the ward's estate, the balance due her by the guardian for necessities furnished the ward at the request and upon the credit of the guardian. The profits of the ward's estate were much more than sufficient for her support, and were received and wasted by the guardian, instead of being applied to that purpose; and the securities in the guardian's bond have been compelled to account for and pay the balance due by him to the ward after deducting all

421 credits, including the balance due by the guardian to Mrs. Frost as aforesaid. If the guardian had paid the balance due to the ward without deducting the balance due to Mrs. Frost, then, upon the principle of subrogation aforesaid, she might, perhaps, recover the amount due her against the ward. But instead of doing so he died insolvent, leaving a large balance due and unpaid to the ward, which his securities as guardian have since been compelled to pay as aforesaid.

Then the only remaining question is, has Mrs. Frost any right to recover, either at law or in equity, the balance due her by the guardian against his securities? I think not. Bond is required to be given by the guardian "for the safety of the ward," and not for the benefit of the creditors of the guardian, even though the debts due to such creditors may have been created on account or for the benefit of the ward. The ward being an infant, often of tender years, whose estate is placed by authority of law in the hands of an agent, to be managed for the infant and accounted for to him when he arrives at age, the law therefore takes care of him by requiring the guardian to give bond with surety. Those who deal with the guardian do so voluntarily, and do not need and have no claim to such protection. They are sui juris and can take care of themselves. They are not obliged to give credit to the guardian on account of his ward, any more than on his own account; and they may require what security they please, as the condition of their doing so. If they neglect to require such security, and fail to recover their claims of the guardian, by reason of his being or becoming insolvent, they have no more recourse against the sureties of the guardian for the recovery of such claims, than they could have for the recovery of any other claim against him, founded upon any other consideration.

That such are the meaning and object of the guardian's bond and the nature of 422 the liability of his sureties, is obvious from the terms of the law requiring the bond to be given, prescribing the form of its condition, and declaring his powers and duties. Code of 1860, ch. 127; and ch. 13, § 8. Chapter 127, § 5, declares, that "every guardian, unless in the case of a testamentary guardian, the will otherwise directs and the court in such case deems it unnecessary for the safety of the ward, shall give bond," &c. "If any court omit to require such a bond, or accept such person as surety or sureties as do not satisfy it of their sufficiency, the judge or justices so in default shall jointly and severally be liable to the ward for any damages he may sustain thereby." Section 7 declares, that "every guardian who shall be appointed as aforesaid, and give bond when it is required, shall have the custody of his ward, and the possession, care and management of his estate, real and personal, and out of the proceeds of such estate shall provide for his maintenance and education." "At the

expiration of his trust, he shall deliver and pay all the estate and money in his hands, or with which he is chargeable, to those entitled thereto." Section 8. "No disbursements shall be allowed to any guardian, where the deed or will, under which the estate is derived, does not authorize it, beyond the annual income of the ward's estate, except in the following cases," &c. Section 13. "The circuit, county and corporation courts in chancery may hear and determine all matters between guardians and their wards, require settlements of the guardianship accounts, remove any guardian for neglect or breach of trust, and appoint another in his stead, and make any orders for the custody and tuition of an infant and the management and preservation of his estate." Chapter 13, § 8, declares that "every such bond," &c., including a guardian's bond, "shall be with condition for the faithful discharge by him of the duties of his office or trust." These provisions of the

423 present Code are not materially variant from the law as it was when the guardianship bond in this case was given. 1 R. C. 1819, ch. 108. The condition of the bond as prescribed by § 4 of that chapter, is, "for the faithful execution of his office," to the same effect and almost in the very words of the present law. And the same form of condition was prescribed by the act of 1785, 12 Hen. St. ch. 86, § 1, p. 195, from which the law on the subject in the Rev. Code of 1819 was derived.

The form of the condition of the bond of the guardian which was executed in this case, and which bears date on the 12th day of December, 1836, was not simply "for the faithful execution of his office," according to the literal terms of the Code of 1819, but was as follows: "that if the said Larkin Litchfield guardian," &c., "shall well and truly pay and deliver, or cause to be paid and delivered, unto the said orphans, all such estate or estates as now is, or may hereafter appear to be due to the said orphans from the said guardian, when thereto required by the justices of the said court; as also keep harmless and indemnify the above named justices," &c. This is the form of condition which seems to have been generally, if not universally, used in the commonwealth, as we find it in Robinson's Forms, p. — old edition, and pp. 453-4, new edition. See also, Pratt v. Wright, &c., 13 Gratt. 175. It was adopted prior to the act of 1785, Call v. Ruffin, 1 Call 333, and continued afterwards to be used.

The sureties of course are bound only by the bond which they executed, and if that does not bind them for the claim of Mrs. Frost, they are not bound for it at all, whatever may be the obligation of the guardian. There is no ground on which they can be made liable for it in equity, if not liable at law by the terms of their bond. The condition of their bond is, that the guardian shall pay and deliver to the orphan all such estate, &c., and to indemnify *the justices, &c. These

424 terms do not seem to imply, any more

than they express, a promise to pay any debt which the guardian may create on the ward's account and fail himself to pay. But it would have made no difference if the bond of the guardian had been conditioned in the very words of the law, "for the faithful execution of his office." It cannot be said to be a part of the official duty of the guardian to pay his debts created on account of the ward; and therefore the payment of such debts cannot come within the terms of the condition of the bond as prescribed by the statute, so as to entitle the creditor, or even the ward, to maintain an action on the bond for non-payment of said debts. The interest and safety of the ward, for which only the bond was designed, does not require that such a right of action should exist. If it be said that while the ward might have an ample estate for his support even out of its profits, the guardian might be insolvent or untrustworthy, so that no person would credit him on his personal liability only, and therefore the ward might suffer for want of the necessities of life; the answer is, that the law has made ample provision for such a case. The court of chancery is always open to hear the complaints of a ward against his guardian, whether made by the ward in person or by any friend for him, and may at any time remove the guardian for neglect or breach of duty, and appoint another in his stead, and make any orders it may deem proper for the custody and tuition of the ward and the management and preservation of his estate. Code, p. 589, ch. 127, § 13, cited supra; 1 R. C. 1819, p. 406, § 4.

It seems to me that such is not only the true and sound construction of the law and the bond, but that it would be in the highest degree unjust to the sureties of the guardian to hold them liable to the creditor in such a case as this. The ward was 425 placed by the *guardian in December, 1836, with the plaintiff Mrs. Frost, a near relation of the ward, to be boarded, clothed and educated on the guardian's account, who promised to pay the amount to become due therefor out of the profits of the ward's estate, which were more than ample for the purpose. The ward continued to reside with Mrs. Frost and to be boarded, clothed and educated by her and at her expense, until the 1st of September, 1844. The accounts for the first two years, 1837, and '38, were paid by the guardian to Mrs. Frost. For the amount of the account for the third year, 1839, due 1st of January, 1840, \$74.06, he executed his bond on the 27th of August, 1840. For the amount of the account for the fourth year, 1840, due 1st of January, 1841, \$59.93½, he executed his bond on the 18th of February, 1841. For the amount of account for the fifth and sixth years, 1841 and '42, \$200.26½, he executed his bond on the 14th of April, 1843. To the name of the guardian subscribed to each of these bonds was added the word "guard." or words "as guard.," being a contraction for "guardian" or "as guardian." When these bonds were respect-

ively executed, receipts were given by Mrs. Frost to the guardian for the amount of the accounts respectively for which the bonds were given. For the amount of the accounts for the seventh and eighth years, 1843, and '44, which were the last two years, making together \$226.99, no bond appears to have been executed by the guardian, but it is probable that a receipt was given to him for that amount also, to be used as a voucher in the settlement of his guardianship account. At all events it seems that all these accounts have been allowed as credits to the guardian in the settlement of his account, made in a suit in chancery brought against him by the ward, and the balance found due upon such settlement to the ward, has been decreed against the 426 sureties of the guardian. Mrs. Frost might have demanded payment of these accounts of the guardian as they became due, and resorted to legal means, if necessary, to enforce their payment. Had she done so; had she used due and ordinary diligence, she would long since have received her money of him who legally and justly owed it. Instead of that, she has been guilty of the grossest laches, in waiting with him until he wasted all the profits of the ward's estate and became totally insolvent, and then she came forward and demanded payment of the sureties of the guardian! And that, too, after having given him the receipts for the amount of her accounts to be used in the settlement of his guardianship account, which were actually used and credited in such settlement. I think she has no right to any relief against the sureties at law or in equity, and therefore that the decree ought to be reversed and the bill dismissed; but the other judges being of a different opinion, the decree must be affirmed.

Decree affirmed.

GUARDIAN AND WARD.

- I. Modern Forms of Guardianship.
- II. Powers and Duties of Guardians.
- III. Accounting by Guardian.
- IV. Rights and Duties Arising from Relation of Guardian and Ward.
- V. Termination of Guardianship.
- VI. Guardian De Facto.
 - See Infants.
 - See Judicial Sales.
 - See Parent and Child.

I. MODERN FORMS OF GUARDIANSHIP.

Guardianship by Nature.

Father as Guardian.—The father is the natural guardian of his infant children and in the absence of good and sufficient reasons, shown by the court, such as ill-usage, grossly immoral principles or habits, want of ability, etc., is entitled to their custody, care and education. *Rust v. Vanvacter*, 9 W. Va. 600; *McDodrill v. Pardee*, 40 W. Va. 564, 21 S. E. Rep. 878; *State v. Reuff*, 29 W. Va. 751, 2 S. E. Rep. 801; *Green v. Campbell*, 35 W. Va. 608, 14 S. E. Rep.

212; *Merritt v. Swimley*, 82 Va. 433; *Coffee v. Black*, 82 Va. 567.

Mother as Guardian.—When the father is dead, the mother is entitled to the custody of her child, when the facts disclose nothing which should induce the court in the exercise of a sound discretion to deprive her of the custody, and a second marriage does not deprive her of the right; where there is no legal guardian of the child. *Armstrong v. Stone*, 9 Gratt. 102; *McDodrill v. Pardee*, 40 W. Va. 564, 21 S. E. Rep. 878.

Re-marriage of the mother does not disqualify her, under the W. Va. Code 1891, ch. 82, § 7. *State v. Reuff*, 29 W. Va. 751, 2 S. E. Rep. 801.

Not Entitled to Care of His Estate.—Neither father nor mother as guardian by nature is entitled to the care or possession of child's estate. *McDodrill v. Pardee*, 40 W. Va. 564, 21 S. E. Rep. 878.

Power of Parent to Transfer Custody of Infant.—Where the parent has transferred to another the custody of his infant child, by fair agreement, which has been acted on by such person, to the manifest interest of the child, the parent will not be permitted to reclaim the custody of the child, unless he can show that it will materially promote its welfare. *Cunningham v. Barnes*, 37 W. Va. 746, 17 S. E. Rep. 808; *Green v. Campbell*, 35 W. Va. 608, 14 S. E. Rep. 212; *Merritt v. Swimley*, 82 Va. 433; *Coffee v. Black*, 82 Va. 567.

Welfare of Infant Controlling Consideration.—In contests for the custody of children, the welfare of the infant is the polar star, by which the discretion of the court is to be guided. *Cunningham v. Barnes*, 37 W. Va. 746, 17 S. E. Rep. 808; *Merritt v. Swimley*, 82 Va. 433; *Slater v. Slater*, 90 Va. 845, 20 S. E. Rep. 790.

Testamentary Guardianship.

Power of Appointment.—In *Tallaferro v. Day*, 83 Va. 79, it was held that a wife had no authority to appoint a testamentary guardian for a niece of her husband.

Necessary Language.

What Insufficient.—A bequest in a will to the testator's son of a sum of money "from the proceeds to educate him in the best manner under the direction of my said executors" does not constitute such executors the testamentary guardians of testator's son, the court saying: "The declaration of such intention should be distinct and unequivocal and in terms inconsistent with the existence of the power and authority of the natural guardian." *Kevan v. Waller*, 11 Leigh 414.

Where, in the execution of a power of appointment, a will makes the following provision, "The property my husband left me a life estate in, I leave to Charles T. and Mary D.; when this child is old enough to be sent to school, I wish Charles to educate and give her \$5,000 as her portion of the estate;" held, this does not constitute Charles T. guardian of Mary D. *Tallaferro v. Day*, 83 Va. 79. See also, *Dupuy v. Hardaway*, 4 Leigh 584.

Incidents.—It is settled under the statute that the authority conferred on testamentary guardians, is joint and several; it is not a mere naked authority, but coupled with an interest; if one dies, it goes to the survivor; if one refuses, the other may qualify without him; each is a complete guardian, if the other does not qualify. *Kevan v. Waller*, 11 Leigh 414.

Guardian by Appointment of Court.

Power of Courts of Chancery.—Courts of chancery in Virginia have always had the power to appoint guardians, and such power has not been taken

away. Ch. 219, § 11, of the Code of 1849; Durrett v. Davis, 24 Gratt. 302; Code 1887, § 2599; Code W. Va., ch. 82, sec. 8.

County Courts.—The appointment of a guardian by election of an infant is made on the chancery and not on the common-law side of the county court, hence the superior court of law has no jurisdiction to grant a writ of error to said court in such cases. Ficklin v. Ficklin, 2 Va. Cas. 204.

Recorders under the old Code had power to appoint guardians of infants. Reed v. Hedges, 16 W. Va. 167; Mathews v. Wade, 2 W. Va. 464.

II. POWERS AND DUTIES OF GUARDIANS.

Right to the Ward's Person.

Grandmother Not Entitled to Custody of Infant as against Lawful Guardian.—By the Va. Code 1887, it is provided that, "Every guardian shall have the custody of his ward and the management of his estate, but the father of the minor, if living, and in case of his death, the mother, while she remains unmarried, shall, if fit for the trust, be entitled to the custody of the person of the minor and the care of his education." *Held*, where the father and mother are dead, the grandmother is not entitled to the custody of the infant, as against the lawful guardian. Mathews v. Wade, 2 W. Va. 464.

When Writ of Habeas Corpus Not Applicable.—A contest as to the guardianship of a child cannot be determined by a writ of *habeas corpus*. Rust v. Vanvactor, 9 W. Va. 600; Armstrong v. Stone, 9 Gratt. 108.

The regularity or the propriety of the appointment of the guardian cannot be determined upon a writ of *habeas corpus*. Mathews v. Wade, 2 W. Va. 464.

Power of Guardian to Change Ward's Domicil.—A guardian cannot fix the domicil of his ward. The domicil of infant wards is not changed by the remarriage of their mother, who is their testamentary guardian, and her removal with her husband out of the state, carrying the children with them. Mears v. Sinclair, 1 W. Va. 185.

Appointment of Guardian Cannot Be Questioned Collaterally.—Where a guardian has been appointed by a chancery court, though such court have only power to remove and appoint, and not to appoint in the first instance, the validity of that appointment cannot be questioned in a collateral proceeding. No other court, unless it be an appellate court, is authorized to inquire whether the power was exercised upon a proper occasion. Durrett v. Davis, 24 Gratt. 302.

Powers of Guardian over Estate of His Ward.—Although the guardian has no beneficial interest in the estate of his ward, still his authority is coupled with an interest, and is not barely an office. In respect to the real estate, he may make a lease for years, upon which ejectment may be maintained; he may have an action of trespass against a stranger, in his own name, for spoliating the grass; he may have a writ of right of ward, and recover the land and damages, as well as the body of the ward; he may assign dower and institute proceedings for partition. In respect to the personal estate, his powers are very extensive. His authority extends to the collection of debts and other choses in action belonging to the ward, to the receipt of legacies and distributive shares, and granting acquittances for the same. He may assign mortgages, compromise and submit to arbitration, and in fine, do what-

ever is necessary to protect the ward's interest. Ware v. Ware, 28 Gratt. 670.

Power of Guardian to Sue for Trespass—Effect of Consent by Guardian—Ward's Power to Sue.—Guardians in socage and testamentary guardians, although they have no beneficial interest, have a legal interest in, and right to the possession of their ward's property, and can maintain an action for trespass to ward's property, and must account to the ward for the damages recovered; but the ward cannot maintain an action in his own name. If the guardian consent to the trespass no action of trespass can be maintained by any one; the ward must seek compensation from the guardian. Truax v. Old, 6 Rand. 556.

But where there is no guardian, the infant may maintain an action of trespass in his own name by his next friend. McDoddrill v. Pardee, 40 W. Va. 564, 21 S. E. Rep. 878.

Power over Personal Estate—Bonds.—A guardian has the power to sell his ward's personal estate, hence where he has possession of a bond of his ward's assigned to him by an executor, whatever interest the ward has in it, is subject to the guardian's control; he can receive the money due on it, if voluntarily paid, can sue on it in a common-law court in the name of his assignor, for his own use as guardian, or he can sell the bond. Hunter v. Lawrence, 11 Gratt. 111.

Drafts.—A guardian can bring assumpsit in his own name on a draft made payable to the guardian. Jolliffe v. Higgins, 6 Munf. 2.

Bank Stock—Liability of the Bank for Improper Sale.

—A guardian has power to dispose of his ward's personal estate, hence he can sell his ward's bank stock and have it transferred on the books of the bank and where such sale is improperly made, the guardian's sureties will be responsible and not the bank, where the only notice to the bank consists of a subpoena, with a restraining order endorsed on it by the clerk, served on the president. Bank of Va. v. Craig, 6 Leigh 899.

Authority to Convert Personality into Realty.

Liability of Third Persons.—Guardians have no authority to convert the personality of their wards into realty without the sanction of a court of chancery first obtained, and if they do so, may be called to account by their ward; and one who sells realty to them knowing that they are guardians, will be held equally liable with them. Boisseau v. Boisseau, 79 Va. 73.

Ward May Either Take the Land or Subject It to His Claim.—Where a guardian uses her ward's money to buy land, the ward has her election to take the land, or to subject the land to the amount of her money so applied. Hughes v. Harvey, 75 Va. 200.

Power of Husband's Guardian over Wife's Property.—The guardian of an infant husband has the power to reduce into possession the choses in action of the wife. Ware v. Ware, 28 Gratt. 670.

Power over Real Estate.

Deed by Guardian of Ward's Real Estate is Void and Cannot be Ratified.—The deed of a guardian, conveying away the interest of his ward in lands is void, and it is immaterial whether be acted with the consent and approval of his wards and as their alleged agent or not; such deed is void and cannot be ratified by the wards on coming of age. Dellinger v. Foltz, 93 Va. 729, 25 S. E. Rep. 908.

Sales of Infant's Lands—Ward May Elect to Take the Land or the Proceeds.—Where land is devised to be

sold for the benefit of a ward, the ward can elect the land or the proceeds and if the guardian sells such land, a court of chancery will not enforce such sale, where it seems not to ward's advantage and the purchaser knows the circumstances, but will elect for the ward. *Turner v. Street*, 2 Rand. 404.

By Decree of Court Generally.—Infant's real estate can be sold only upon proper proceedings under the statute providing for such sale (Code Va. ch. 116, § 2609), or upon a proper bill for partition and sale. *Snively v. Harkrader*, 29 Gratt. 112.

But if a guardian has made a sale and afterwards applies to a court of chancery to affirm it, the court, if it appear that the interests of the infant manifestly required such sale and that it was advantageous to them, may affirm such sale instead of ordering a new one. *Garland v. Loving*, 1 Rand. 396.

No Inherent Power in Chancery to Sell Infant's Lands Independent of Statute.—In a dictum in *Pierce v. Trigg*, 10 Leigh 423. *TUCKER, J.*, held that there was no inherent power in a court of chancery to change the real estate of an infant into personalty by a sale of his lands. *PARKER, J.*, concurring. See, in accord, *Faulkner v. Davis*, 18 Gratt. 651, 98 Am. Dec. 668.

Power of Court to Decree Sale of Lands.—Where there is no *absolute prohibition* by will a court can always decree the sale of infant's lands, when, in its discretion, it seems best. *Talley v. Starke*, 6 Gratt. 339.

Ward's Lands Sold When Partition Cannot Conveniently Be Made.—A guardian has authority to institute proceedings in equity for a partition of the ward's lands, and if partition cannot conveniently be made and the interests of wards require it, the court will order a sale. Va. Code 1887, sec. 2564; *Zirkle v. McCue*, 26 Gratt. 517.

Code 1849 Divesting County Courts of Jurisdiction Does Not Apply to Pending Suits.—The Code of 1849 divested the county courts of jurisdiction in proceedings by guardians to sell infants' lands; but causes already pending were excepted, ch. 157, sec. 8, so that decrees in such causes were valid. *Pennybacker v. Switzer*, 75 Va. 671.

Statutes to Be Construed Liberally.—The statutes providing for the sale of infants' lands are to be construed liberally, so as to include contingent estates in remainder, etc., as well as fee simple estates. *Faulkner v. Davis*, 18 Gratt. 651, 98 Am. Dec. 668; *Garland v. Loving*, 1 Rand. 396.

The fact that the guardian is life tenant and his wards have only a remainder after him, does not exclude the guardian from the provisions of the statute. *Cooper v. Hepburn*, 15 Gratt. 551.

Law Allowing Sale of Infants' Lands Not Retroactive.—Until the 19th of March 1873, there was no law in Virginia, which permitted any part of infant's real estate to be appropriated to his maintenance or education. On that day, an act was passed giving the circuit courts power to make such appropriation. This act was held not to be retroactive in effect in *Rinker v. Streitt*, 33 Gratt. 663; *Gayle v. Hayes*, 79 Va. 542.

Petroleum in Place Is Realty.—Oil in place under land is a part of the realty and a conveyance of the right to remove it under what is called an "oil lease" is in effect a sale and must be made in accordance with the provisions of the statute governing the sale of infants' lands by guardians. Code W. Va. ch. 82; *Wilson v. Youst*, 43 W. Va. 828, 28 S. E. Rep. 781.

Standing Timber Is Realty, after Felling, Personality.

—Timber trees, while standing are real property and the guardian has no authority to sell them, but if they are cut down or detached in any other way they become personal property and the guardian can sell them, but the ward cannot maintain trover for them. *Truss v. Old*, 6 Rand. 566.

Interests of Infants Paramount Consideration in Sale of Their Lands.—A court of chancery should only decree a sale of infants' lands in accordance with the statute, when it is manifestly to the interest of the infants, and should direct the proceeds to be invested in such a way as to secure the interests of all who may be interested in the fund. *Garland v. Loving*, 1 Rand. 396.

Suit to Sell Infants' Lands Not Proper Vehicle to Enforce Debts against Such Lands.—A suit brought by a guardian to sell infants' lands, under ch. 128, Va. Code 1880, the bill in which contains no matter as to the existence of debts of the person from whom their estate descended, and asks no relief in that respect, cannot be made the vehicle to enforce such debts against such lands. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447.

Amendment of Bill to Include Other Lands.—Where it appears in the progress of a cause that the sale of other lands is proper, the bill may be amended accordingly, without constituting a new cause. *Pennybacker v. Switzer*, 75 Va. 671.

Necessary Parties—Representation.—It is not necessary to make persons, not in being and who have only a contingent interest in the subject-matter, or if in being, who are sufficiently "represented" parties to a bill to sell infants' lands, such parties being "represented" by the parties before the court, holding the immediate interests. *Faulkner v. Davis*, 18 Gratt. 651, 98 Am. Dec. 668. See also, *Cooper v. Hepburn*, 15 Gratt. 551; *Garland v. Loving*, 1 Rand. 396.

When Guardian, Though an Heir, Is Not a Necessary Party Defendant.—A guardian, who would be an heir of his ward, brings suit to sell his ward's land, and after he ceases to be guardian goes on the bond for the purchase money as surety, the guardian is not a necessary party defendant. *Durrett v. Davis*, 24 Gratt. 302.

Requirement of Additional Security on Sale of Land—Discretionary in the Court.—A court of equity may direct the payment of the proceeds of the sale of infants' real estate to their guardian, without requiring additional security even where it exceeds \$300, notwithstanding the language of the statute, ch. 79, sec. 3, W. Va. Code 1891, but it is advisable to follow the statute. *Reed v. Hedges*, 16 W. Va. 167.

No Need for Security When Sale is on Credit.—Where the sale of infants' lands is *on credit* to be secured by the purchaser, there is no necessity for requiring security of the guardian. *Talley v. Starke*, 6 Gratt. 339.

When Purchase by Guardian Will Be Enforced.—A purchase by a guardian of his ward's lands, at a sale thereof at public auction, instituted by him, will be enforced, where the price is adequate, and the guardian has been in possession of the land for fourteen years, without question. Such sale will be enforced against the guardian and his sureties on the purchase money bonds. *Redd v. Jones*, 30 Gratt. 123.

Payment of Purchase Money to Unauthorized Officer.—Payment of purchase money to an unbonded commissioner is void, Va. Code 1887, § 3397, unless a certificate of the clerk that such commissioner has

given the required bond is published with the advertisement of sale, Code Va. § 3309, and the land will be sold again for the benefit of the wards by a rule against the purchasers to show cause against such re-sale, and it is too late to raise the objection for the first time in the appellate court, that the remedy against the guardian and his sureties should have been exhausted before proceeding against the purchasers, especially where the guardian is insolvent. In such a case when a re-sale is ordered, the former sale is not set aside; but the property is sold as the property of the purchaser. If it brings more than the debt, he is entitled to the surplus, if less he is responsible for the deficiency. *Whitehead v. Bradley*, 87 Va. 676, 18 S. E. Rep. 195.

Failure to Avert That the Guardian Sues "as Guardian."—A failure to aver formally in a bill to sell infants' lands, that the guardian brings the suit "as guardian" is no ground for reversal, where the bill follows the statute in other respects, and states his qualification as guardian. *Cooper v. Hepburn*, 15 Gratt. 551. See also, *Zirkle v. McCue*, 26 Gratt. 517.

Affidavit by Guardian.—If the bill is sworn to by the guardian at any time before the court acts upon it the statute is complied with. *Durrett v. Davis*, 24 Gratt. 302.

Presumption in Favor of Regularity of Proceedings.—Where the records in a suit for the sale of infants' lands have been destroyed during the war, in the absence of proof to the contrary, all proceedings will be presumed to have been duly taken, in accordance with the maxim, *omnia præsuntur rite esse acta*; and such sale cannot afterwards be collaterally attacked except for errors affecting the jurisdiction. *Pennybacker v. Switzer*, 75 Va. 671.

Recitals in Decree, Conclusive in Appellate Court.—Where the decree recites that the bill was filed in due time and all steps regularly taken, such recitals are conclusive in the court of appeals. *Durrett v. Davis*, 24 Gratt. 302.

Purchaser Must See to Regularity of Proceedings, but Not to the Truth of Matters Stated in Bill.—Although a purchaser at a judicial sale may be required to see to the regularity of the proceedings upon which the jurisdiction of the court is founded, he is not bound to investigate the truth of the matters stated in the bill and deposed to by the witnesses touching the estate owned by the infant. His title cannot be affected because the case made by the record happens not to be warranted by the facts. *Durrett v. Davis*, 24 Gratt. 302.

Sale Not to Be Set Aside for Technical Informalities.—True Interest of Infant to Govern.—The power to sell the estate of those who have no capacity to be heard is a very grave one, and only to be exercised with great caution. Still it is an indispensable power, and is vested in some tribunal in every well regulated state. Sound policy requires that judicial sales shall not be brought into disrepute by the practice of vacating decrees for slight and minute defects in the preparation of causes, when the true meaning and spirit of the law has been observed. If the court clearly perceives that the sale when made was an advantageous one, it ought not to regard mere technical informalities which do not substantially affect the validity of the proceedings, or the rights and interests of the infant. In determining whether the sale was a beneficial one, we must look to the circumstances as they existed at the time it was made, and not to subsequent events. *Durrett v. Davis*, 24 Gratt. 302.

Court May Refuse to Confirm, When Necessity for Sale Has Ceased.—It is proper for a court to refuse to confirm a sale of ward's land, under sec. 3609, Code 1887, if the necessity for the sale has ceased to exist; but if it seemed proper at the time to bring the suit and the ward united in the application, it is proper to rent the land out to pay the costs of the suit. *Harkrader v. Bonham*, 88 Va. 247, 16 S. E. Rep. 159.

Confirmation of Sale Curing Defects.—A purchaser of infants' land under decree of court cannot, eighteen months after confirmation of sale, object that one of the infants was over fourteen at the time of suit and failed to answer the bill in proper person; he is protected by Code Va. 1887, § 3425, from any future claim of this infant. *Cooper v. Hepburn*, 15 Gratt. 551. As to effect of confirmation in curing irregularities in proceedings of sale where the sale is beneficial to the infants, see *Daniel v. Leitch*, 13 Gratt. 195; *Cralle v. Meem*, 8 Gratt. 496; *Garland v. Loving*, 1 Rand. 304.

A Proper Sale, Not Set Aside, after Confirmation, at Suit of Wards.—If a sale appears to have been properly made in a suit by guardian for partition of wards' lands, and all adult parties approved and sale was confirmed, purchase money paid and conveyance made, such sale cannot be afterwards questioned by wards. *Zirkle v. McCue*, 26 Gratt. 517.

Effect of Failure of Title to Part of Tract.—When lands are sold by *metes and bounds*, in a suit to sell infants' lands, instituted by their mother as guardian, subject to her right of dower therein, and the lands are sold subject to the right of dower and with warranty of title, and she shows the tract to the purchaser before the sale, and puts him in possession and he enjoys, without disturbance, the land then shown him, the title to that being perfect; on its turning out that the metes and bounds set out in the deed include land not shown to the purchaser, and never held or claimed by the vendor or those under whom she claims, the court by a rule, may require the vendee to pay the whole of the purchase money, without allowing him any abatement for the land which was not shown him, but which is included in his deed and to which his title is worthless, on the ground that she did nothing to mislead the vendee. *Crislip v. Cain*, 19 W. Va. 438.

Effect of Sale on Character of Property.—A judicial sale of an infant's lands under ch. 79 and 83 of W. Va. Code does not immediately convert into personality, but the proceeds remain land until his death before majority or till majority; in the former case the proceeds go as the land would have gone if never sold. *Findley v. Findley*, 42 W. Va. 372, 26 S. E. Rep. 433. See *McKay v. McKay*, 83 W. Va. 724, 11 S. E. Rep. 213; *Vaughan v. Jones*, 23 Gratt. 444; *Rinker v. Streit*, 33 Gratt. 663.

Liability of Guardian.—Where a guardian is also administrator with the will annexed and sells his ward's land under authority of the will and takes bonds, payable to himself as guardian, he is responsible as guardian and his sureties likewise. *Broadus v. Rosson*, 3 Leigh 12.

Power of Guardian to Lease Ward's Lands.—To Whom Rent May Be Reserved.—In Whose Name Action to Be Brought.—There is no doubt, but that a guardian may lease the lands of the ward during infancy, if the guardianship so long continue; and, in this case, the demise being from year to year, if another guardian had been appointed, the term would have ceased. The reservation of the rent to the infant was proper, and cannot be likened to the case of a

reservation to a stranger; for the inheritance being in the ward, there is a privity between her and the lessee, and, therefore, there is no doubt of her right to maintain an action of debt to recover the arrears of rent. It is true, that the guardian may, by a lease in writing, reserve the rent to himself, to cover advances which he may make for the use of the ward; and in that case the action must be brought in his own name, unless he assign the lease to the ward. The reason why the ward cannot in such a case maintain the action is, that, as he must declare upon the written lease, there would be a variance between the allegation and the proof. But in either case, there is no doubt but that a payment of the rent to the guardian, during the continuance of the wardship, would be a good discharge of the tenant for so much. *Ross v. Gill*, 1 Wash. 90.

Lease Need Not Be at Public Outcry.—A guardian may lease his ward's land either by private contract or public outcry. *Windon v. Stewart*, 48 W. Va. 711, 28 S. E. Rep. 776.

Proper Method of Finding Rental Value of Ward's Lands.—The method of finding the annual rental value of the ward's estate by taking the average of the value fixed by a number of witnesses, is proper. *Snively v. Harkrader*, 29 Gratt. 112.

Limited to Period of Infancy.—Leases by the guardian of an infant to extend beyond the period of infancy are void, hence a lease "until the heir shall marry or come of age, with liberty to give it up at end of any year, on three months' notice, and, unless the heir, when of age or married, want the property and give three months' notice before the expiration of the year, to last until the ensuing year," is void. *Ross v. Gill*, 4 Call 250.

Domestic Guardians of Non-Resident Infants.—When a minor, though living in another state, has estate in Virginia, it is proper to appoint a guardian in Virginia and having been duly appointed and qualified, such domestic guardian is entitled to the custody of the ward's estate, but, the father being alive, he is entitled to the custody of her person. *Taliaferro v. Day*, 82 Va. 79.

Transfer of Estate to Foreign Guardian.—A decree ordering the payment to a foreign guardian of a ward's money without his compliance with the provisions of the statute Va. Code 1887, ch. 118, sec. 2639, is erroneous. *Snively v. Harkrader*, 29 Gratt. 112; *Taliaferro v. Day*, 82 Va. 79.

Requirement of Notice.—Although the application by a foreign guardian for the removal of the assets from the state, is a summary proceeding, four weeks' notice must be given by publication. Va. Code 1887, sec. 2631. And if the court finds that the order for removal was improper, it may take all necessary steps to protect the rights of all involved. *Clendenning v. Conrad*, 91 Va. 410, 21 S. E. Rep. 818.

Contracts of Marriage Settlement.—Contracts of marriage settlement, made by infants through their guardians are binding. *Tabb v. Archer*, 3 H. & M. 399. The husband, at least, cannot have it set aside. *Lee v. Stuart*, 3 Leigh 76.

Wife Must Be a Party.—Marriage articles made between the guardian of an infant feme on the one part and her intended husband on the other, to which she is no party, and which have not been executed, are of no binding force on her, where there are no acts of the feme, after she has attained full age and when *sui juris*, of such a nature as to adopt or ratify the marriage agreement made

for her by her guardian. *Healy v. Rowan*, 5 Gratt. 414.

Waiver of Wards' Rights by Guardian.—It is not competent for guardians to waive the rights of their wards. *Hite v. Hite*, 2 Rand. 400.

Consent of Guardian Ineffectual to Prejudice His Wards.—A guardian cannot, by consent to a proceeding which would be void and ineffectual to prejudice the estate of the infants, render it effectual to prejudice their estate. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. Rep. 447.

III. ACCOUNTING BY GUARDIAN.

Necessity for an Accounting.—A court ought not to undertake to make a decree in a case where there are mutual accounts, without referring such accounts to a commissioner to report. *Bland v. Wyatt*, 1 H. & M. 543.

When Accounting Prior to the Decree Not Necessary.—But it is not necessary that an account be taken before a decree can be rendered, where the property of the ward consists of a single claim and there is no doubt as to the amount due from the guardian. *Sage v. Hammonds*, 27 Gratt. 631.

Guardian's Accounts Settled before a Commissioner, Prima Facie Correct.—A guardian's accounts duly settled before a commissioner are *prima facie* correct, but *prima facie* only, and are subject to be surcharged and falsified by a suit in proper time. *Haught v. Parks*, 30 W. Va. 243, 4 S. E. Rep. 376. See also *Hannah v. Boyd*, 26 Gratt. 603; *Newton v. Poole*, 12 Leigh 116.

Objections to Commissioner's Report Must Be Made in Lower Court.—It is too late to object in the appellate court to a charge of interest as having been received from the administrator, which he has in fact never received, when the guardian has failed to object to the commissioner's report made upon that basis. *Foreman v. Murray*, 7 Leigh 412, *BROCKENBROUGH, J.*, and *TUCKER, P.*, dissenting.

Evidence Admissible to Prove Payments to Guardian.

The Record in a Former Suit.—The record in a former suit is admissible evidence to establish the amount of indebtedness of the guardian in a suit to settle his accounts. *Morrison v. Householder*, 79 Va. 637. See also, *Roberts v. Colvin*, 3 Gratt. 338; *Hooper v. Royster*, 1 Munf. 119.

An Administrator Exonerated from Liability.—When an administrator has been exonerated from liability by a decree in a former suit he is a competent witness to prove a payment by him as administrator to a guardian. *Hooper v. Royster*, 1 Munf. 119.

Entry in Administrator's Books.—An entry in an administrator's books by a clerk is competent evidence against a guardian that he received the money, the clerk being dead and his handwriting proved. *Brown v. Brown*, 3 Wash. 151.

In Suit to Surcharge and Falsify, Only the Items Surcharged Need Be Restated.—When a former settlement is surcharged and falsified, no new settlement covering the whole transaction is to be made, but an account is made of its items surcharged or falsified and the sum of such items is the measure of relief to the party injured by the former settlement. *Windon v. Stewart* (W. Va.), 37 S. E. Rep. 603. See also, *Newton v. Poole*, 12 Leigh 116.

Need Not Specify Errors.—Where errors appear on the settlement, even the bill need not specify those errors, but there may be at once a review of such settlement, and even where there is no error apparent on the settlement assailed, and in a case where

no reference is at the time proper, yet if it turns out at last to have been proper from further developments in the case, the court will not on account of such premature reference alone, reverse the decree. *Windon v. Stewart*, 48 W. Va. 711, 28 S. E. Rep. 776; *Seabright v. Seabright*, 28 W. Va. 412.

Guardian's Accounts, Confirmed by Court, Are the Best Evidence.—The guardian's accounts, allowed by the court, are the best evidence of the guardian's management, as vouchers may be lost. *Tabb v. Boyd*, 4 Call 458.

Accounts Must Be Itemized.—Credit will not be allowed a guardian for payments on account of his wards, even where he has the previous authority of the court to expend the principal of their estate, unless the accounts against the ward are itemized and sustained by satisfactory proof. *Hescht v. Calvert*, 32 W. Va. 215, 9 S. E. Rep. 87.

Accounts of Wards Should Be Kept Separately.—Where there is more than one ward, the proper way is to state the account of each ward separately, either from the beginning or from the time when the claims of the wards ceased to be the same in amount. *Armstrong v. Walkup*, 9 Gratt. 373. See *Hescht v. Calvert*, 32 W. Va. 215, 9 S. E. Rep. 87.

The accounts as guardian should be kept separate from those as executor. *Hannah v. Boyd*, 35 Gratt. 602.

Settlement before Commissioner Acting under Confederate Government Valid.—The settlement of a guardian's accounts before a commissioner of a county court acting under the Confederate government of Virginia, is as valid as if made prior to the war, *i. e.*, *prima facie* correct, but subject to be surcharged and falsified. *McClure v. Johnson*, 14 W. Va. 432.

A Compromise, Acquiesced in for Eleven Years, Sustained.—A compromise of a suit to settle a deceased guardian's accounts, ratified by decree of court and acquiesced in for eleven years will not be set aside, except upon the clearest proof of fraud, misrepresentation, concealment or mutual mistake. *Epes v. Williams (Va.)*, 27 S. E. Rep. 427.

Justices Who Took Defective Guardian's Bond Not Necessary Parties to a Suit to Settle Guardian's Accounts.—Although the decree, in a suit against a guardian for the settlement of his accounts, is evidence in an action to enforce the liability of justices for taking a defective bond, such justices are neither necessary nor proper parties in such suit, their interest arising only out of a collateral liability. *Austin v. Richardson*, 1 Gratt. 310.

JUDGE BALDWIN in a dictum in *Austin v. Richardson*, 1 Gratt. 310, says: "The sureties of a guardian are proper though not necessary parties" to a suit to settle a guardian's accounts.

Wards Entitled to Notice.—Wards, even if non-residents, if they have already appeared in the suit, are entitled to notice of the taking of depositions and the settlement of their guardian's accounts. Va. Code 1873, ch. 166, sec. 15; *Burwell v. Burwell*, 78 Va. 574.

If Suit against Justices Is Dismissed as to One, It Should Be Dismissed as to All.—In a suit against a guardian, the surviving justices, and the representative of a deceased justice, the suit is dismissed as to the surviving justices who answered, for lack of jurisdiction. *Held*, that it should also be dismissed against the representative of the deceased justice, against whom the bill was taken for confessed. *Austin v. Richardson*, 1 Gratt. 310.

Allowances to Guardian.

Support and Education of Wards.—A guardian is entitled to credit in his own account for the support and education of his wards, and the fact that he promised to support and educate them free of charge, if without consideration, is no defence, since he is under no obligation to do so. *Armstrong v. Walkup*, 9 Gratt. 373; *Sayers v. Cassell*, 35 Gratt. 525. *Semle contra*, *Hooper v. Royster*, 1 Munf. 119. But in this case, as in *Sayers v. Cassell*, although no direct allowance was made for board, still no interest was allowed during the period the ward resided with the guardian. See also, *Jackson v. Jackson*, 1 Gratt. 143; *Brown v. Brown*, 2 Wash. 151; *Arrington v. Cheatham*, 2 Rob. 492.

Where their circumstances do not require that they should be apprenticed, it is proper for the guardian to keep his wards in his family, and in such case the guardian is entitled to a reasonable compensation for their board and clothing. *Armstrong v. Walkup*, 12 Gratt. 608.

Where a ward is supported by his mother, and the guardian makes large advances for the family's support, including said ward, it is proper to allow the guardian a reasonable allowance for the support of said ward. *Cunningham v. Cunningham*, 4 Gratt. 48.

Guardian Furnishing Necessaries, in Same Position as Any Other Person.—A guardian, having no funds legally applicable thereto, who furnishes necessaries to her ward, has the same right to reimbursement therefor, as any other person furnishing such necessaries. *Myers v. Myers (W. Va.)*, 35 S. E. Rep. 868.

But the guardian and his sureties are bound to show that expenditures were necessary and actually made. *Broadus v. Rosson*, 8 Leigh 12.

Proper Items of Support.

Clothes, Schooling, etc.—A guardian is entitled to compensation for the clothes, schooling, and other necessary expenses of her ward, in so far as such advances are suited to the estate and condition of said ward and did not, after said ward came to an age to be bound out, exceed the profits of his estate; unless it shall appear, that from extraordinary circumstances, such disbursements were unavoidable, without culpable neglect on the part of said guardian, in which case such disbursements should be allowed out of the principal with interest on same from the end of each year. *Hooper v. Royster*, 1 Munf. 119.

A Horse.—In *Wallis v. Neale*, 43 W. Va. 530, 27 S. E. Rep. 227, a horse purchased on ward's written request was held to be a proper item of the support of a ward.

Ratification by Infant after Age.—Where a ward uses a horse purchased for her by her guardian, and after age, trades him off, and finally receives the proceeds, though her estate is not bound during minority by her guardian's note for the purchase price, such acts are deemed a ratification, and where a succeeding guardian buys up the note, he will be allowed credit for it in the settlement of his guardianship accounts. *Wallis v. Neale*, 43 W. Va. 530, 27 S. E. Rep. 227.

Limited to Income.—The allowance to guardians or those who act as quasi guardians, for support, etc., of their wards, is limited to the income of ward's estate except under very extraordinary circumstances. *Jackson v. Jackson*, 1 Gratt. 143.

Not Confined to Income of Property in the Hands of Guardian.—A guardian, in the allowance to him for

support of ward, is not to be confined to the income from the estate of the ward in his own hands, but that from the ward's estate in the hands of the administrator is to be included also, so as not to exceed the whole income. *Foreman v. Murray*, 7 Leigh 412. See also, *Bennett v. Claiborne*, 23 Gratt. 366.

A Deficit in First Years May Be Made Up by Surplus in Later Years.—If the expense of educating and maintaining infant wards exceed the annual income of their estates, until they are old enough to render services, then the surplus income from that time till they come of age ought to be set off against the surplus expenditure during former period. *Myers v. Wade*, 6 Rand. 444.

But the surplus in the hands of the guardian at the end of any one year becomes part of the principal and cannot be expended to meet disbursements of succeeding years without authority of court. *Garrett v. Carr*, 1 Rob. 196.

Exceptions.

When Authorized by Will.—A guardian may be authorized by decedent's will to expend the principal of ward's estate. *Barton v. Bowen*, 27 Gratt. 849.

Authorized by Statute on Application to the Court. As to Personality, Application to Court Need Not Be in Advance.—The guardian may, in a proper case, apply the principal of the ward's personal estate, to his maintenance and education, and, if the court would have authorized it in advance, it will sanction such an application if already made by the guardian. *Rinker v. Streit*, 33 Gratt. 663. See also, *Barton v. Bowen*, 27 Gratt. 849; *Sedgwick v. Taylor*, 84 Va. 823, 6 S. E. Rep. 226; *Cogbill v. Boyd*, 77 Va. 455.

In West Virginia Application in Any Case Must Be in Advance, as Was the Old Statute in Virginia.—A guardian cannot, without a previous order of court, use any part of the principal of the ward's personal estate for any purpose, and a court can only make such order for maintenance or education, not for improvement of land or other purpose (opinion reserved as to a child too young to be bound out). *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. Rep. 776; ch. 82, sec. 8, W. Va. Code 1891; *Myers v. Wade*, 6 Rand. 444. See Va. Code 1887, sec. 2604, for present statute. But see *Wallis v. Neale*, 43 W. Va. 529, 27 S. E. Rep. 227.

Neither Ward Personally, Nor His Real Estate Liable.

—If disbursements have been made beyond the income in accordance with sec. 2604, Va. Code 1887, neither the ward personally nor his real estate is liable, so where the ward has no personal estate and the guardian has not applied to the court in advance to sell the ward's land for his maintenance and education, the guardian cannot be reimbursed. *Harkrader v. Bonham*, 88 Va. 247, 16 S. E. Rep. 159; *Gayle v. Hayes*, 79 Va. 542; *Brown v. Grant*, 29 W. Va. 117, 11 S. E. Rep. 900.

As to Realty, Previous Authority of Court Necessary.

—Authority to apply the proceeds of the sale of infants' real estate to their maintenance and education must be given by the court before such application. *Whitehead v. Bradley*, 87 Va. 676, 13 S. E. Rep. 195; *Gayle v. Hayes*, 79 Va. 542; *Rinker v. Streit*, 33 Gratt. 663; *Cumming v. Simpson* (Va.), 1 S. E. Rep. 657. But see dictum of SNYDER, J., in *Maguire v. Doonan*, 24 W. Va. 507.

When Ward Should Be Apprenticed.—If the estate is too small to support the wards out of the income, they should be bound out. *Anderson v. Thompson*, 11 Leigh 439.

Allowance to Father as Guardian.—A father, if of ability, is bound to maintain his infant children, even though they may have property of their own; yet, where the father is guardian as well, the court, if, from a comparison of the estates of father and children, it deems it proper, will authorize the income from the children's estates to be applied to their support. But when the application to allow the income to be so appropriated is not made, as it ought to be, in advance, and is delayed until the guardianship has terminated the court will not permit it without the clearest proof that justice requires it. *Evans v. Pearce*, 15 Gratt. 513.

Even though the father, being guardian, be authorized by the court to use the income from the ward's estate for her support and education, yet if there is nothing in the record to show that he either intended to or did use her income for such purposes, and he had sufficient means to maintain her himself, no allowance will be made for such purposes after the guardianship has terminated. *Stigler v. Stigler*, 77 Va. 163. See also, *Griffith v. Bird*, 23 Gratt. 78; *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. Rep. 776; *Myers v. Wade*, 6 Rand. 444.

In *Hauser v. King*, 76 Va. 731, the case of a father as guardian is distinguished from that of a committee of a lunatic who is entitled to allowance for lunatic's support.

Allowance to Mother as Guardian.—Where the mother, testamentary guardian of her two daughters, marries again, she and her husband are entitled to compensation for the maintenance of the infant wards, in a manner suitable to their condition and including medical treatment, etc., where necessary. *Mears v. Sinclair*, 1 W. Va. 185.

In a dictum in *Wade v. Myers*, JUDGE COALTER said: "Had the widowed mother possessed an estate sufficient for the maintenance and education of her infant children, although I am not prepared to say that she would have been bound to expend it in that way, yet, had she thought proper to do so, it would have been a voluntary donation, in no wise a bar to their future claim to their own estate." *Myers v. Wade*, 6 Rand. 444.

Allowance for Improvements.—The guardian or quasi guardian may be allowed compensation not only out of the income, but out of principal also of the ward's personal estate for improvements of ward's real estate, where they are obviously beneficial to the infant, the value of such improvements to be taken at the time of final accounting, by deducting the depreciation from decay from the amount expended on the improvements. *Jackson v. Jackson*, 1 Gratt. 143. *Contra* as to principal in *West Virginia*, *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. Rep. 776.

Articles Necessary for the Realty—Guardian's Oath Sufficient.—Where articles are proved by disinterested testimony, to have been purchased by the guardian for the necessary purposes of the real estate, he should have credit for them out of the rents, without further proof than his oath that they were so applied. *Newton v. Poole*, 12 Leigh 116.

Repairs Which Tenant Should Make.—But a guardian cannot allow the tenant for repairs which the tenant should make and get credit in his account against the ward. *Windon v. Stewart*, 43 W. Va. 711, 28 S. E. Rep. 776.

A Debt Justly Due from Father's Estate.—A guardian is entitled to credit in his account where he pays a debt justly due from the estate of the ward's father. *Foreman v. Murray*, 7 Leigh 412.

Cash Payments to Ward Must Be Ratified by Ward after His Majority.—A guardian should not be credited with cash payments to his wards during their minority, unless the proof is clear that wards ratified said payment after majority. *Hescht v. Calvert*, 33 W. Va. 215, 9 S. E. Rep. 87.

Allowance for Advancements.—Where the father is guardian *de facto* of his daughter he is entitled to credit for an advancement made to the husband of his daughter to help him out of financial difficulties. *Peale v. Thurmond*, 77 Va. 758.

Forfeiture of Compensation by Guardian.—A guardian forfeits his claim to compensation by failure to lay his accounts before a commissioner within six months after the expiration of each year. W. Va. Code 1887, sec. 7. But guardian should be allowed any reasonable expenses incurred by him. *Hescht v. Calvert*, 33 W. Va. 215, 9 S. E. Rep. 87. See also, *Jennings v. Jennings*, 23 Gratt. 313.

Absence of Commissioner during Civil War.—Where a guardian failed to settle his accounts within the time required by law, if it happened during the war, contrary to the general rule, extraneous testimony will be admitted to show that there was no commissioner. *McClure v. Johnson*, 14 W. Va. 432.

Charges against Guardian.

Interest on Balance in Guardian's Hands Not Loaned within a Reasonable Time.—Interest should be charged on balances in the hands of guardian at the end of any year, as prescribed in ch. 83, sec. 10, Code W. Va., *i. e.*, from the end of the year in which such balance arose, where such balance remains in the guardian's hands which should have been loaned out in a reasonable time. *Hescht v. Calvert*, 33 W. Va. 215, 9 S. E. Rep. 87.

Interpretation of Reasonable Time.—Interest is not to be charged to the guardian on money received by him, from the day of receipt, but he is to be allowed six months in which to invest it. *Armstrong v. Walkup*, 12 Gratt. 608; *Hooper v. Royster*, 1 Munf. 119.

In *Cunningham v. Cunningham*, 4 Gratt. 48, two months was held a proper time to be allowed a guardian for collecting and investing the annual profits of his ward's estate.

Interest was not allowed against a guardian when the debt arose largely from the misconduct of his wife before marriage and the estate never came to his hands, and if he had been accountable for it, he had paid it before his wife's death and if it had been carried into his guardian's account, it must have been scaled as of that time. *Tabb v. Boyd*, 4 Call 458.

When Compound Interest Is Charged.—When a guardian fails to settle his accounts annually, he will be charged compound interest, and interest will be charged on conjectural rents and profits. *Garrett v. Carr*, 1 Rob. 196. See also, *Jennings v. Jennings*, 23 Gratt. 313.

Wards' Services.—Wards are not entitled to charge their guardian for their services, where such are not needed and are of trifling value. *Armstrong v. Walkup*, 12 Gratt. 608. See, however, *Snively v. Harkrader*, 29 Gratt. 112.

Balance Due from Guardian, a Fiduciary Debt.—The mere giving of bonds for the balance due by a guardian, is not a novation of the debt, and the debt is still a fiduciary one. *Smith v. Blackwell*, 31 Gratt. 291.

Chargeable with Property Received before Appointment.—If one who is not their guardian, receives the legacies of infants, and is afterwards appointed their guardian, such legacies become chargeable to

him, as guardian, by operation of law. *Thurston v. Sinclair*, 79 Va. 101.

Liability for Losses.

General Rule.—Where a guardian does an act, and it is sought to make him liable for a resulting loss, on the theory that his act was injudicious, if the act was in entire good faith, and the fault was only an error of judgment, and the act be one which, as a prudent man, he might have done in his own affairs, he cannot be made liable. *Windon v. Stewart*, 48 W. Va. 711, 28 S. E. Rep. 776. See also, *Elliott v. Howell*, 78 Va. 297; *Kester v. Alexander* (W. Va.), 34 S. E. Rep. 819.

Leases of Ward's Lands.—Where a guardian leases his ward's land, he is presumed to have acted in good faith, and he cannot be charged with a higher rental, unless the rent be so inadequate as to carry the conviction of bad faith. *Windon v. Stewart*, 48 W. Va. 711, 28 S. E. Rep. 776.

Lease to Guardian Himself.—Where a guardian leases his ward's property to himself at a certain rental and settles with the guardian of her co-heir on this basis and also with her after age, such acquiescence on ward's part bars her from setting up a claim against her guardian for twice as great a rental on the ground that the actual profits were twice as great. *Paxton v. Gamewell*, 83 Va. 706, 1 S. E. Rep. 92.

Deposits Lost by Destruction of Whole Currency of the Country.—"A *bona fide* deposit of the money of his wards by the guardian in his own individual name, provided that it can be shown that it was in fact the money of his wards, will acquit and protect the guardian from the responsibility for loss, which ensues, not from the form or designation of the deposit, but from the general and universal destruction of the whole currency and all the banking and financial interests of the state." *FAUNT-LEROY, J.* And the declarations of the guardian, contemporaneous with the deposit, that the money belongs to his wards, are competent evidence to prove the fact. *Parsley v. Martin*, 77 Va. 876.

Receipts in Depreciated Currency.—Where a guardian, under the Act of 1781 receives depreciated paper money for a legacy *then due* and loans out part of it, he is not responsible. *Sallee v. Yates*, 1 Wash. 226; in accord, *Yates v. Salle*, Wythe 163; *Walker v. Walke*, 2 Wash. 195.

Claims of Doubtful Collectibility.—It is error to hold a guardian responsible for claims due his ward without first inquiring as to collectibility of said claims and as to whether the guardian is guilty of negligence in failing to collect them. *Lincoln v. Stern*, 28 Gratt. 816.

Due Diligence Must Be Employed However.—It is the duty of a guardian to invest properly the funds coming to his hands, belonging to his wards, and for his failure to do so, he will incur responsibility according to the nature of the case and its attendant circumstances. *Elliott v. Howell*, 78 Va. 297.

Loans on Insufficient Security with a Knowledge of Which the Guardian Is Affected.—Where a guardian loans his ward's money on insufficient security, and that already encumbered by liens obtained by himself as counsel, that is not due diligence and the guardian is accountable. *Burwell v. Burwell*, 78 Va. 574.

Where a guardian is negligent in collecting a bond, and after ample time for collection, the obligors become insolvent, the guardian is liable. *Ergenbright v. Ammon*, 26 Gratt. 490.

If a guardian fails to collect a debt when the

debtor's assets are ample, he will be charged with the amount of the debt. *Brown v. Brown*, 2 Wash. 151.

Negligence in Failing to Lease Ward's Lands.—A guardian is entitled to possession of his ward's land till her majority, and the ward is entitled to have the land rented out, and if the guardian negligently fails to get rent it is his own fault and he is chargeable with what he might have received, if he had exercised due diligence. *Windon v. Stewart*, 48 W. Va. 711, 28 S. E. Rep. 776.

Unnecessarily Receiving Depreciated Currency.—Even under the statute March 5, 1863, where the ward's debts are good, *ante-bellum*, specie debts, the guardian has no right to collect them in depreciated Confederate currency and invest in Confederate bonds, where there was no necessity for it; if he does so, he will be held responsible. *Ammon v. Wolfe*, 36 Gratt. 631. See also, *Crawford v. Shover*, 30 Gratt. 69.

Failure to Exercise Diligence in Lending Out Money Received during Civil War.—When a guardian received money of his ward, early in the civil war, in notes *very little, if at all, depreciated* and invested it in a Confederate bond late in the war, when he no longer had the amount in kind, paying for it in greatly depreciated currency, he was charged with the full amount received with interest, and could not off-set the bond at its face value; the guardian failing to show that he could not have loaned it when received, and the Act of the Virginia Legislature of March 5, 1863, not authorizing the circuit court to approve such an investment, where the money was not in the hands of the fiduciary. *McClure v. Johnson*, 14 W. Va. 432.

Claims Barred by Statute of Limitations or Otherwise.—Credit will not be allowed a guardian for payments made by him on account of his ward which were barred by the statute of limitations or illegality of consideration or any other fact within his knowledge. *Hescht v. Calvert*, 32 W. Va. 215, 9 S. E. Rep. 87.

The mere execution of a bond by a former guardian to his successor, for a balance due ward, does not exonerate the former guardian's estate from its primary liability. *Bennett v. Claiborne*, 23 Gratt. 366.

Scaling of Payments Made to Guardian in Depreciated Currency—Presumption.—Receipts by guardian during the periods when money was depreciated are presumed to have been paid in depreciated currency and the scale of depreciation must be applied. *Hooper v. Royster*, 1 Munf. 119.

Same Rule Applies to Receipts.—Payments made by a guardian in Confederate money are to be credited to him at their scaled value. *Bennett v. Claiborne*, 23 Gratt. 366.

Where a guardian receives sums due his ward, in sound money and makes payments to his successor in Confederate money, he will be credited with only the scaled value of such payments; absence of fraudulent intent is no defence. Act of March 3, 1866, does not apply. *Jennings v. Jennings*, 23 Gratt. 313.

Scale Not Applied to Expenditure of Proceeds of Ante-Bellum Debts.—Where a guardian pays for the maintenance and education of his ward during the civil war with the proceeds of *ante-bellum* debts, such payments are not to be scaled as of the date of payment, but he is not to be allowed a reasonable charge in sound money. *Barton v. Bowen*, 27 Gratt. 849.

Where a guardian receives an ante-war debt and pays therewith ante-war expenses, neither receipts

nor disbursements are to be scaled. *Bennett v. Claiborne*, 23 Gratt. 366.

Where a second guardian receives Confederate money from his predecessor, not knowing he had received sound currency, though he gives a receipt, the second guardian will only be responsible for the scaled value. *Jennings v. Jennings*, 23 Gratt. 313.

Settlement between Guardian and Ward—When Sustained.—The law is well established that settlements made soon after the ward comes of age, and especially before he is in possession of his estate, are viewed by a court of equity with a watchful and jealous eye. The law, however, does not prohibit the guardian from dealing with his recently emancipated ward, although it regards the transaction with jealousy, and a release of the guardian, or a gift to him, may consequently stand, if shown to have been made deliberately, and with sufficient opportunity for consultation and advice. Long and unexplained acquiescence is in this case as in other cases of like kind an effectual bar. *Baylor v. Fulkerson*, 96 Va. 265, 31 S. E. Rep. 63.

Settlement Made Soon after Age.—Both deeds of gift and deeds of acquittance and discharge executed by a ward, soon after attaining her full age, at or before the time of settling the accounts and delivering up her estate are vacated by the law on a principle of public policy, without proof of actual fraud, still more when circumstances of fraud exist, nor does lapse of time during coverture affect the female ward's right of avoidance. *Waller v. Armistead*, 3 Leigh 11, 21 Am. Dec. 594.

Where, however, a settlement with the guardian by the ward, made soon after age, is acquiesced in for twelve years, with full knowledge of the circumstances, and no proof of misrepresentation or concealment, such laches bars all remedy in equity. *Baylor v. Fulkerson*, 96 Va. 265, 31 S. E. Rep. 63.

Devises Accepted by Wards in Satisfaction of Claims against Guardian's Estate.—Where wards accept devises from their guardian, either in satisfaction of their claims against him or on condition that they release all such claims, they are estopped to set up such claims afterwards. *Lewis v. Overby*, 31 Gratt. 601.

A Receipt in Full Not Conclusive on Ward.—A ward is not concluded by his receipt in full to his guardian, executed soon after attaining his majority, from showing, in equity, that his guardian is still indebted to him. *Shackelford v. Newbill*, 3 Pat. & Heath 232.

Release of Guardian—Laches of Ward.—Where the ward, being of full age, executes a receipt in full to his guardian, on consideration of a sum received from a third party in satisfaction of ward's estate loaned by guardian to this party, such receipt is a valid acquittance of the guardian, and if not, the ward's laches in acquiescing for six years, amounts to a waiver. *Kelly v. McQuinn*, 42 W. Va. 774, 26 S. E. Rep. 517.

IV. RIGHTS AND DUTIES ARISING FROM RELATION OF GUARDIAN AND WARD.

Duty of the Guardian.—The duty of every fiduciary is to keep the trust fund separate and distinct from his own property and to apply it in the due course of administration or to invest it securely for the benefit of the parties entitled. *Asberry v. Asberry*, 23 Gratt. 463.

The court will not allow, much less aid, a guardian to apply the estate of his wards to the discharge

of his own individual indebtedness. *Dobyns v. Rawley*, 76 Va. 537.

Guardian Appropriating Ward's Estate to Pay His Private Debts.—A guardian cannot appropriate his ward's estate to pay his private debts, such an application is a breach of his trust and the guardian is chargeable. *Asberry v. Asberry*, 33 Gratt. 463; *Jennings v. Jennings*, 22 Gratt. 313; *Hunter v. Lawrence*, 11 Gratt. 111.

Wards' Bond Used to Pay a Judgment against Himself.—A guardian will be held responsible for the loss of a bond, payable to his wards, when he converts it to his own use by paying an individual judgment against himself, as guardian: the reacquisition of the bond afterwards, by the guardian makes no difference. *Burwell v. Burwell*, 78 Va. 574.

Appropriating Note Given for Money Lent as Guardian.—A guardian cannot treat as his individual property, a note given him for money lent as guardian, until he has either paid it or been in some way released from it; the mere fact that he has secured it is not enough, unless such security is accepted by the wards. *Dobyns v. Rawley*, 76 Va. 537.

Bank Stock Belonging to Ward.—Where a guardian misappropriates bank stock of his ward, he and his sureties will be held to account for its value as of the date of the decree of the court below and the amount of dividends accrued thereon, and no commissions will be allowed on the value of the stock; but only on the amount of the dividends. *Bank of Va. v. Craig*, 6 Leigh 399.

A guardian, having in his hands the proceeds of the sale of ward's real estate cannot satisfy there-with a judgment, recovered by him against the administrator of his ward's ancestor. *McKay v. McKay*, 33 W. Va. 724, 11 S. E. Rep. 214.

Where a guardian gives his wards credit for a bond and holds it as his own property, the loss will fall on him, if the obligors become insolvent. *Ergenbright v. Ammon*, 26 Gratt. 490.

Last Investments Must Appear to Belong to Ward.—Where a guardian buys Confederate bonds payable to himself individually and indorses on each "Wolfe's heirs" such is not sufficient evidence that he invested ward's money in such bonds. *Ammon v. Wolfe*, 26 Gratt. 621.

Trusts in Favor of Wards Resulting from Application of Their Money to the Purchase of Lands.—To create a resulting trust in favor of a ward in a tract of land purchased by his guardian, the trust funds must either have been paid at the time of, or entered into the consideration for the contract of purchase, though paid afterwards. If a guardian purchases a tract of land, with her own money and takes the deed in her own name, the mere fact that she satisfies the unpaid purchase money out of the guardianship funds, which afterwards come into her hands, cannot create a resulting trust in favor of her wards. A court of equity, in a proper case, may treat such funds, so used and to the extent thereof, as a charge against the land. *Myers v. Myers* (W. Va.), 35 S. E. Rep. 868.

Authority of Guardian to Receive Money Due His Wards.—Where there are three wards, a payment made to the husband of one, who is also the guardian of another, should be charged only to the two for whom he is authorized to receive it and not to the third ward, an adult, who has given him no such authority. *Armstrong v. Walkup*, 9 Gratt. 372.

Those Who Collude with Guardian in Breach of Trust, Held Equally Liable with Him.—"It is firmly estab-

lished that a party who consents with a fiduciary in a misapplication of trust funds or in any other act contrary to the duty of the fiduciary becomes *particeps criminis* and will be held liable accordingly." *STAPLES, J.*, in *Asberry v. Asberry*, 33 Gratt. 463.

And where such party receives the assets of the ward's estate in payment of a private debt of the guardian to him, the law stamps such a transaction as conclusively fraudulent, and he will be held to account, however *bona fide* he may have acted. *Asberry v. Asberry*, 33 Gratt. 463.

It is proper for a purchaser from an administrator who is also a guardian, to execute bonds to the guardian for the purchase price, but if he colludes with the guardian in a breach of trust, he will be held ultimately responsible in case of the insolvency of other parties. *Broadus v. Rosson*, 3 Leigh 12.

Innocent Purchasers However Are Not Liable.—The breach of trust of the guardian is not alone sufficient to invalidate his transactions with innocent parties, and an innocent purchaser of a bond from the guardian, payable to him, for value and without notice, will not be made to account to the injured ward, since their equities are equal and the purchaser has the advantage at law in having collected the money due on the bond. *Hunter v. Lawrence*, 11 Gratt. 111.

Advancements to Guardian for the Benefit of Wards.—Persons dealing with a guardian are not obliged to show that advances made to a guardian were necessary for the infants, and the acknowledgment of the guardian is sufficient proof of the advancement and price of the goods, nor are such persons obliged to see that such advancements are not paid for out of the principal of the ward's estate, though if they are indeed aware of such fact they cannot recover against the ward's estate. *Broadus v. Rosson*, 3 Leigh 12.

No Contribution between Guardian and Those Who Collude with Him.—Where a decree has been recovered by a ward against his guardian and his sureties and the ward is satisfied, the guardian cannot object for the first time in an appellate court, that others who participated with him in his breach of trust should be held equally liable with him. *Crawford v. Shover*, 29 Gratt. 69.

Guardian and His Sureties Are Liable on Their Bond for Support of Ward.—It is the duty of the guardian to support and educate his ward, Va. Code 1887, sec. 2008, and if he fails to pay a just claim for such support, etc., he and his sureties will be liable on their bond to anyone furnishing it, if the ward's income is sufficient therefor and he wastes the assets, whether the condition of the bond is in the old form, "to pay and deliver to said orphans all the estate due them from said guardian, when thereto required, etc.," or the new form, "for the faithful execution of his office." *MONCURE, P.*, dissenting. *Barnum v. Frost*, 17 Gratt. 398.

Wards Not Prima Facie Necessary Parties.—A demurrer to a bill against a guardian for board, etc., furnished to his wards by the plaintiff, ought not to be sustained on the ground that the wards should have been parties, but leave to file an answer should be given and, if on the coming in of said answer, it should appear proper, the wards should be made parties. *Sutton v. Gatewood*, 6 Munf. 898.

Guardian is Not Liable Personally for Support of Ward, Only Ward's Income.—A guardian, in the absence of express contract, is not liable personally for the support of his ward, but the remedy is in

equity against the ward's income, and the income only, and though he gives his bonds therefor, if they show an intention not to bind himself personally, he will not be bound. *MONCURE, P.*, dissenting. *Barnum v. Frost*, 17 Gratt. 398.

Guardian's Contract Personal at Common Law.—But when guardian's contract is express, at common law, his contract is deemed personal; but where the guardian's undertaking is to pay for the ward's board out of the profits of ward's estate and is signed as guardian, it binds the ward's estate. *Barnum v. Frost*, 17 Gratt. 398. *MONCURE, P.*, dissenting. See *Wallis v. Neale*, 43 W. Va. 599, 27 S. E. Rep. 227.

Liability of Second Guardian for Supplies Furnished to Ward under a Former Guardian.—Where there is no contract, express or implied, on the part of the second guardian, no action can be maintained against him for supplies and services furnished to the ward during the guardianship of a former guardian. *Young v. Warne*, 2 Rob. 420.

Jurisdiction of Equity.—A court of equity has jurisdiction of all claims against a ward's estate. *Barnum v. Frost*, 17 Gratt. 398.

Where Guardian Should Be Sued.—Where a guardian qualifies in Frederick Co., Va., and is in possession of part of his ward's estate there, he may be sued in the circuit court of said county, though his ward owned real estate in West Virginia which the guardian had sold and the guardian had given a bond there. *Rinker v. Streitt*, 33 Gratt. 663.

Guardian May Submit Himself to the Jurisdiction of a Foreign Court.—Although the general rule is that a guardian cannot be sued, as such, out of the state in which he qualified, yet if he sues in a foreign court, if found within its jurisdiction, he may be proceeded against under its decree. *Clendenning v. Conrad*, 91 Va. 410, 21 S. E. Rep. 818.

Situs of Ward's Property for Taxation.—Where a guardian qualifies in one city of a state and settles her *ex parte* accounts there, but afterwards removes to another city, and invests her ward's funds there, said funds are taxable only in latter city. *Hughes v. Staunton*, 97 Va. 518, 34 S. E. Rep. 450.

Guardian Must Sue for Ward's Property in Name of Infant, as His Next Friend.—A guardian is not authorized to file a bill in his own name to obtain possession of the property of his ward; but must file it in the name of his ward as his next friend; calling himself "guardian of the ward" is not sufficient. And the objection for want of proper parties may be made for the first time in the court of appeals, if it was not waived in the lower court, and the want of parties appears on the face of the bill. *Sillings v. Bumgardner*, 9 Gratt. 273; *Burdett v. Cain*, 8 W. Va. 282; *Stewart v. Crabbin*, 6 Munf. 280.

Suits against a Former Guardian for an Accounting Must Be in Name of Infant by His Next Friend.—A guardian has no authority to file a bill in his own name against a former guardian, for an account of his transactions in relation to the wards' estate; the bill should have been filed in the names of the infants by their next friend or guardian. The guardian is liable to an action of account, at common law, by the infants after he arrives at age; and the infant, while under age, may, by his next friend, call the acting, or any preceding guardian, to account by bill in chancery. *Lemon v. Hansbarger*, 6 Gratt. 301. See also, *Morrison v. Householder*, 79 Va. 627.

An action for assault and battery committed on an infant should be brought in the name of the infant, by his guardian, not by and for the guardian. The

latter is error for which the judgment would be reversed, even after a general verdict in favor of the plaintiff, before January 1st, 1820. But see *Rev. Code 1819*, vol. 1, ch. 128, sec. 103; *Stewart v. Crabbin*, 6 Munf. 280.

If the guardian is sole plaintiff in the bill and has no further interest in the suit than as guardian, the bill must be dismissed. *Lemon v. Hansbarger*, 6 Gratt. 301; *Burdett v. Cain*, 8 W. Va. 282.

But if he is further interested in the suit and a proper party to it, the decree should be merely reversed and the cause remanded in order that proper parties may be made. *Sillings v. Bumgardner*, 9 Gratt. 273.

In Absence of Guardian, Infant Must Defend by Guardian Ad Litem.—Where there is no guardian, by testament nor by appointment of court, an infant defendant must defend by guardian *ad litem*, the court not passing on the question where there is such a guardian. *Brown v. McRea*, 4 Munf. 439.

Guardian's Defence Binding on Infant.—Where a guardian, appointed by the county court, with its sanction, defends a suit against her ward, her defence is binding on the ward, but if the guardian die before the decree, though all the testimony has been taken, a guardian *ad litem* must be appointed. *Beverleys v. Miller*, 6 Munf. 99.

When Error to Make a Joint Decree in Favor of Several Infants.—Where one of several wards is still an infant it is error to make a joint decree in their favor, though made with the consent of the infant's next friend. *Armstrong v. Walkup*, 9 Gratt. 372.

When Allowable on Suit by One Only.—One of two infants sues their common guardian for a settlement of his accounts, making her sister defendant, but only alleging that the moneys paid to the guardian were the common property of herself and her sister; if her sister files her answer and establishes her claims, the court may decree in favor of both. *McKay v. McKay*, 33 W. Va. 724, 11 S. E. Rep. 213.

When Proper to Decree Wholly against Administrator of Guardian.—In decreeing against the estate of a guardian *de facto*, it is proper to decree wholly against his administrator when the real estate has been divided and the personality has not, when they both go to the same parties, although the plaintiff's claim is for rents and profits out of real estate which has been divided up, and one heir has gotten the real estate in suit, since the co-heirs would have to contribute and thus circuity of action is avoided. *Martin v. Felder*, 82 Va. 455.

New Claim Cannot Be Set Up in Appellate Court.—Where a decree has been rendered against a guardian who is also administrator, on his guardian's account, on appeal, a claim cannot be set up by the wards in the appellate court to augment such decree, by the balance against the guardian in his administration account. *Williamson v. Howard*, 2 Rob. 30.

Guardian Has a Right to Notice, When His Ward's Land is to Be Condemned.—In condemnation proceedings the guardian of the infant owners of the land proposed to be taken, must be notified, and has a right to appear and make defense on behalf of his wards. *Charleston & S. S. Bridge Co. v. Comstock*, 86 W. Va. 263, 15 S. E. Rep. 69.

Power of Guardian to Arbitrate Ward's Interests.—A guardian has authority to submit any controversy touching his ward's estate to arbitration, without first complying with the provisions of the W. Va. Code 1891, ch. 108, sec. 5.

Investment of Ward's Estate by Order of Court.—Before a county court can make any order for the investment of a ward's estate, the commissioner must have posted a list of the fiduciaries' accounts before him for settlement, at the courthouse door, according to the statute, ch. 132, sec. 16, Va. Code 1860; Code 1887, sec. 2093. For failure to do so, such order may be set aside on motion. *Whitehead v. Whitehead*, 23 Gratt. 376.

V. TERMINATION OF GUARDIANSHIP.

By Death of Guardian or Ward's Arrival at Full Age or Marriage.—The guardianship is terminated either by the arrival of the ward at full age, or his marriage, or by the death of the guardian. *Armstrong v. Walkup*, 12 Gratt. 608.

The guardianship over a female infant is terminated by her marriage. *Guerrant v. Hocker*, 7 Leigh 366.

Court Guardian's Authority Continues Till Ward Attains His Age.—Where a county court has regularly appointed a guardian for a minor under the age of fourteen, the infant, on reaching the age of fourteen, cannot have a guardian of his own selection appointed in the place of the one already appointed, merely because he prefers him, and without showing any cause. *Ham v. Ham*, 15 Gratt. 74; *Ross v. Gill*, 4 Call 250.

Removal by the Circuit Court.—A large discretion is necessarily vested in the circuit court in the removal of guardians, and where it appears that the guardian is managing his ward's estate for his own advantage, rather than for the good of his ward, it is not error to remove him. *Snavely v. Harkrader*, 29 Gratt. 112.

The circuit court may remove a guardian for refusal to give a new bond. *Jennings v. Jennings*, 23 Gratt. 313.

Guardian Entitled to Notice.—An order revoking a guardian's appointment, upon a rule granted on motion of his sureties for counter security, without summons to the guardian, or appearance by him, is void, at least as to persons dealing with the guardian without notice of such revocation. *Bank of Va. v. Craig*, 6 Leigh 399.

Guardian Should Have Reasonable Time to Give New Bond if Required.—On a motion in the county court to require a guardian to show cause why he should not give a new bond, on failure to show cause, the court should order a new bond to be given in a reasonable time. It is not proper to order his motion from office immediately. *Sage v. Hammonds*, 27 Gratt. 651.

On Removal, a Receiver May Be Appointed.—Where the guardian is plainly unfit for the trust, it is proper for a court of chancery to take the estate from him and put it in the hands of a receiver, for management, until the wards are capable of taking care of it, or until another guardian is duly appointed. Such receiver must give bond. *Sage v. Hammonds*, 27 Gratt. 651.

Appointment of Successor.—A second guardian cannot be appointed until the first has been removed. *Kester v. Hill*, 42 W. Va. 611, 26 S. E. Rep. 376.

Upon the appointment of a second guardian, the former guardian's authority, as guardian, to receive and pay monies, ceases. *Walker v. Walke*, 2 Wash. 195.

Duty and Liability of Former Guardian to His Successor.—It is the duty of a guardian, whose powers as such are revoked, to account to his wards, or to

his successor as guardian, if there be one, for their estate, including evidences of claims which may have come into his hands; and if after such revocation he collect any money on account of any such claims, he, and his surety as guardian, are accountable therefor to the parties entitled thereto; at least, provided such payment be made in good faith, by a person who is not informed of such revocation, and who believes at the time of making it that the party claiming to be guardian is so in fact, and has authority, as such, to receive the money. *Sage v. Hammonds*, 27 Gratt. 651.

Appeal.—There was no appeal, under 1 Rev. Code, ch. 64, sec. 3, ch. 66, sec. 50, 51, from an order of a county court appointing or displacing a guardian, to the superior court of chancery or thence to the court of appeals. *Dupuy v. Hardaway*, 4 Leigh 584.

Mode of Settlement of Guardian's Accounts on Termination of His Office.—From the termination of the guardianship, the accounts should be settled on the ordinary principles as between debtor and creditor; compound interest should not be allowed. *Cunningham v. Cunningham*, 4 Gratt. 43; *Garrett v. Carr*, 1 Rob. 196; *Armstrong v. Walkup*, 12 Gratt. 608; *McKay v. McKay*, 33 W. Va. 724, 11 S. E. Rep. 218; *Windon v. Stewart*, 37 S. E. Rep. 603.

VI. GUARDIANS DE FACTO.

What Insufficient to Charge as Guardian De Facto.

Signing Oneself Guardian.—Where the only evidence that the defendant was guardian or attempted to act as such is that he signs himself "guardian" in a receipt to the commissioner of the court, it is insufficient to charge him either as guardian or guardian *de facto*. *Magnire v. Doonan*, 24 W. Va. 507.

Never Appointed or Acted as Guardian.—When there is no proof that defendant was ever legally appointed or qualified as guardian, especially when he never acted as guardian, it is error to treat him as guardian. *Lincoln v. Stern*, 23 Gratt. 816.

Executor Treated as Guardian.—Where an executor undertakes to fulfill the duties of guardian, instead of having a guardian appointed according to law, he must be treated as such in his transactions with the infant. *Garrett v. Carr*, 3 Leigh 407. See also, *Bennett v. Claiborne*, 23 Gratt. 366; *Arrington v. Cheatham*, 2 Rob. 492.

Taking Charge of Estate Sufficient.—Where the administrator buys the shares of the adult heirs of decedent and takes possession of the whole tract including the shares of two infant heirs, he will be held to account as guardian *de facto* of the infant heirs for rents and profits received, with compound interest during their minority, and thereafter at legal interest. *Martin v. Fielder*, 82 Va. 455. See also, *Waller v. Armistead*, 2 Leigh 11.

Father Holding Child's Estate.—A father is liable for the rents and profits of the estate of his minor child as guardian *de facto*, as long as he holds the same. *Peale v. Thurmond*, 77 Va. 753.

A father, by retaining in his possession the lands and slaves to which two of his infant children became entitled on the death of their mother and receiving the rents and hires, rendered himself responsible as their guardian *de facto*, and the same rules as to compounding interest and the charge of interest on conjectural profits, apply as in the case of legally appointed guardians. *Evans v. Pearce*, 15 Gratt. 513.

Guardian De Facto a Fiduciary.—Neither the statute of limitations nor lapse of time constitute any bar to a claim of a ward against her guardian *de facto*,

such guardian being a fiduciary. *Peale v. Thymond*, 77 Va. 753.

Allowance for Expenditures.—The same rules as to allowance for expenditures in excess of income apply to guardians *de facto* as to guardians *de jure*. *Gayle v. Hayes*, 79 Va. 542.

A de facto guardian, like any other, must confine himself strictly to the profits of the estate. *Anderson v. Thompson*, 11 Leigh 439.

427 ***James River and Kanawha Co. v. Adams.**

April Term, 1897, Richmond.

(Absent, RIVES, J.)*

1. **Verdicts—Reduction by Court—Case at Bar.**—In an action of covenant assigning numerous breaches, there is a verdict for the plaintiff, and on a motion by the defendant for a new trial, on the ground that the verdict is against law and evidence, and that the damages are excessive, the jury report to the court the items which constituted the elements of their verdict; and the court being of opinion that as to some of the items the plaintiff is not entitled to recover, gives the plaintiff the option to reduce the verdict by the amount of these items, or to have a new trial; and the plaintiff agrees to take the verdict according to the opinion of the court. There is nothing in the action of the court to which either party can object.

2. **Same—Same—Objection in Appellate Court.**†—In such a case the court states, in its judgment, the items disallowed and those allowed; and the defendant does not except to the opinion of the court. The defendant cannot object in the appellate court, that the verdict is against law and evidence, or that the damages are excessive.

3. **Contract—To Furnish Cement—Breach—Excuse.**—In the agreement between a canal company and a contractor for building a dam, the company is to furnish the cement upon the written order of the contractor; but "if from any cause the company shall not be able to supply it as required, they shall not be responsible for any damages arising to the contractor from the want of the same." It is not a sufficient excuse for failing to furnish the cement that the company had not a sufficient quantity on hand to supply it as required. It was their duty to use due and reasonable diligence to obtain and keep on hand a sufficient supply for that purpose. Their failure to do so is a breach of the covenant, for which the contractor may recover damages.

*He was a stockholder in the company.

†**Verdicts—Reduction by Court—Objection in Appellate Court.**—In *Moses v. Cromwell*, 78 Va. 676, it is said: "Upon the point of the refusal of the court to set aside the verdict, on the ground that the damages were excessive, it might be answered, that the objection in the record is aimed at the verdict as it was originally returned by the jury, and before the court had required a release of more than half of the amount thereof; and that as the plaintiff in error has not excepted to the judgment of the court for the \$3,000, as he might have done, we do not think it would be proper for us to undertake to interfere with it. *James River & Kanawha Co. v. Adams*, 17 Gratt. 435; *Preston v. Bowen*, 6 Munf. 271; *Field on Damages*, § 882; *Sedg. on the Measure of Damages*, 660, *note*." The principal case is also cited and approved in *Vinal v. Core*, 18 W. Va. 62.

4. **Same—To Build Canal Lock—Case at Bar.**—The agreement for the construction of a lock provides, that it is to be done with such changes and alterations thereof as might *thereafter be adopted by the company; they paying all the additional expense for increase of work or materials caused by such change or alterations. The company may change the location and materials of the lock; and by so doing they incur no other liability than that prescribed in the contract itself.

5. **Same—Same—Same.**—If in such a case, notwithstanding any modification, change or alteration in the plan, construction or material used, the contractor continues the work, and his work is estimated and paid for according to the terms of the contract, the contractor is not entitled to recover for any such work done, beyond the estimates, or for loss of time or consequence thereof, unless the company has acted in bad faith.

6. **Same—Liability of Company.**—The company is only liable for a failure to comply with its covenant after its execution; but the contractor may show that it was executed prior to its date.

On the 8th of December, 1848, a covenant was entered into between the James River and Kanawha Company of the one part, and John L. Adams of the other, whereby the latter contracted to construct, in a substantial and workmanlike manner, the dam across James river, known as the "Pedlar dam," and the river lock connected therewith, in conformity with certain specifications annexed to the covenant, and with the plan of the said dam and river lock exhibited by the company, and with such changes and alterations thereof as might thereafter be adopted by the president and directors of the said company, and to furnish all the materials which might be necessary and proper therefor, according to the specification, of such quality as the principal assistant engineer having the superintendence of the said dam and river lock, or the chief engineer of the company, might approve. Stipulations were contained in the covenant that monthly estimates should be made by an engineer of the company, of the quantity and value of each species of work done pursuant to the contract, at the prices contained in the proposal annexed thereto, according to a *scale to be made out for the purpose by the principal assistant or chief engineer; which scale should provide for estimating the proportional value of any materials procured for said dam and river lock; and that there should be included in such monthly estimates all suitable materials which might have been delivered upon the land of the company near the site of the work, or at other places, if properly secured to the company; also the value of any extra work done in consequence of any alteration of the plan of the said dam and river lock, which might have been adopted by the president and directors of the company, and of the material required for the construction of such extra work, where such alteration shall have caused an increased expense to the contractor; and where any such alteration shall have caused a saving of ex-

429 nced thereto, according to a *scale to be made out for the purpose by the principal assistant or chief engineer; which scale should provide for estimating the proportional value of any materials procured for said dam and river lock; and that there should be included in such monthly estimates all suitable materials which might have been delivered upon the land of the company near the site of the work, or at other places, if properly secured to the company; also the value of any extra work done in consequence of any alteration of the plan of the said dam and river lock, which might have been adopted by the president and directors of the company, and of the material required for the construction of such extra work, where such alteration shall have caused an increased expense to the contractor; and where any such alteration shall have caused a saving of ex-

pense to the contractor, a reasonable deduction was to be made therefor by the engineer making the said estimates. And it was mutually agreed between the contracting parties, that the said monthly estimates, after being corrected when necessary and approved in the manner provided by the contract, should be final and conclusive. At the first meeting of the president and directors after the due return of any monthly estimate or the correction of any errors therein, it was agreed that four-fifths of the sum appearing to be due for work performed and materials furnished since the preceding estimate, should be paid to the contractor; but no portion of the remaining fifth was to be paid until the contract should be fulfilled on the part of the contractor, and the whole work delivered to the company in good order in pursuance thereof. Within thirty days after the completion of the work, a final estimate of all work not embraced in former estimates was to be made, approved and, if necessary, corrected, in the manner provided for in regard to monthly estimates; and at the first meeting of the president and directors after the adjustment of the final estimate, the whole balance due upon the contract was to be paid: provided, however, that such payment should not be made until the contract shall have been fulfilled on the part of the contractor and the whole work delivered to the company in good order in pursuance thereof. It was further agreed that the work should be commenced within thirty days from the date of the contract, should be steadily prosecuted without interruption until completed, and should be completed and delivered up in good order on or before the first of January, 1850. It was also agreed that all orders given by an engineer which should cause an increase or diminution of the quantity or value of the work to be performed should be given in writing, and that no claim for extra compensation for work done under any order of the engineer should be allowed to the contractor, unless the order was in writing. Other stipulations and details are contained in the contract, which are stated in the opinion of Judge Moncure. The work seems to have been commenced in due time, but was not finished until some time in 1851, though it does not appear that any objection was made on that account. Regular monthly estimates were made in pursuance of the contract, with one or two exceptions only (which are not a subject of objection in the case), commencing with the first day of January, 1849, and ending on the first of January, 1851, inclusive, four-fifths of which were regularly paid to the contractor, who executed his receipts therefor, specifying in each receipt that the amount received was in full payment for the work done by him up to the date of the estimate to which the receipt applied after deducting the reserved twenty per cent. And on the first of December, 1851, a final estimate was made, the balance of which, after deducting the amount paid

on the monthly estimates, \$5,450 advanced at different times on account of the reserved twenty per cent., and two other credits, was afterwards paid by order of the contractor to Thomas O. Acree, who gave his receipt to the company in full of the same. This receipt bears date March 15th, 1852.

In September, 1852, John L. Adams the contractor, brought two actions against the James River and Kanawha company, for damages on account of their alleged violation of their contract with him in regard to the construction of the "Pedlar dam" and river lock aforesaid; one of them an action of covenant founded on the contract aforesaid, and the other an action of assumpsit. In the former, the declaration set out the whole contract at length, with the specifications and proposal aforesaid annexed, and assigned thirteen breaches of the covenant. The defendants pleaded that they had not broken the covenant; on which plea issue was joined. In the action of assumpsit, the declaration contained only the common counts, and with it was filed a bill of particulars, headed "The James River and Kanawha company in account with John L. Adams for work done and materials furnished in and about the Pedlar dam and the river lock connected therewith." The general issue was joined. In August and September, 1856, these actions came on to be tried together by the same jury, when a verdict was rendered, in the action of covenant for the plaintiff, and his damages were assessed at \$12,000; and in the action of assumpsit for the defendants. Judgment was entered on the latter verdict without objection; and all proceedings in the action of assumpsit were thus ended. But in the action of covenant, a motion was made by the defendants to set aside the verdict and for a new trial, upon two grounds: 1st, that the verdict was against law and evidence in toto, and 2dly, that if the plaintiff was entitled to any recovery, the damages were excessive. The court was of opinion that the verdict was not against law and evidence in toto, but that the damages were excessive to the extent of \$7,000; and upon the plaintiff's consenting in open court to release that amount of the verdict, the court gave judgment for the remaining \$5,000 with interest and costs. In the opinion of the court overruling the motion for a new trial, which seems to have been entered on the order book as a part of the judgment, the mode in which the court arrived at the conclusion that the damages were excessive is stated; from which it appears that the jury reported to the court the items which constituted the elements of their verdict for \$12,000; which items are set forth in the opinion, as also are the reasons of the court, for considering that as to some of them, which are enumerated, the plaintiff was precluded and barred from a recovery by the monthly and final estimates made in pursuance of the contract, there having been proved neither fraud nor mistake as to the latter items.

But as to the other items reported by the jury, the court was of opinion, that the plaintiff was entitled to recover, notwithstanding the monthly and final estimates; and the evidence being conflicting, the court could not say that the damages assessed for those items were excessive.

No exception was taken to the opinion or action of the court on the motion for a new trial. But on the trial of the cause, fifteen instructions to the jury were moved for by the defendants, all of which were given by the court, except the 7th, 8th, 11th, 13th, 14th, and 15th, which were refused; but the 15th was modified and then given. To such refusal the defendants excepted. These instructions are stated in the opinion of Judge Moncure.

The judgment was rendered on the 5th of September, 1856, and on the 24th of August, 1861, the James River and Kanawha company applied to this court for a writ of error, which was awarded.

433 *Lyons, for the appellant.

There was no counsel for the appellee.

MONCURE, P., after stating the case, proceeded as follows:

The defendants took no step to have this judgment of the Circuit court reviewed by this court from the time it was rendered, on the 5th of September, 1856, to the 24th of August, 1861—a period of nearly five years—which number of years, if it had fully elapsed, would have barred the presentation of a petition for a supersedeas. This delay, in part at least, may perhaps be accounted for by the fact that the cases of *Condon v. South Side Railroad Company*, 14 Gratt. 302, and *Baltimore and Ohio Railroad Company v. Polly, Woods & Co.*, Id. 447, which seem to be supposed to have a material bearing upon this case, were not reported until 1859; and by the further fact that the case of the *James River and Kanawha Company v. Adams*—a case between these same parties founded on a contract almost identically the same with the contract in this case, for the construction of the “Bald Eagle” dam and a river lock connected therewith—was not decided by this court until the 14th of April, 1858, though it was pending here when the judgment of the Circuit court in this case was rendered. The delay is unimportant, however, as it was not for full five years. On the 24th of August, 1861, the defendants applied for and obtained an order for a supersedeas. In their petition they assign for errors, 1st, the refusal of the court to give the 7th, 8th, 11th, 13th and 15th instructions asked for by the defendants; and 2dly, the refusal of the court to set aside the verdict and grant a new trial; in support of which second assignment of error, the decisions of this court above mentioned are cited and firmly relied upon.

434 *The second assignment of error will first be disposed of, and upon the ground that no exception was taken by the

defendants to the opinion of the court overruling their motion for a new trial, upon the plaintiff's releasing \$7,000 of the damages assessed by the jury. Their failure to take such exception may, perhaps, be accounted for in the same way which has been suggested in regard to their application for this appeal, and they may then have had little hope of being able to reduce the amount of damages which might be recovered against them on a new trial to less than \$5,000. But whatever their motive may have been in not taking such exception, the effect is the same, and the judgment cannot be reversed for any supposed error of the court in overruling the motion for a new trial. In the first place, all the facts of the case are not certified so as to enable this court to determine the question; and in the second place, if there had been an exception, the plaintiff might have withdrawn his release or declined giving it.

Reference is made in the argument of the appellant's counsel to what is said to be the “extraordinary conduct of the judge in obtaining from the jury a statement of the grounds of their verdict.” I see no just ground of objection to this course of proceeding. The jury had performed their function by finding a verdict for the plaintiff and assessing his damages. The defendants moved for a new trial. The judge thought that the plaintiff was entitled to recover some damages, but that the amount assessed by the jury was excessive. He wished to end the case, and thus prevent the expense, trouble and delay of a new trial, by giving judgment for so much of the damages as he might think just, provided the plaintiff would release the residue. But his difficulty was to ascertain what was just, and he referred to the jury,

who were judges of the facts and had
435 tried the *case, to aid him in overcoming this difficulty. If he could have come to a satisfactory conclusion in regard to the facts upon his hearing of them in the course of the trial, he might, and no doubt would, have acted upon that conclusion. But as he could not, or did not, I see no impropriety in calling the jury to his aid. The plaintiff cannot complain of this, because he is not bound to give the release, which is merely proposed to his election as an alternative to the granting of a new trial; and a fortiori, the defendants cannot complain, because it is for their benefit that the damages are reduced, and they may still except to the opinion of the court if they consider it erroneous. A motion for a new trial is addressed to the sound discretion of the court, and the object of granting it is to attain the justice of the case. If that object could be attained in the mode pursued by the judge in this case, it was proper for him to pursue it.

The other assignment of error will now be considered, and that is, the refusal of the court to give the 7th, 8th, 11th, 12th, 13th and 15th instructions asked for by the defendants.

The 7th is in these words: “That al-

though the jury may believe that the defendants were responsible for delays, by which the plaintiff was subjected to inconvenience and loss, that upon the present aspect of the pleadings in these causes the plaintiff can recover no damages therefor: not in the action upon the covenant, because such delay is no breach of the written covenants entered into by the defendants; nor in the action on the case, because it only declares for work and labor done and performed and materials furnished, and lays no claim for damages for any loss, but only *ex contractu*." The 8th is in these words: "That according to that provision of the covenant declared upon, which provides

that 'it is expressly stipulated that
436 although the Canal company *agrees to furnish the cement for this dam, yet if from any cause the said company should not be able to supply it as required, they shall not be responsible for any damages to the contractor for the want of the same,' the plaintiff is not entitled to recover for any failure on the part of the defendants to supply him with cement unless he presented a written requisition for the same as required by the covenant, and the defendants, having a sufficient quantity on hand to supply said requisition at the time, refused to do so."

The material specifications in regard to cement in the contract are, that "the cement shall be furnished by the Canal company, and shall be taken by the contractor for the dam from some one of the deposits of cement which shall be established by the Canal company, upon the written order which he shall from time to time receive from the engineer for the same, and the engineer shall be the sole judge as to which deposit it shall be drawn from, and shall express the same in said order; and the said contractor shall transport the cement so received to said work in good tight barrels, casks or bags, to be provided by him at his own cost, and shall keep it secured from the weather until used, in suitable cement houses, built at his own cost, one near each abutment, under the direction and subject to the approval of the engineer; but the company shall pay the contractor, upon the completion of the dam, one-half of a cent per bushel per mile for every bushel of cement transported by him in good order and actually used in his contract. On presenting the written order of the engineer and receiving the cement, the contractor, his agent or boatman, shall apply to the company's agent from whom he received it, for a certificate of the quantity and quality of the cement which may be delivered to him; which certificate

shall be presented to the assistant engineer,
437 on the arrival of the *cement at the place where it is to be used, and it shall be the duty of the assistant engineer to examine and compare the cement delivered there with that which the certificate calls for. No cement shall be used in the work which shall have been damaged on its passage from the mill, depot or kiln,

or while in the possession of the contractor; and in the event of any cement being so damaged, the loss of the same shall be sustained by the contractor. It is expressly stipulated, that although the Canal company agree to furnish the cement for this dam, yet if from any cause the said company shall not be able to supply it as required, they shall not be responsible for any damages arising to the contractor from the want of the same."

By these stipulations of the contract the company were bound to furnish the cement for the dam, as required by the contractor as aforesaid, if of ability to do so, and were responsible for any damages arising to the contractor from the want of the same, if, being able, they failed so to furnish it. It was not a sufficient excuse for failing so to furnish it, that they had not a sufficient quantity on hand to supply it as required. It was their duty to use due and reasonable diligence to obtain and keep on hand a sufficient supply for that purpose. The 7th and 8th instructions asked for by the defendants were therefore properly refused. The 7th, because, if the plaintiff sustained damages for being delayed by the failure of the defendants to furnish the cement as aforesaid according to their covenant, then the plaintiff was entitled to recover such damages in the action of covenant. And the 8th, because it confines the title of the plaintiff to recover for any failure on the part of the defendants to supply him with cement, to the single case of their refusal to do so on his presentation of a written

requisition for the same as required by
438 the covenant, they having a *sufficient quantity on hand to supply said requisition at the time: thus ignoring the obligation of the defendants to use due and reasonable diligence to obtain and keep on hand a sufficient supply. The instruction should have been to the effect, "that the plaintiff is not entitled to recover for any failure on the part of the defendants to supply him with cement unless he presented a written requisition for the same, as required by the covenant, and the defendants refused to do so, though they had, or might, by using reasonable diligence, have had a sufficient quantity on hand to supply said requisition at the time."

The 11th instruction asked for by the defendants is in these words: "that at any time during the progress of the work they had a right under said contract to abandon the construction of the lock on the south side of the river, and to erect it on the north side and to change the materials out of which it was to be constructed; and that they incurred no other liability than that prescribed in the contract itself, that of paying all the additional expense for increase of work or materials prescribed in the covenant caused by said work."

I can see no just ground of objection to this instruction, and think it ought to have been given. The contract, as we have seen, expressly bound the contractor to construct in a substantial and workmanlike man-

ner the "Pedlar dam" and river lock connected therewith, in conformity with the annexed specification, and with the plan of the said dam and the river lock exhibited by the company, and with such changes and alterations thereof as might thereafter be adopted by the president and directors of the said company; thus reserving to the defendants the right to adopt such changes and alterations of the work as they might thereafter think proper; and they had,

therefore, a right, under the contract, 439 to "abandon the construction of the lock on the south side of the river, and to erect it on the north side, and to change the materials out of which it was to be constructed; and by so doing, they incurred no other liability than that prescribed in the contract itself; that of paying all the additional expense for increase of work or materials, caused by the adoption of such changes and alterations, for the ascertainment and payment of which additional expense express provision was made by the contract. There being no breach of the contract on the part of the defendants by reason of any such changes and alterations, they could have incurred no liability therefor beyond what the contract prescribed, and if any other damage was sustained by the plaintiff therefrom it was *damnum absque injuria*.

The 13th instruction asked for by the defendants is, that if the jury "believe from the evidence, that notwithstanding any modification, change or alteration in the plan, construction or material used, the plaintiff continued the work, and the work done in pursuance of such modification, change or alteration, was estimated according to the terms of the contract, the plaintiff is not entitled to recover in this action for any work done according to said modification, change or alteration, or any loss of time, or consequence thereof, unless the defendants acted in bad faith."

I think this instruction also ought to have been given, and substantially for the reasons assigned in regard to the 11th instruction. Of course the instruction must be understood as implying, what the evidence tended to prove, that the work done in pursuance of such modification, change or alteration was paid for, as well as "estimated, according to the terms of the contract;" but to make the meaning more plain, the words "and paid," should have been inserted after the word "estimated." 440 If the defendants "acted in good faith in regard to any modification, change or alteration made by them in the plan, construction or material of the work, and estimates were duly made and paid according to the terms of the contract, there could be no further liability on them for any work done according to said modification, change or alteration, or any loss of time or consequence thereof, for there was no breach of the contract in that respect.

The 15th instruction to the jury asked for by the defendants was, "to disregard all

evidence of a failure on the part of the defendants to supply the plaintiff with cement prior to the 8th day of December, 1848 (the date of the covenant sued on);" which instruction the court refused to give as asked for, but gave it in a modified form as follows, to wit: "that the jury should disregard all evidence of a failure on the part of the defendants to supply the plaintiff with cement prior to the 8th day of December, 1848 (the date of the covenant sued on), unless it should be proved to the satisfaction of the jury, that the said covenant was executed before the 8th day of December, 1848."

I can perceive no just ground of objection to this modification of the instruction asked for, and no injury which it could have caused to the defendants. I therefore think the court did not err in giving the instruction in the modified, instead of the original, form. There is evidence in the record that the work was commenced, and the covenant may have been executed, before the day on which it bears date. If it was, it should have effect from the time at which it was executed. If it was not, then the defendants had the full benefit of their instruction in the form in which they offered it.

Upon the whole, I think the court erred in refusing to give the 11th and 13th instructions asked for by the defendants, and therefore the judgment ought to be 441 reversed, "the verdict set aside, and the cause remanded for a new trial to be had therein; on which new trial, should the evidence be in substance the same as on the former trial, and the said instructions be again asked for, they ought to be given.

JOYNES, J., concurred in the opinion of Moncure, P.

Judgment reversed.

NOTE.—The case of *The James River and Kanawha Company v. Adams*, referred to in this case, was decided by this court on the 14th day of April, 1868. It was founded on a contract for the construction of the "Bald Eagle dam" and a river lock connected therewith; which contract was similar to the one on which this case is founded. All the judges were present, except Judge Daniel, who had an interest in the case, which prevented him from sitting; and all present concurred in the following opinion, delivered by JUDGE MONCURE, which sufficiently states the case to make the opinion intelligible.

I am of opinion that the Circuit court erred in refusing to give the 4th instruction: and also in giving the instruction which it did in lieu thereof. The 4th instruction is according to the substance and almost in the very words of the contract, and ought therefore to have been given in the form in which it was asked. The contract prescribes the mode in which monthly estimates are to be made and approved, of the quantity and value of each species of work done in pursuance thereof at the prices contained in the proposal, &c., and directs that the value of any extra work done in consequence of any alteration of the plan, &c., should be included in the said estimates. It then

expressly declares that any estimate made and approved as aforesaid, shall be *final and conclusive*, unless objected to before paid, &c. There is nothing unlawful in these provisions of the contract, and full effect must therefore be given to them. How, then, could the court with propriety refuse to instruct the jury that estimates so made and approved, and the receipt of the money specified therein, are by the terms of the covenant to be regarded conclusive evidence as between the parties, of the prices of the work, &c., as therein set forth? And how could the court with propriety instruct the jury that such estimates and receipts were *prima facie* evidence only of the prices of the work, &c.? The error was not cured by further instructing the jury that to enable the plaintiff to

rebut and overcome such *prima facie* evidence, 442 and to recover for such work, &c., *higher prices than those mentioned in such estimates and receipts, he must prove that an agreement was made between him and the defendants for such higher prices; or that there was no agreement between them on the subject of price, so as to leave that an open question to be settled by the jury upon the principle of a *quantum meruit*, in assessing their damages in an action of covenant. If there was in fact a new agreement between the parties as to prices, then the action to recover such prices should have been upon the new agreement and not upon the covenant. This action being upon the covenant, only the covenant prices can be recovered. If there was no new agreement between them on the subject of price, the question was not an open one to be settled by the jury, but was closed by the covenant, which provided a mode of ascertaining it. The covenant provided for the construction of the entire work in conformity with a specification and plan agreed upon, with such changes and alterations thereof as might afterwards be adopted by the company; and it provided a mode of ascertaining the amount to be paid for the entire work, whether done in pursuance of the said specification and plan, or of any such changes and alterations. That mode was by monthly and final estimates. If made, approved and not objected to according to the covenant, they are, by the very terms of the covenant, final and conclusive.

But even if the question as to the price of any of the work done by the plaintiff under the covenant could ever have been considered as an open one, it was certainly settled and concluded by the facts that such work was included in estimates made and approved according to the covenant, and that the plaintiff, without objection thereto, had, either in the manner mentioned in the covenant or otherwise, received the money mentioned therein and executed receipts therefor. Such estimates and receipts ought surely to be regarded as conclusive evidence of the price of the work, even without reference to the terms of the covenant expressly declaring them to be so. The monthly estimates (33 or 34 in number) appear generally to have been made on the first day of each month, commencing July 1st, 1848, and ending May 1st, 1851. The amount due on each estimate was paid a few days after its date, and a receipt, written under the estimate, was given by the plaintiff for the amount; "being," as each receipt expresses, "full payment for the work done by me on the above mentioned dam up to the date of the above estimate, after deducting the reserved twenty per cent. as above stated."

It is argued by the counsel for the defendant in

error, that there is a difference between *monthly* and *final* estimates in regard to their effect as evidence; and that while the latter are conclusive according to the decision of this court in *Kidwell v. The Baltimore and Ohio Railroad Co.*, 11 Gratt. 676, the former are not. Whether either are conclusive or not, depends upon the contract, which may

443 make *either or both conclusive, according to the intention of the parties. Sometimes these monthly or periodical estimates are obviously designed as mere approximations, to enable the company to make safe and reasonable advancements to the contractor during the progress of the work. All that is required to the validity of such estimates (it has been held) is, that they were made *bona fide* and with the intention of acting according to the exigency of the contract. *Redfield on Railways*, 207; *Rouger v. Great Western Railway*, 37 Eng. L. & E. R. 85-46. If evidence at all in an action for the balance due on the completion of the work, they would only be *prima facie*; or, if conclusive, it could only be as an estoppel in connection with evidence of the assent of the parties. But ordinarily these monthly estimates are designed to be accurate and final, as far as they go; and sometimes the contract expressly provides that they shall be final and conclusive. *Redfield* 207; *Herrick v. Belknap's estate, &c.*, 27 Verm. R. 673; *Barker, &c. v. Same*, Id. 700. The contract in this case so provides. It prescribes the same mode of proceeding in regard to the final as in regard to the monthly estimates, and declares both, alike, final and conclusive. Indeed, it directs the final estimate to be made, not of the whole work, but of all work *not embraced in former estimates*. Thus showing that, in effect, the final estimate is the last monthly estimate, and all the monthly estimates, as far as they go, are final estimates. It is true that these monthly estimates are not final and conclusive as to matters not embraced therein, or not considered and estimated by the engineer in making them. In this respect they are unlike the final estimate, which was intended and expressly directed to embrace "all work not embraced in former estimates;" so that while a part of the work might have been omitted in former estimates because of its unfinished state or otherwise, it must of necessity be embraced in the final estimates. But as to matters embraced in the monthly estimates, they are as conclusive as the final estimate.

But it is argued that a *fraudulent* estimate is not conclusive, and that therefore the court would have erred in giving the 4th instruction asked for by the defendants. Without deciding whether fraud in making the estimates would avoid them at law or not, it is a sufficient answer to the argument to say that fraud will not be presumed, and that there was no evidence whatever of any such fraud before the jury. If the plaintiff had evidence of any such fraud, he should have offered to introduce it, and thus have plainly raised the question. Indeed, there is no charge of fraud in the declaration, and certainly the court did not refuse to give the 4th instruction, and give another in lieu thereof, on the ground of fraud, but on wholly different and inconsistent grounds. An award is final and conclusive in equity as well as at law; and yet it may be avoided, always in equity and sometimes at 444 law, by proof of fraud. Such proof, *when admissible, gets the award out of the way. So long as it remains in the way, it is final and conclusive. It is never *prima facie* evidence merely, of the matter it decides. If evidence at all, it must be

conclusive. And so of the monthly estimates in this case. If evidence at all they must be conclusive and not *prima facie*. They were offered and received as evidence without objection. No motion was made to exclude them. No evidence was offered to impeach them on the ground of fraud or otherwise. The court, therefore, erred in refusing to instruct the jury that they were conclusive, and instructing them that they were *prima facie* evidence only of the prices of the work, &c.

I am therefore of opinion that the judgments should be reversed.

445 *Mitchell, &c., v. Baratta & als.

Same v. Riviera & als.

April Term, 1867, Richmond.

1. **Ejectment—Statute—Parties.**—If a tenant is sued in ejectment for the land so held by him, his landlord is entitled under the act, Code, ch. 135, § 5, to be made a party defendant to defend the action.
2. **Trial by Court—Jury Waived—All Evidence on Record.**—Parties agree to dispense with a trial by jury and refer the whole matter of law and fact to the judgment of the court under the act, Code, ch. 162, § 9, p. 629; and all the evidence is stated on the record; though no exception is taken to the judgment of the court. **Held:**
 1. **Same—Same—Same—Effect.**—It sufficiently appearing that the evidence was intended to be a part of the record, it will be so considered, though there was no exception.
 2. **Same—Same—Certification of Evidence.**—In such a case the evidence and not the facts proved should be stated.
 3. **Same—Same—Rule as to Reversal.**—The opinion of the judge who decided the case, should not be reversed, unless it is plainly erroneous, especially if the evidence or a part of it be oral; and more especially if it be conflicting.

***Appellate Practice—All Evidence on Record—No Bill of Exceptions.**—See principal case cited in *Adkins v. Globe, etc., Co.*, 45 W. Va. 302, 33 S. E. Rep. 197; *Board v. Parsons*, 24 W. Va. 553.

†**Same—Certification of Evidence or Facts.**—As to whether the evidence or the facts proved should be set out in a bill of exception, where the jury has been waived and the whole matter of law and fact has been heard and determined by the court, there has been some conflict in Virginia. See a review of the Virginia decisions in *Western Union, etc., Co., v. Powell*, 94 Va. 275, 26 S. E. Rep. 823.

But, from Va. Code 1887, § 3484, it is to be implied that a case at law whether tried by jury or decided by court, may be heard in the appellate court when either the facts or the evidence are certified. *Western Union, etc., Co. v. Powell*, 94 Va. 276, 26 S. E. Rep. 823.

‡**Appellate Practice—Certificate of Evidence—Rule as to Reversal.**—As to how the appellate court will regard and give effect to a bill of exceptions in which the evidence (and not the facts proved) is certified, in a case tried by the court without a jury, and when the evidence is conflicting, is also a question on which there has been some conflict in Virginia. *Old Dom. Steamship Co. v. Burckhardt*, 31 Gratt. 664.

See *Hodge v. First Nat. Bank*, 22 Gratt. 51, and *foot-note*; *Backhouse v. Selden*, 29 Gratt. 581, and

3. **Ejectment—Writ of Right.**—If the plaintiff in ejectment would have been entitled at the time the Code of 1849 went into effect and at the time of the institution of his suit, to recover in a writ of right, he is entitled to recover in the present action of ejectment, under the provisions of the Code, ch. 135, §§ 2 and 38 and ch. 149, § 19.

4. **Same—Comparison of Titles.**—A case of comparison of titles, in ejectment.

These cases were actions of ejectment in the Circuit court of the city of Richmond, brought in 1854, by Richard D. Mitchell and Adolph D. Williams, one against 446 *Angelo Baratta, and the other against Nicholas Riviera, to recover two adjoining lots of ground fronting on the south side of Franklin street in the city of Richmond. The facts are the same in both cases, and they were tried together in the Circuit court, and heard together in this court. In June, 1855, the heirs of Henry Clarke applied to the court to be admitted as parties defendants in the actions; and in support of their motion exhibited a deed of lease from Henry Clarke to Nicholas Riviera for the ground embraced in both actions. This deed bore date the 14th day of January, 1852, and leased the ground to Riviera for eight years from the date. Baratta held under Riviera. The plaintiffs opposed the motion, on the ground that Henry Clarke only claimed title to the property as one of two trustees in a deed to secure the payment of certain debts therein mentioned; which deed bore date as far back as June 10th, 1819; and that the plaintiffs had made an agreement with Baratta and Riviera, that upon the plaintiffs establishing their right to the lots in controversy by a judgment or decree of any competent tribunal, then that Baratta and Riviera should occupy the same for five years. But the court admitted the parties as defendants.

At the May term 1856, there was a trial of the causes, when the jury found a verdict for the defendants, which was set aside by the court; and in November, 1857, there was another trial, when the jury could not agree, and were discharged. On the 24th of January, 1861, the following judgment was rendered. Came the parties by their attorneys, and waived their right to have a jury for the trial of the causes, and agreed that the whole matter of law and fact may be heard and determined, and judgment given by the court; and the matters arising upon the pleadings, the state-

foot-note, for a collection of authorities. But, by Va. Code 1887, § 3484, it is enacted that when the evidence (and not the facts) is certified, that it shall be heard as on demurrer to evidence.

In *State v. Hunter*, 37 W. Va. 745, 17 S. E. Rep. 308, the court said: "We cannot reverse the finding and judgment of the court below unless it plainly appear that the finding is erroneous. See *State v. Barnett*, 34 W. Va. 74-78, 11 S. E. Rep. 735; *Dudleys v. Dudleys*, 3 Leigh 436; *Mitchell v. Baratta*, 17 Gratt. 452; *State v. Workman*, 35 W. Va. 367-374, 14 S. E. Rep. 9." See generally, monographic *note* on "Bills of Exception" appended to *Stoneman v. Com.*, 25 Gratt. 887.

ment of evidence and the deeds, plat, books and writings therein mentioned, 447 agreed by *the counsel for the respective parties and by them submitted to the judgment of the court, being maturely weighed, it seems to the court here, that the defendants have a valid defense, sufficient in law to bar the plaintiffs from having or maintaining their present action against the defendants. Therefore it is considered by the court, &c. : judgment with costs.

There was no exception to the opinion and judgment of the court, but the case agreed sets out the whole testimony of both parties, including deeds, wills, plats, and various other papers, and the oral testimony of witnesses introduced by both parties; and it was agreed that Henning's Statutes and certain maps might be read and examined in the appellate court, without being copied into the record.

The plaintiffs, in support of the issues on their part, produced in evidence a patent to William Byrd, dated April 20th 1687, by which there was granted to him nine hundred and fifty-six acres of land on the James river in the county of Henrico, the boundaries of which are described as beginning at the mouth of Shockoe creek, and running down the river, &c. The next to the last line strikes Shockoe creek at a point designated; and the last line is as follows: "Thence down the said creek according to the meanderings thereof three hundred and sixty-one poles to the place it began." And they then traced their title by regular conveyances from William Byrd to themselves. One of those conveyances was dated the 28th of August, 1818, and conveyed the ground in controversy in this case, and there were subsequently several conveyances which conveyed the ground definitely, and described it as bounded on the west by Shockoe creek and land claimed by William Lownes.

The defendants introduced a deed, dated the 22d of November, 1808, from Nathaniel Anderson to James *Lownes, 448 by which Anderson conveyed to James Lownes all that parcel of land in the city of Richmond called the Falling Garden, "bounded on the east by Shockoe creek," and containing by estimation five acres; also a deed, dated August 1st, 1815, from James Lownes to William and Caleb Lownes, by which it was recited that by the conveyance from Byrd's trustees to James M. Doswell and the intermediate conveyances to James Lownes, the Falling Garden was described as bounded on the east by Shockoe creek, and that in the course of time and events, the channel of said creek was changed, so that a large space of ground formerly lying on the west margin of the creek is now situated on the eastern margin thereof; and the ground lying between the present boundary and what was claimed to be the former boundary of the creek, belonging to the Falling Garden, was conveyed to William and Caleb Lownes. These parties proceeded to divide

the ground between them, and execute deeds to each other; that of William to Caleb Lownes, bearing date the 7th of March, 1817, conveying to Caleb the lot of ground in controversy in these suits. On the 10th of June, 1819, Caleb Lownes conveyed the said lot to Reuben Burton and Henry Clarke, to secure certain debts therein specified. It is under this deed that the defendants claim.

The disputed questions of fact in the cause were, 1st, As to the true locality of Shockoe creek. There is no doubt that the creek had changed its bed, and probably more than once. It seems to be pretty certain that in 1801 or 1802 the creek ran east of the lots in controversy; and it is equally clear that in 1808, when Anderson made his deed to James Lownes, the creek ran west of these lots, and has continued ever since to do so. 2d, If the true locality of the creek could not be ascertained, then the question was, which of the parties had had possession. The evidence on these ques-

449 tions is voluminous, and cannot *be stated in any reasonable limits. The opinions of Judges Moncure and Rives contain so much of it as they deem material.

Upon the application of the plaintiffs, writs of error were awarded.

Daniel and Sands, for the appellants.
Lyons, for the appellees.

MONCURE, P. I think the Circuit court did not err in permitting the heirs of Henry Clarke to be made co-defendants in these suits, under the provision in the Code, chapter 135, § 5, which provides that "if a lessee be made a defendant at the suit of a party claiming against the title of his landlord, such landlord may appear and be made a defendant with or in the place of his lessee." This privilege is given by law as well for the benefit of the landlord as of the tenant. The tenant has a right to be defended by the landlord, and the landlord has a right to defend his title whenever it is assailed by an action of ejectment against his tenant. This right of the landlord cannot be surrendered or prevented by any act of the tenant. The tenant cannot dispute the landlord's title, but having received possession from him, is bound to restore it at the termination of the lease. The whole property in controversy in these two suits was leased for eight years by Henry Clarke to Nicholas Riviera, a defendant in one of the suits, by deed dated the 14th day of January, 1852. A few days after the execution of this deed, to wit: on the 28th day of the same month, an agreement was entered into by and between R. D. and W. Mitchell (the former and assignee of the latter of whom are the plaintiffs in these suits), of one part, and the said Nicholas Riviera and Angelo Baratta, a de- 450 fendant in the *other suit, of the other part, whereby it was, among other things, agreed that in the event the said Mitchells should establish their right to the said property, by a judgment or de-

cree of any competent tribunal, then the said Riviera and Baratta should occupy the said property for the term of five years from the date of said agreement, at the annual rent of \$300, which they were, in that event, to pay to the said Mitchells. By an arrangement between Riviera and Baratta, the property seems to have been divided equally between them and held in severalty, and these suits were brought severally against them for their several portions. Riviera having become the tenant of Clarke by the deed of the 14th of January, 1852, did not and could not, by the subsequent agreement and arrangement aforesaid, prejudice the right of the latter as landlord or lessor, and his heirs had therefore the same right to be made defendants in the suit against Baratta as in the suit against Riviera. Indeed, those heirs are the only substantial defendants in the suits, and must have been contemplated as such in the agreement of the 28th of January 1852. The Mitchells were to establish their right by a judgment or decree. But against whom? certainly not their own tenants, whom they could not expect to sue, except pro forma; but the adverse claimant, who was Clarke. As to there being no proof of the execution of the deed of lease, it was not denied by the plaintiffs, who resisted on other grounds the motion of the heirs of Clarke to be made defendants in the suits.

I am of opinion that the statement of the evidence, documentary and oral, copied into the records in these suits under the head of "cases agreed," ought to be regarded as part of the said records by this court, in reviewing the judgment of the Circuit court, although not made so by a bill of exception. The usual and regular
451 *mode of making such matter a part of the record is by bill of exceptions, but it is not always the only mode. It may be embodied in the judgment, either verbatim, or by being referred to and identified therein as part thereof. In these suits the judgments recite that "the matters arising upon the pleadings, the statement of evidence and the deeds, plat, books and writings therein mentioned, agreed by the counsel for the respective parties, and by them submitted to the judgment of the court, being maturely weighed, it seems to the court," &c.; and the statement under the head of "cases agreed," immediately follows the judgments in the certified records before us. That statement affords unmistakable evidence that it was intended by the parties to be a part of the records and to be so regarded in this court. It contains an express agreement that "Henning's Statutes," and "Hddings' map," and "Bates' map," and "the plat made by T. M. Ladd," should be exhibited and used in the appellate court without being copied into the record. It is not pretended that the statement copied into the record is not the true statement referred to in the judgments, and a certiorari has not been applied for to complete or verify the record. This statement, though called in the records "cases

agreed," is not a case agreed in lieu of a special verdict, but merely a statement of evidence agreed by the parties to be read by the court on the trial of the issue between them, they having waived their right to have a jury and agreed that the whole matter of law and fact might be heard and determined, and judgment given by the court.

I am further of opinion that the settled general rule of practice, which requires a certificate of facts instead of evidence to enable an appellate court to revise a judgment of an inferior court upon a motion to set aside the verdict of a jury and grant a new trial, does not apply to a case in which the parties waive the right to have a
452 *jury, and the judgment sought to be reviewed is that of the inferior court upon the whole matter of law and fact; in which case, as in every other case tried by a court upon the whole matter of law and fact, it is sufficient to make the evidence a part of the record, to enable an appellate court to revise the judgment.

My views upon this subject are fully set forth in the opinion of the dissenting judge in *Pryor v. Kuhn*, 12 Gratt. 615, and also in the opinion of Judge Daniel in *Wickham, &c. v. Lewis, Martin & Co.*, 13 Id. 427, in which I concurred. I therefore think it unnecessary for me to say anything more on the subject, especially as my brother Rives, who I am glad to find entertains the same views, has fully and clearly set them forth in his opinion, in which part of it I entirely concur. I will repeat, however, that I consider the rule laid down in the case of *Dudleys v. Dudleys*, 3 Leigh 436, as the true rule which ought to govern the appellate court in all such cases; and I do not think the judgment of the court below ought to be reversed upon the ground that it is contrary to evidence unless it plainly appears to be erroneous, especially if the evidence or a part of it be oral, and more especially if there be a material conflict in such evidence. "The credibility of witnesses," said Judge Cabell in that case, "depends on a variety of circumstances, which may be seen and known by those who are present at their viva voce examination, but which cannot be transmitted through their written testimony to an appellate court. On a mere question of credibility, therefore, when there is nothing in the record to throw light on the subject, this court will always presume, that the inferior court, which saw and heard the witnesses examined, has decided correctly." Id. 441.

I am also of opinion that if the plaintiffs in these suits would have been entitled in a writ of right, at the time
453 *the Code took effect and at the time of the institution of these suits, to recover the land in controversy, if the Code had not been enacted, they are entitled to recover it in these actions of ejectment under the provisions in the Code, ch. 135, §§ 2 and 38, and ch. 149, § 19. But the proceedings in any such action must of course be such

as are prescribed by the Code, whether the subject of controversy might have been recovered in an action of ejectment or could only have been recovered in a writ of right if the Code had not been enacted. While the right is saved the old remedy is abolished, with all the rules and principles which belonged to it, and a new one submitted to its place, with all the rules and principles which belong to the new remedy.

Having expressed these opinions upon the preliminary points arising in these cases, I now proceed to consider them upon the merits.

The plaintiffs claim the lot in controversy, by a long chain of title, under a grant to William Byrd, dated on the 20th of April, 1687, granting land bounded on the west by Shockoe creek, while the defendants seem to claim it under another grant to the same William Byrd, granting land bounded on the east by the same creek, though a copy of the latter grant is not in the record, nor do the defendants connect themselves therewith by any chain of title appearing in the record. The lot in controversy now lies on the east side of Shockoe creek, and the plaintiffs contend that it must be presumed to have been on that side at the time of the grant to Byrd under which they claim, or at least that it has been so long on that side, and there have been so many acts of the parties and others concerned fixing, or acquiescing in the present location of the stream, as to settle the rights of the riparian proprietors in the same manner as if it had always run as it now does. On the other hand, the

454 defendants *contend that the lot was formerly, and even during the present century, on the west side of the stream, which has since changed its course and thrown the lot on the east side; and that they and those under whom they claim have had actual possession of the lot, at least since the year 1815. The plaintiffs also contend that those under whom they claim had possession, actual or constructive, from about the same time, or perhaps a short time before, down to the year 1839, since which time they seem to admit that the defendants and Henry Clarke, under whom they claim, have been in possession.

Beyond all question, the stream has changed its course, and the lot in controversy has been, at different times, on each side of it—and that within the memory of living witnesses, living at least at the time of the trial of these actions. That fact is attested by witnesses on both sides, such at least I consider the effect, if not the express language, of testimony on both sides. Two witnesses on the side of the defendants, Philip Courtney and Thomas Diddep, expressly say so. Thomas Diddep says that "in 1801-'2, the lot in controversy was west of the creek." He seems to have been absent from the city from about that time until 1827, and therefore does not know when the lot ceased to be on the west side. The circumstances detailed by these two witnesses fully confirm this fact, and it

seems also to be confirmed by the testimony of a witness for the plaintiffs, the surveyor Ladd. If there were a conflict of evidence on this question, we would still have to regard the fact as proved, if the rule I have before stated be the true one for our government in such a case, at least unless there was something in the record to turn the scale and clearly show the contrary. But there is indeed no such conflict of evidence. That the creek has changed its bed is a historical fact, proved in the case by an act of the legislature passed in May, 1780,

455 *in which provision is made for improving the navigation of Shockoe creek, "either by turning the water into its old channel or by clearing the present channel." 10 Hen. St. p. 319. Indeed, besides the oral evidence, the documentary evidence on the side of the plaintiffs as well as that on the side of the defendants, refers to or recognizes the fact of such a change. In the bill of John Adams filed in 1818, he bounds the land which he claims "by Shockoe creek as it now runs," and by the line of "Shockoe creek, as the same may be established to have run." A similar description is contained in the deed from Christian to John Adams, dated in the same year; in the deed from Page administrator of Byrd to Carrington administrator of Adams, dated the 26th of June, 1833; and in other deeds bearing date about the same time, in some of which the land is described as lying "on the east or lower side of Shockoe creek according to the ancient reputed course thereof." It appears from some of these deeds that John Adams claimed and held, and those deriving title under him, no doubt, yet claim and hold, a lot now lying on the west side of the creek; upon the ground that it was once on the east, and therefore embraced in the original grant under which they claim. The strong probability is that this stream, which has been very liable to overflow its banks by freshets, has several times changed its bed since the date of the grant to Byrd, under which the plaintiffs claim; and it would now be impossible to ascertain where it was at that time, and whether the lot in controversy was then on the eastern or western side thereof. It cannot be said, therefore, that the plaintiffs, any more than the defendants, have shown a connected chain of title to the land in controversy from the original patentee down to the present time. The plaintiffs say the land now lies on the east of the creek, and must

therefore be presumed to have been 456 there at the *time of the original grant. But it was not there in 1801 or 1802, certainly, and perhaps down to a later period; and the presumption is at least as strong, if not stronger, that the stream was then in its natural bed, if it can be so called, as that it is now in such bed. Suppose, while the land was on the west side of the creek, James Lownes, or Anderson under whom he claimed, had built a house upon the land, as being a part of the Falling Garden to which he was entitled and

which was bounded on the east by the creek, could the Adamases have recovered it of him without at least showing that the creek formerly ran on the west side of the land and therefore probably ran on that side at the time of the original grant? I presume not. But surely it cannot affect the question of title to the land that a house was not built upon it as aforesaid, except so far as the building of such a house would be an act of possession which might by continuance ripen into a title.

The decision of these cases therefore, it seems to me, must depend, not upon a comparison of the relative chains of title of the parties, but upon a comparison of their claims arising from actual possession. Before we make this latter comparison it may be well to inquire when it was that the stream changed its bed from the eastern to the western side of the land in controversy? It is shown, I think, that the stream was on the eastern side, at least as late as 1801 or '2, but not as late as the 22d of November 1808, the date of the deed from Anderson to Lownes. The change took place between these two periods, but at what precise time does not appear. Probably it took place shortly before 1808, as Ladd states that as the period when he became acquainted with the property. He states facts which cannot well be reconciled with the location of the stream when he first knew it, on the west side of the land in controversy. The presumption therefore *is that he was mistaken as to time, and that his first acquaintance with the creek was before 1808. The witnesses, or some of them, seem to have been mistaken as to the cause of the change, which they refer to the building of the arch and bridge over Franklin street. That, no doubt, produced some change in the bed of the stream, but not so much as to throw it on the other side of the land, or even to any very material extent. The arch and bridge were constructed on Franklin street between the years 1814 and 1817, whereas the change in question seems to have been before 1808, as before mentioned. It is more probable that the witness Courtney referred the change to the true cause when he said, "the creek was turned westward by a bank thrown up in making Main street." When that bank was thrown up, or how long it was thereafter before the change took place, does not appear. He says the stone bridge on Main street was begun in 1795."

Now let us compare the claims of the parties arising from actual possession. And, first, what are those of the defendants? In 1815 the possession of the land seems to have been vacant. On the 1st of August of that year, James Lownes, to whom the Falling garden had been previously conveyed by Anderson, conveyed to his two sons William and Caleb Lownes, by deed which was duly recorded in the same month, land described as being a part of the Falling garden, lying between Shockoe creek as it then ran and the same creek as it ran at the period of the conveyance from Byrd's

trustees under which James Lownes claimed title, embracing the land in controversy. The two sons, William and Caleb, seem to have taken immediate possession under the deed from their father; as we find they had a survey, map and division of the land, allotting the land in controversy, designated as lot No. 2, to Caleb, and another lot 458 of precisely the same size *and form, designated as No. 1, lying between No. 2 and the creek as it then ran, to William; and deeds were interchanged by the brothers for their respective lots, which bear date on the 7th of March, 1817, and were shortly thereafter duly recorded in the Hustings court of Richmond. Each of the brothers shortly thereafter executed a deed of trust upon his lot. The one executed by Caleb Lownes bears date on the 10th day of June, 1819, was duly recorded in the same month, and is that under which the defendant Clarkes claim title as heirs of Henry Clarke, the surviving trustee in the deed. Wm. Lownes and those claiming under him, have ever since the division been in possession of the land allotted to him; and so far from its being claimed by those under whom the plaintiffs claim, they refer to it in their deeds as the boundary of the land claimed by them. From the time of the execution of the deed to Caleb Lownes down to the present time, he and those claiming under him seem to have had actual possession of the property, except between 1827, or there about, and 1839, during which interval it appears to have remained vacant, there being during that period no house upon it. Page testifies that in 1818 there was a house about the middle of the lot in controversy, then situated east of the creek, which had been formerly used by Caleb Lownes as a carpenter's shop, but in the said year was rented by him to two policemen as a stable. In a few years after 1818 the house went down, being exposed to freshets, and the people burnt it up. The place was almost a quagmire. The lot was used as a fish market while the house was there and afterwards. There were no fish benches, but some on the adjoining lot belonging to Colonel Carrington. There was no attempt by Lownes to disturb the fish market. Thomas Diddep testifies that there had been a hut on the property which was said to have been William Lownes', 459 *who rented it to Frazier. Witness was made clerk of the market in 1827. Frazier was a police officer and put a black man who attended the cage in the hut, which witness thinks was removed somewhere about the time he was made clerk of the market. The hut spoken of by Diddep, was no doubt the house spoken of by Page, and seems to have been occupied by Caleb Lownes and his tenants from 1818 to 1827. After that time we hear no more of the possession of Caleb Lownes, probably not only because the house had gone down, but because the incumbrance by deed of trust on the property exceeded its value. But it was notorious that Henry Clarke, the surviving trustee, claimed the subject under

the deed. Whether he was connected in any way with John Clarke, the principal creditor provided for by the deed, or was in any way interested in the debt secured to him, does not appear. George M. Carrington, personal representative and a devisee of Richard Adams and a witness for the plaintiffs, testifies that when the sale was made in 1839, under the deed of trust from Adams to secure the Bank of Virginia, Henry Clarke was present and made no objection to the sale, at which the witness was surprised, for he knew that Clarke claimed it under a deed of trust from Lownes. The next morning when the witness went to market about sunrise, he found the lot now in controversy enclosed, and was told that it had been done by Henry Clarke. The witness had intended to buy it from the Banks, but after Clarke enclosed it he gave up all idea of the purchase, not wishing to buy a law suit. The knowledge of Clarke's claim had not deterred witness from bidding for the property at the sale. Page proves that Clarke put up the enclosure in the night of the day on which the sale was made to the Bank. From that day, which was in July, 1839, until the present, Clarke and 460 *those claiming under him have remained in actual possession of the land.

Such is the evidence of actual possession on the part of the defendants and those under whom they claim. What evidence is there of actual possession on the part of the plaintiffs and those under whom they claim? There is, I believe, but one witness who testifies as to such possession, and that witness is Colonel Carrington. He testifies that he has known the land in controversy since 1813 and perhaps earlier, and that Richard Adams was then in possession of it. And he says, in another place, that "the deed from Lownes to his sons was a paper affair, and no possession was taken under it. The land in controversy was in the possession of the Adams's. They paid the taxes on it." In regard to the deed from Lownes to his sons and the possession taken under it, I have already had occasion to remark. In regard to the possession of the Adams's, of which the witness speaks, it is evident that he does not refer to any actual possession by them, but only to that constructive possession which arises from the legal title supposed by him to have been vested in the Adams's. When he first mentions the subject of possession he connects it with the suit brought against Richard Adams by Byrd's heirs, to which, by Chancellor Wythe's order, the city of Richmond was made a party, and to the compromise and deeds which grew out of that litigation. In this connection it may not be out of place to remark, that it seems to be at least very doubtful whether, until after the date of those deeds in 1833, the Adams's had any title to any land between Shockoe creek and the western line of the original city, which is said to have been 17th street; as by the act of May, 1742, for establishing the town of Richmond, all

that land was dedicated by William Byrd, "as a common for the use and benefit of the inhabitants of the said town 461 "forever." 5 Hen. St. 191. The deed from Byrd's trustees to Adams bears date after that act, to wit: on the 11th of December, 1761. This accounts for Chancellor Wythe's order. The only evidence tending to prove actual possession of the lot by the plaintiffs or those under whom they claim is the statement of Carrington, that "in 1815 or 1816 the fish market, which had formerly been on the east side of Shockoe creek, between Main and Cary streets, where a flat rock was situated, which was used as a fish bench, and where country carts used to encamp, was moved to the lot in controversy by the permission of Richard Adams, who wished to build on the ground between Main and Cary streets. The fish market consisted of nothing but one or more benches, none of which were placed on the lot in controversy, but near it, and the fish carts used the said lot and fish were washed in the creek near thereto. The fish market remained there until the extension of the market building, which was probably a year or two after a condemnation of land in 1827," for the purposes of the market. The witness does not say that Adams gave any other permission than merely to acquiesce in this use by the fishermen of what he believed to be his property, but it must be confessed to be at most very slight, if any evidence of actual possession. The fisherman would be apt to occupy without permission, with their fishcarts, any vacant land near the market, and the owner would not be apt to object, especially if the land was a quagmire. But it seems that during most of the time the lot was so used, it was in the actual occupation of Caleb Lownes and his tenants, who themselves must have permitted such use. The sale of the lot in 1839 under the deed of trust for the benefit of the Bank, cannot be considered as evidence of actual possession. It does not appear that it was even made on the lot; though that fact is not material.

Can there be any doubt in this comparison of the evidence 462 *of actual possession as to the side on which the scale preponderates? Can it be said that the judgment of the court below is plainly erroneous? I think not.

Several other topics were discussed in the argument which I intended to have noticed in my opinion; but it has already been extended much beyond my anticipation, and I therefore forbear to say more. Indeed, I can find no excuse for having said so much but in the great importance of the cases and the great ability with which they have been argued by the counsel on both sides.

I am of opinion to affirm the judgments.

RIVES, J. These cases are identical in character and principle. They involve the same questions and depend on the same evidence. They are certainly not agreed cases, as they are termed in the respective records. Instead of being presented upon

sentences not founded on verdicts. But these advantages are sensibly lessened by the manner in which this court deals with such appeals. Where conflicts exist or doubts arise upon the testimony, they are to be settled by deferring on these points to the judgment of the court that enjoyed the opportunities of testing the credibility and gauging the relative worth of the witnesses, thus insuring to the parties litigant in the last resort the original and unimpaired benefit of these guaranties of truth and justice in the oral examination of testimony. *Dudleys v. Dudleys*, 3 Leigh 436.

For these reasons, I do not object that the whole mass of testimony has been brought up in this record. There is an irregularity, it is true, in failing to except to the final judgment, and thus procuring from the judge a more formal authentication of the evidence; but inasmuch as some indulgence should be extended to this new proceeding ⁴⁶⁶ under the Code, and the objection is rather technical and does not affect the merits, it seems to me better to entertain jurisdiction in this imperfect form, rather than incur the delay of sending it back to repair this fault.

Having thus sought to settle this preliminary question and to establish a rule of practice for the future, I come now to the merits of this controversy. I shall treat it briefly. In my view, I am relieved of the task of scrutinizing the testimony with the view of reconciling its contradictions or conflicts, if any exist. If I can find no uncontested facts to conduct my mind to a stable and satisfactory conclusion, if the testimony is contradictory on points material to the issue, and I can reach no decision except through doubtful disquisitions upon the weight of opposing evidence, then I am bound by the principles which I have announced, to concur in the judgment below. In such event, I need assign no other reason but that I entertain doubts and encounter conflicts of testimony that are to be solved in favor of the judgment appealed from. But if the foundations of an opinion adverse to that judgment can be found in prominent and undisputed facts, such a sentence would in nowise conflict with the authority that I impute to the original judgment, although upon minor and unessential points there might be a contrariety of evidence.

This action is to be interpreted as substituted for the writ of right, as the law stood before the introduction of this new remedy. It supersedes both the writ of right and the old action of ejectment; but as the latter, it would be barred in this case by the lapse of time from Clarke's entry; it is only as the former that the remedy is now preserved to the appellants. The rule of trial is very different in the two cases; in the former, the plaintiff must recover upon the strength of his title alone, and the defendant can defend himself by ⁴⁶⁷ proving title in another; *but in the latter, a comparison of titles is had

and the issue made as to which party has the better right to the tenement.

It will be conceded that the plaintiffs have made out an unbroken and perfect chain of title from Byrd's patent in 1685 down to McMurdo's deed of July the 16th, 1837, to the Bank of Virginia, under whom they claim. The question is one as to the western boundary of this grant. In Byrd's patent it is declared to be "Shockoe creek, according to the meanderings thereof," and in the deed of Byrd's trustees to Richard Adams of 11th November, 1761, the land conveyed is similarly described as "a parcel of land on the lower side of Shockoe creek, containing by estimation 831 acres." These deeds carried with them from this ancient period a constructive legal seizin, with which there has been no pretext of interference, as far as this record discloses, until the deed of 22d November, 1808, to James Lownes, from Nathaniel Anderson, under which the appellees claim. Anderson is said to have derived title from the same source with the appellants, namely, from Byrd's trustees; although, strange to say, the deed from the latter is not produced. Perhaps, it was not material, for it doubtless called for the same eastern boundary with Anderson's deed to Lownes, which described the Falling garden as "bounded on the east by Shockoe creek." These respective adversary and coterminous claimants are, therefore, disputing about the location of this stream. In this state of the case, the most conclusive evidence as against the appellees would be to fix this boundary in 1808 (when their claim originated), by the recognition and acts of James Lownes.

It would be unreasonable and impracticable to require the appellants to locate this vagrant stream at the date of Byrd's patent, or of the conveyance of his trustees in ⁴⁶⁸ *1761, or at any period anterior to the memory of living witnesses. Nor does it matter, where it shall have been proven to be at the end of the last or beginning of this century, previous to the origin of the claim asserted by the appellees. But even if this were not so, it may be admitted that the course of this stream was, prior to this century, east of the lot in controversy; yet, unless it can be further shown that it did not acquire its bed of 1808, by gradual and imperceptible accretions on its eastern side, but by a sudden change of its course, these riparian claims are fixed by the stream itself without reference to the gradual and imperceptible encroachments, year by year, in a long course of time, on the one side, with corresponding gains to the other. 2 Bla. Com. 262; Angel on Water Courses, p. 43. To make out the case of the appellees in this view of it, the aged witnesses should not only have proven this fluctuating boundary to have been about the year 1800, east of this tenement, but that in the eight subsequent years this stream gained its bed, as recognized by James Lownes, at that time, by sudden and violent irruptions, and not by those imperceptible changes which are adjudged to enure to the owner whose

borders are thus enlarged. I do not, therefore, think there is anything in the testimony as to the ancient wanderings of this stream in conflict with the rights of the appellants to be ascertained at the date of James Lownes' deed of 22d November, 1808. In the comparison of rights which this action contemplates, that period is the chosen one for adjusting the boundary between these parties. No sooner had James Lownes acquired the Falling garden, than he proceeded with great dispatch to sell and convey the lots into which he had divided it. A map was made, by which they were sold. His first deed was dated on the day next after the date of his own deed from Anderson; and his deed to Prosser 469 and Moncure *for the lot lying on Shockoe creek bears date the 1st March, 1809.

These were the deliberate acts of James Lownes, the ancestor, under whom the vendors of the appellees held; they have been verified by a survey in this cause, and established beyond cavil his eastern boundary to be on the creek as it now is. Whatever, therefore, may have been the course of this stream at an earlier period, James Lownes' deeds in 1808-'9 show it then to have been co-incidental with its present bed, and west of the tenement in controversy. This is documentary evidence of no uncertain character; but of the highest authority for the settlement of this dispute. There is no fact or particle of testimony in conflict with it; and it seems to me impossible, in view of these conveyances and the actual survey in accordance with them, to contradict their tenor or evade their import by placing farther east the course of this creek as called for by James Lownes' deed of 22d November, 1808.

After disposing of the last of these lost to Thomas Rutherford on the 28th of July, 1812, we hear nothing of James Lownes' claim east of Shockoe creek until August, 1815. In the meantime, doubtless, it began to be bruited that this creek had changed its course so as to give room for speculation in floating claims on the eastern side. James Lownes did not then think proper to prefer a claim for himself; perhaps the matter was then too susceptible of adverse proof; but he devolves the speculation, whatever it might chance to be, at a more remote period, upon his sons William and Caleb. His deed, therefore, recites, cunningly enough, that "the said boundary in the course of time and events, and the channel of Shockoe creek, had been changed by the course of its waters, whereby a large space of ground formerly lying on the west margin of 470 the bank of said *creek, is now situated on the eastern margin thereof," and accordingly undertakes to convey "all that piece or parcel, pieces or parcels of ground, which are contained within the space from the western boundary of Shockoe creek as it now runs up to the western margin or boundary of Shockoe creek as it formerly stood," &c. At this date, Richard Adams was in the actual possession of this

land, recognized as its owner, and as such impleaded by Byrd's heirs and the City of Richmond in a suit which was terminated by compromise in the year 1818. This deed of Lownes to his sons, then, was wholly inoperative in consequence of this adversary possession of Adams, and directly contravened the policy of the then existing law against pretence titles. It was void in its inception, and of no avail against parties seized both in law and deed. Let it, therefore, be admitted that the sons made plats of this land and partitioned it by deeds between themselves; nay, further, that Caleb Lownes erected and leased a hut on this ground in 1818, and received the rents therefrom; nevertheless, so long as such acts were without color of title, as I have endeavored to show them to be, they were but the acts of trespassers or squatters, and could derive no validity from the efflux of time or any implication of acquiescence on the part of the rightful owner. They still remained wrongs, of which, it could only be said, the owner was perhaps ignorant, or if not, chose from some motive or other to submit to them.

Whose right, then, to this tenement is the better—that of the defendants, whose title deed of bargain and sale had no possession to convey to the use and was therefore void; or that of the demandants, who had actual as well as constructive seizin? The answer to the questions thus put is too apparent and inevitable to be stated. This speculation was not a fruitless one for William Lownes; his claim seems to have 471 been submitted *to, as the deed of Christian, commissioner, &c., called for his line; and it ripened into an undisputed title under Bolling's trust deed.

It will be seen that the reasonings which have governed my view of these causes, have been limited to a very few salient and decisive facts, of which there is neither doubt nor dispute. I have not, therefore, treated many questions raised by counsel, because I did not deem their solution necessary to this decision.

While the disposition of these cases on their merits supersedes a decision upon the bill of exceptions to the admission of Clarke's heirs as parties defendant, it may be well to say that I see no error therein.

I am, therefore, for reversing the judgments in these cases, and entering them for the appellants.

JOYNES, J., dissented from the other judges upon the construction of the statute; he concurred with Moncure, P., on the merits.

Judgment affirmed.

472

Peshine v. Shepperson.

April Term, 1867, Richmond.

[94 Am. Dec. 468.]

1. Pleading and Practice—General Issue—Special Pleas. —A cause is tried upon the general issue, and there is a verdict and judgment for the plaintiffs, whilst

there is a demurrer to one special plea, and an objection to the admission of another, not acted on by the court. If these pleas present no bar to the action, the failure of the court to pass upon them affords no ground for reversing the judgment.

2. **Depositions—No Exception—Admission on Another Trial.**—If depositions are read on a trial without objection, or if objection is made, without an exception taken to their admission, upon another trial of the cause, they will not be excluded for the failure to prove notice to take them, unless the party objecting has given notice to the other party of his intention to object to them in time to enable the party offering them to take them again and the witnesses are alive at the time of such notice.

3. **Sale of Goods by Agent—No Authority—Liability of Purchaser.**—A salesman of a merchant agrees with a creditor of his principal to sell him goods in payment of his debt; and at night, without the knowledge of the principal and against his wishes, known to both of them, the goods are selected and sent off by the purchaser. The purchaser acquires no title to the goods by his purchase, and is liable to the merchant for the value of the goods, and for any damages he has sustained by the taking and carrying away the goods.

4. **Same—Same—Same.**—In such a case, if the salesman, at the same time packs up and sends off other goods, to pay other creditors of his principal, the purchaser is not liable for the value of these goods, unless he aided, assisted and concurred in their being so taken and carried away for the other creditors; and the burthen is on the plaintiff to prove this.

5. **Same—Same—Damages—Measure of.**—In such case, no special damage being laid, the merchant is entitled to recover for all such damages as are the natural, proximate *and necessary result of the act of the purchaser; and injury to the credit and business standing of the merchant, and the injury to his business, resulting

therefrom, are properly recoverable as the natural, proximate and necessary consequences of the acts of the purchaser.

6. **Same—Same—Same—Same.**—In such case to ascertain such damages, the nature and extent of the merchant's business, and whether profitable or unprofitable, are proper subjects of inquiry.

7. **Same—Same—Same—Probable Profits.**—In such a case the probable profits of the business are not the measure of damages; but they may be proved by general evidence, as well as the extent and character of the business, as affording the best guide to the jury of which the nature of the case admits.

8. **Aggravation—Provable under General Allegation.**—When the act complained of is accompanied by circumstances of aggravation, they may be proved under the general allegation of *alia enormia*, without further specification, when they do not afford a substantial ground of action.

9. **Instructions—Two Distinct Matters Embraced.**—If one instruction asked embraces two distinct matters, one of which should not, and the other should be given, the court should not reject the whole, but should separate them, and refuse to give the one and give the other.

10. **Same—Partially Incorrect—Action of Court.**—Though an instruction as asked is not wholly correct, yet if the general refusal of it may mislead the jury, the court should accompany the refusal with an explanation to the jury, or should give them an instruction stating the correct proposition.

11. **Oath of Insolvency by Plaintiff—Effect on Suit.**—After a suit is instituted the plaintiff, being in custody at the suit of a creditor, confesses judgment and takes the benefit of the act for the relief of insolvent debtors, surrendering his interest in the suit he had brought. This is no bar to the action; but it may still be prosecuted in his name.

This was an action of trespass brought in 1845, in the Hustings court of the city of

***Depositions—No Exception—Admission on Another Trial.**—In *Electric, etc., Co. v. Consolidated Light Co.*, 42 W. Va. 584, 26 S. E. Rep. 188, it is held: "One assignment of error is that the court allowed the plaintiff to read a deposition of a witness whose deposition had already been taken, the objection being that no leave of court was given to retake the deposition; but this objection ought to have been made the ground of an exception before the trial, and not first made when offered at the trial. This would work a surprise. *Dickinson's Ex'rs v. Clarke*, 5 W. Va. 280; *Jones v. Lucas*, 1 Rand. (Va.) 268; *Foster v. Sutton*, 4 Hen. & M. 401; *Long v. Perine*, 23 S. E. 611, 41 W. Va. 314; *Peshine v. Shepperson*, 17 Gratt. 472; *Bart. Ch. Prac.* 758; *Bart. Law Prac.* 490; *Doane v. Glenn*, 21 Wall. 35."

†**Damages—Measure of—What Considered.**—In *Gerst v. Jones*, 32 Gratt. 526, and *note*, it is said: "It is well settled, that the plaintiff is entitled, as a general rule, to recover such damages as are a natural and proximate result of the wrongful act of the defendant. *Peshine v. Shepperson*, 17 Gratt. 472, 485."

The principal case is also cited and followed in *Burruss v. Hines*, 94 Va. 416, 26 S. E. Rep. 875; *Fishburne v. Engledove*, 91 Va. 558, 22 S. E. Rep. 354. That the question of the amount of damages is one for the jury, see *foot-note* to *Daingerfield v. Thompson*, 33 Gratt. 136, where the principal case is cited with a large number of others.

‡**Aggravation—Provable under General Allegation.**—In *Fishburne v. Engledove*, 91 Va. 558, 22 S. E. Rep. 354, it is said: "There are no allegations in the declaration of such facts as would show that the alleged trespass was accompanied by circumstances of aggravation, nor is there the general allegation of *alia enormia*, under which circumstances of aggravation might be proved as they may when they do not afford a substantial ground of action, but are mere incidents of the trespass complained of. *Faulkner v. Anderson*, *Glimer*, at page 226-7; *Peshine v. Shepperson*, 17 Gratt. 472-3, 489."

§**Instructions—Partially Incorrect—Action of Court.**—For the proposition that, though an instruction as asked is not wholly correct, yet if the general refusal of it may mislead the jury, the court should accompany the refusal with an explanation to the jury, or should give them an instruction stating the correct proposition, the principal case is cited as authority in the following cases: *Johnson v. R. & D. R. Co.*, 86 Va. 979, 11 S. E. Rep. 829; *Alexandria Sav. Inst. v. McVeigh*, 84 Va. 46, 8 S. E. Rep. 885; *Rosenbaums v. Weeden*, 18 Gratt. 800; *Ward v. Churn*, 18 Gratt. 816; *Womack v. Circle*, 29 Gratt. 207. See, in accord, *B. & O. R. Co. v. Polly, Woods & Co.*, 14 Gratt. 447. See monographic *note* on "Instructions" appended to *Womack v. Circle*, 29 Gratt. 207.

Richmond, by Elisha Shepperson, a merchant of Richmond, against John S. Peshine and Adam B. Gouldthwait, merchants doing business in Newark, New Jersey.

The declaration charges that the defendants, on the 26th day of May, 1845, 474 with force and arms, at the city *of Richmond, &c., without the knowledge and against the consent of the plaintiff, entered the store of the plaintiff, and then and there and from the said store took and carried away a large quantity of the goods and chattels of the plaintiff, to wit, &c., all of great value, viz: of the value of \$5,000; and other wrongs to the plaintiff, then and there did; to the damage of the plaintiff \$10,000.

The defendants appeared and demurred to the declaration, in which the plaintiff joined; and the demurrer was overruled by the court. The defendants also filed a special plea—that since the institution of this suit, the plaintiff had taken the benefit of the act for the relief of insolvent debtors, at the suit of several of his creditors named; and that afterwards executions of fieri facias had been issued on the judgments obtained by these creditors, and that divers of the goods, &c., in the declaration mentioned, had been taken in execution by virtue of these writs, by and for the creditors aforesaid; and that by virtue of the act aforesaid and the oath so taken, the interest of the plaintiff in the subject in controversy in this suit, was vested in the sergeant of the city, for the benefit of the said creditors; and as to the residue of the said goods in the declaration mentioned the defendants were not guilty. To this plea the plaintiff demurred, and the defendants joined in the demurrer. This demurrer, though argued after the case went to the Circuit court, was not passed upon by the court. They also, at the same time, filed the plea of “not guilty;” on which issue was joined.

The cause was continued in the Hustings court until July, 1848, when the death of the defendant Gouldthwait was suggested, and the defendant Peshine tendered to the court another special plea—that the plaintiff had been taken into custody by virtue of the writs of capias ad respondendum, at the suit of certain of his creditors, named,

and being so in custody had confessed 475 judgments, and *taken the benefit of the act for the relief of insolvent debtors, and had surrendered in his schedule his interest in the subject matter of this suit. That by force of the said act and the discharge of the plaintiff all his estate and interest in the said cause of action, as well as all his other estate, was vested in the sheriff of Henrico, in trust for the purposes declared in the act.

The reception of this plea was objected to by the plaintiff; and the court, without passing upon it, upon the motion of the defendant, removed the cause to the Circuit superior court of law and chancery for the county of Henrico and city of Richmond.

In December, 1851, the cause came on for trial, but the jury could not agree upon a verdict, and were discharged; and the cause was continued from term to term, until May, 1859. At this term of the court, the defendant having been ruled into a trial, before the jury was sworn he moved the court to exclude certain depositions, which had been taken by the plaintiff, and which he proposed to read to the jury. These were the depositions of persons living in the state of New Jersey; and the defendant moved to exclude them on the ground that no commission had been issued for taking them, and no notice had been given to the defendant. In opposition to the motion the plaintiff introduced his affidavit made on the 18th of March, 1846, before the clerk of the Hustings court, where the cause was then pending, that these parties were material witnesses for him, and that they were not residents of the state of Virginia. He also introduced a commission by the said clerk, bearing the same date, to any two justices of the peace for the city of Newark, in the state of New Jersey, authorizing them to take the depositions; but the paper, upon inspection, did not appear to have been attached at any time to the depositions.

Two persons signing themselves as 476 justices of the peace for Newark, *New

Jersey, certified the taking the depositions in Newark, in pursuance of a commission issued from the Court of Hustings of the city of Richmond; and it was proved by one of the counsel of the plaintiff, that the said depositions were read on the former trial of the cause, and no objection appears upon the record to have been made to the reading of them, but it was not proved or stated that they were then read without objection by the defendant, except so far as appears by the absence of any exception on the record. The court thereupon overruled the motion, and decided that the said depositions should be read to the jury; and the defendant excepted.

On the trial an immense mass of testimony was introduced, all of which, either in the form of depositions, or if oral, reduced to writing, with the papers and accounts referred to by the witnesses, is set out at length. It is only necessary to state enough to show the relevancy of the instructions asked.

The defendant Peshine was a merchant of Newark, in the state of New Jersey, and dealt in boots, shoes, trunks, &c. Prior to July, 1844, he had formed a partnership with Enos M. Leonard, of the same city, to do a similar business in the city of Richmond, to be conducted by Leonard. In July, 1844, they determined to wind up their business; the partnership was dissolved, the stock being the property of Peshine, and Leonard was left in Richmond to wind up the business as the agent of Peshine. About the 1st of September Leonard sold to Shepperson a part of this stock of goods; and Leonard was employed by Shepperson to attend to that branch of his business; he having previously carried on a hat store,

and intending to combine the two. During the year Shepperson seems to have paid in part for the stock he purchased, and in January, 1845, he executed to Peshine eight notes, amounting together to \$2,366.53, 477 the first *payable in four months from the 1st of February, 1845, and the others being payable a month apart, making the last at eleven months.

In September, 1844, Leonard was sent north by Shepperson to purchase goods for him, and Leonard seems to have purchased leather goods from several persons in Newark and the neighborhood, who were acquaintances of his, but strangers to Shepperson, upon their confidence in him.

Shepperson failed in May, 1845, and Peshine, and Gouldthwait came to Richmond with authority from his Newark creditors, to arrange their debts with him. Not being able to agree upon an arrangement for the creditors, Leonard seems to have proposed to them to sell them goods to the amount of their debts; and they having been advised by counsel, as they said, that this might be done, on the night of the 26th of May, 1845, after Shepperson had left the store, they were admitted by Leonard, and they proceeded to select and pack the goods, being boots, shoes, &c., and early in the morning they were sent away and deposited with a mercantile house in the city. At the same time other goods were selected, and packed, and sent away, in satisfaction of the debts due to some other parties from whom Leonard had purchased goods for Shepperson. The defendant denies that he and Gouldthwait had anything to do with this part of the transaction. All the goods were sent away before Shepperson arrived at the store in the morning, and Leonard went to meet him and informed him what he had done, and gave him the account of sales which he had made off. This whole proceeding was without the knowledge or consent of Shepperson, and was immediately repudiated by him.

When all the testimony had been introduced, the plaintiff moved the court to give three instructions to the jury, 478 *and the defendant moved for two.

The plaintiff's first instruction was as follows:

If, from the evidence, the jury shall believe that Leonard, who was the clerk and salesman of the plaintiff, in the usual course of his business, without the knowledge and against the consent of the plaintiff, introduced the defendant to the store of the plaintiff in the night, after the usual hours of business had passed, and the plaintiff had left his store for the night, believing that the business of the day was over; that the purpose so to introduce him was concealed from the plaintiff by Leonard and the defendant; and that during the said night, between the hours of 9 o'clock P. M. and 4 A. M., the defendant, with the assent of Leonard, took the goods and carried them away, in violation of the known wishes of the plaintiff—then the defendant acquired no title to the said goods by such taking

and carrying away, and is liable to the plaintiff in this action for the value of the said goods, and such damage as the jury may believe the plaintiff to be entitled to for such taking and carrying away of his goods, notwithstanding they may believe that the defendant was a creditor of the plaintiff, and when he took the said goods professed to purchase them in satisfaction of his debt.

The other instructions asked by the plaintiff need not be stated. The instructions asked by the defendant are as follows:

1. If the jury shall believe from the evidence that the goods in the declaration mentioned were, at the time it is alleged they were taken by the defendants, in the possession of E. M. Leonard as the agent of the plaintiff; that the said Leonard had at the time a general authority as such agent to sell said goods by wholesale or retail to such persons as were responsible for the amount sold; that such general authority had not been restricted

479 *by any prohibition to sell said goods to the defendants or either of them; that then as to such of said goods as were so sold to the said defendants respectively and delivered by said Leonard to said defendants, the plaintiff cannot recover in this action, and the jury ought to find for the defendant.

And as to the residue of the said goods, if the jury shall believe from the evidence, that they were taken and packed up by Leonard, and sent away by the said Leonard for other creditors of said Shepperson, that as to said residue of said goods the defendants are not liable, and the jury, as to said residue, ought to find for the defendants, unless the plaintiff proves to the satisfaction of the jury that the defendants aided, assisted and concurred in their being so taken and carried away for the other creditors.

2. The plaintiff cannot recover damages in this action for injury to his credit or business standing, or for loss of the profits which might have been made in his business, even though the jury should think that such injury or loss resulted from the act of the defendant.

The court gave the instructions asked for by the plaintiff, and refused to give those asked for by the defendant; and the defendant excepted. There was a verdict for the plaintiff for \$10,000 damages, upon which the court rendered a judgment; and thereupon the defendant obtained a writ of error to this court.

Crump, for the appellant, and Lyons, Daniel and Howard & Sands, for the appellees, submitted the case.

JOYNES, J. This is an action of trespass brought by Shepperson, a merchant doing business in the city of Richmond, against Peshine and Gouldthwait, merchants of the city of Newark, New 480 Jersey, which abated, before *the trial as to Gouldthwait, by his death. The declaration alleged that the defendants on, &c., "with force and

arms," and without the knowledge and against the consent of the plaintiff, entered the store of the plaintiff, and then and there from the said store took and carried away a large quantity of the goods and chattels of the said plaintiff, to wit, &c., of the value, &c., and other wrongs to the said plaintiff, then and there did, to the damage of the plaintiff \$10,000. To this declaration there was a demurrer, which was overruled. There was a trial on the plea of not guilty in 1857, when the jury did not agree, and a subsequent trial in 1859, upon which there was a verdict and judgment for the plaintiff for \$10,000.

The first error assigned is, that the case was tried while there were pending and undisposed of a demurrer to a special plea filed by the defendant, and a motion to exclude another special plea subsequently tendered by him.

The substantial matter of these pleas are the same. They set up in bar of the further prosecution of the suit, the fact that the plaintiff had, after the institution of the suit, taken the oath of insolvency, by virtue of which his interest in the subject matter of controversy had become vested, as alleged in the first plea, in the sergeant of Richmond, and as alleged in the second, in the sheriff of Henrico. But these pleas presented no bar to the action. The action was properly brought in the name of the plaintiff before he took the oath of insolvency, and it might properly proceed in his name afterwards, whatever rights in respect to the subject matter vested, by the insolvent proceedings, in the sergeant of Richmond or sheriff of Henrico. The irregularity in failing to dispose of the questions raised upon these pleas, affords, therefore, no ground to reverse the judgment. *Creel v. Brown*, 1 Rob. R. 255, and cases cited.

481 *The next error assigned is the refusal of the court to exclude certain depositions. When the case was called for trial in 1859, the counsel for the defendant moved the court to exclude these depositions, on the ground that they had been taken without a commission (being taken out of the state) and without notice. A commission was produced, which had not been annexed to the depositions, but no notice was proved. One of the counsel for the plaintiff made affidavit that these depositions had been read on the former trial, but it was not proved or stated whether they were read without objection, except so far as appeared from the fact that no exception was then taken on the ground of their admission.

If the defendant allowed these depositions to be read on the former trial without objection, as may be inferred to be the fact, he must be considered as waiving objection to them. If the objection was made and overruled, the failure of the defendant to except to the opinion of the court was equally a waiver of the objection. If the defendant desired to renew the objection afterwards, which he might do unless the death of the witnesses or some other reason

made it unjust to the plaintiff to allow it, he should have done so in convenient time, and made it known to the plaintiff, so as to enable him to supply the proof of notice, if he could, or to take the depositions again. To spring the objection upon the eve of a second trial, eight years after it has been thus distinctly waived, and when nothing had been done in the meantime to indicate that it was to be relied on, was a surprise upon the plaintiff, and tended to defeat the ends of justice. The object evidently was to delay the trial, and not to protect the just rights of the defendant. Under these circumstances, the Circuit court did not err in overruling the motion to exclude the depositions.

Upon the final trial sundry instructions were given to the jury, on motion of the plaintiff, and excepted to by the defendant. These require no particular notice; for while they are assigned as error, no objection is specified, and the assignment of error is evidently not relied on. And I do not think that any valid objection can be made to either of these instructions.

The defendant also excepted to the refusal of the court to give two instructions moved by him. The first of these instructions consists of two parts, which must be considered separately, as they relate to distinct subjects. The first part relates to the goods which were obtained by Peshine and Gouldthwait from Leonard by purchase in payment of their own debts. In respect to these goods, the court was asked to say to the jury that the defendant was not liable if the goods were in the possession of Leonard, with authority from the plaintiff to sell them, not restricted by a prohibition to sell to the defendant and Gouldthwait, and if they bought them from Leonard.

But this instruction was not appropriate to the evidence before the jury, and was calculated to mislead them, by confining their attention to the mere form of the transaction, without regard to its real character and substance. For the evidence tended to prove that the defendant and Gouldthwait entered the store of the plaintiff by an arrangement with Leonard, his clerk, after it had been closed for the night, and without the knowledge of the plaintiff, and that during the night they made the purchase from Leonard in payment of their debts, after the failure of their efforts to effect a settlement with the plaintiff. The jury might well have believed that this whole transaction was a fraud upon the plaintiff, and that whatever authority Leonard had to make sales of the plaintiff's goods in general and in the course of trade, he had none to make this particular sale, and that the defendant knew it.

483 *The other part of this instruction relates to the goods that were designed for other creditors of the plaintiff, and it asked the court to say that if these goods were packed up and sent off by Leonard, the defendants are not liable on account of

them, unless the plaintiff proves to the satisfaction of the jury that they aided, assisted and concurred in their being so taken and sent away.

[This instruction speaks of the "defendants," when there was but one defendant then before the court, but that does not affect the principle.]

As we have heard no argument in this case, we do not know the ground upon which the propriety of this part of the instruction was objected to. It may be that the court treated the first instruction as an entirety, and refused to give it in consequence of the defect in the first part of it. But the two branches of the instruction are really independent of each other. They relate to different subject matters. The propositions embraced in them are as distinct as if they had been propounded as distinct instructions, and the fact that they are grouped together as one instruction cannot prevent the court from regarding them in their true character. If, therefore, this latter branch of the instruction stated the law correctly in relation to the subject to which it applied, it should have been severed from the other part and given to the jury.

At first this part of the instruction seemed to me to require the plaintiff to prove the express concurrence and co-operation of the defendant with Leonard in respect to these particular goods, and to imply that, in the absence of such proof, his presence and general complicity in the transactions of that night would not have authorized the jury to hold him responsible. But upon further consideration, I do not think this is the true meaning of the instruction. It does not indicate what sort of

evidence is necessary to prove that the defendant *aided, assisted and concurred in the act of Leonard; it only affirms that the defendant is not liable for that act, unless it is shown in some way that he aided, assisted or concurred in doing it. I can see no objection to this proposition. And as the burden was on the plaintiff to make out his case, it was for him, of course, to prove such aid, assistance and concurrence by the defendant as was necessary to make him responsible for the act of Leonard.

The court erred, therefore, in refusing to give the second part of the first instruction.

The second instruction asked for by the defendant declares that the plaintiff cannot recover in this action for injury to his credit or business standing, or the loss of profits which might have been made in his business, even though the jury should think that such injury or loss resulted from the acts of the defendant.

It does not appear how far the counsel for the defendant thought the jury could properly go in awarding damages in this case. It may be inferred from this proposed instruction that they insisted on restricting the damages to the value of the goods taken by the defendant, or by Leonard with his concurrence. Such is the rule of damages

in an action of trespass to property committed without circumstances of aggravation, as for example in trespass de bonis asportatis, for goods taken under a bona fide claim of title. *Sedgwick on Dam.* 454; *Knight v. Egerton*, 7 Exch. R. 407. Where that rule applies, no right of the plaintiff is violated except the right of property, and, therefore, the value of the property measures the full extent of the injury.

When the trespass is committed without fraud, malice, oppression or other special aggravation, the object of the law, it is generally said, is to give compensation for injury suffered, and damages are restricted to that object. *Where the loss is merely pecuniary, and admits of definite estimate, it is proper enough to speak of compensation, which implies the notion of equivalents. But that word becomes inappropriate, where the injury is not merely pecuniary, and does not admit of definite estimate. The use of this word has, I apprehend, been productive of no little confusion in discussions relating to this branch of the law. It would be more appropriate to say that the object of the law is to give amends or reparation. The injury done depends upon the rights that are violated, and the extent of the violation, and the amends or reparation in damages must be measured accordingly. This view of the subject, however, is rather curious than important in the present case.

Whatever be the true theory of damages in such a case, it is well settled that the plaintiff is entitled to recover all such damages as are the natural and proximate result of the wrongful act complained of. But where special damages, as in the present case, are not claimed, he can only recover such damages as are not only the natural and proximate result, but also the necessary result of the act complained of. The law implies from the statement of the injury, that it produced all such consequences as naturally and necessarily flow from such an act. And the real object of the evidence is not to prove the existence of the damage but to ascertain its extent.

The question, then, is whether such damages as are contemplated in this instruction, fall within the description of natural and necessary consequences of the acts complained of. That such acts are well calculated to injure the credit and business standing of a merchant, and that such will always be their effect, to a greater or less extent, seems too obvious to require proof by argument or illustration. They involve an imputation, in the harshest form, upon his credit and also upon his integrity.

And *to take away a large part of a merchant's stock of goods, if it does not break up and destroy his business, must, to a greater or less extent, injure it, by impairing the means of carrying it on and diminishing its profits.

The damages resulting from injury to the credit and business standing of the plaintiff, and from the injury to his business,

were, therefore, properly recoverable, as natural, proximate and necessary consequences of the acts of the defendant. In *Downell v. Jones*, 13 Alab. R. 490, such damages were held to be recoverable as general damages for maliciously suing out an attachment against a merchant, which was levied on his stock of goods.

In order to ascertain the damages resulting from the interruption or embarrassment of the plaintiff's business, the nature and extent of the business, and whether profitable or unprofitable, are proper subjects of inquiry. Without information on these points, the jury would be without any guide to their discretion in the assessment of damages. But in such a case the probable profits of the business are not the measure of damages. They are necessarily dependent on contingencies, and, therefore, as a general rule, not recoverable as damages. 8 Gratt. 16; 7 Cush. R. 516; 13 How. U. S. R. 307.

But while the probable profits of the business do not furnish the measure of damages, they may be proved to the jury by general evidence, as well as the extent and character of the business, as affording the best guide to the jury of which the nature of the case admits, in the exercise of their judgment in the assessment of damages. Such evidence tends to show the character and degree of the injury for which amends is to be made. *Ingram v. Lawson*, 6 Bing. N. Ca. 212 (37 Eng. C. L. R. 350); *Downell v. Jones*, 17 Alab. R. 689; *Wade v. Leroy*, 20 How. U. S. R. 34; *Nebraska City v. 487 Campbell*, *2 Black's U. S. R. 590; *Brown v. Smith*, 12 Cush. R. 366.

When the act complained of is accompanied by circumstances of aggravation, they may be proved under the general allegation of *alia enormia*, without further specification, when they do not afford a substantial ground of action. They give character and quality to the act complained of, and show the degree of the injury, and could not be redressed at all if not allowed to be proved as incidents of the trespass complained of. 2 Saund. Pl. & Evid. 1121; *Sampson v. Coy*, 15 Mass. R. 493; *Faulkner v. Alderson*, Gilm. 221. Thus, the facts that the defendant entered the store of the plaintiff in the night and by collusion with his clerk, not to mention other facts which might have been found by the jury from the evidence in this case, were admissible in evidence, and proper subjects for the consideration of the jury in estimating the damages.

When the trespass is accompanied by circumstances of aggravation, which are proper to be considered by the jury, the theory of compensation, properly speaking, fails as a rule of damages. The injury arising from these circumstances does not, in its nature, admit of definite estimate, and it is impossible to fix its equivalent in damages. But even those who contend for the theory of compensation as the rule of damages in all cases, concede that damages may be given, in such cases, in the dis-

cretion of the jury, proportionate to the character and extent of the injury and the circumstances of aggravation; though they insist that they must be restricted to what is necessary to compensate the plaintiff: a restriction, in the nature of things, wholly indefinite. Others contend that the jury in such cases are not limited by the rule of compensation, but may give what are called indifferently exemplary, punitive or 488 vindictive damages; for *the sake of punishment and example. The discussion as to the theory of damages has been conducted with great learning and ability by Prof. Greenleaf in favor of the rule of compensation and by Mr. Sedgwick against it. 2 Greenl. Ev. § 253; Bost. L. Rep. April, 1847; Id. June, 1847; Sedgwick on Damages. Prof. Parsons agrees with Prof. Greenleaf. 3 Parson's Cont. chap. 8. The views of Mr. Sedgwick are sustained by the Supreme court of the United States and by the courts of most of the states.

But if the jury are allowed to give damages for causes of aggravation which do not admit of definite estimate, which all admit, and if the court will not interfere unless the damages are so excessive as to indicate that the jury were actuated by partiality or prejudice, which is a well settled rule, it does not seem to be a matter of any practical importance whether the damages are given with a view to compensation, or with a view to punishment. If compensation is the rule, there is no measure for it except the discretion of the jury, and if punishment and example are the rule, the damages are equally within the discretion of the jury. Upon whatever theory it rests, this right of the jury to give damages in proportion to the circumstances of aggravation and outrage, is necessary to secure full reparation and amends to the party injured, and exerts a wholesome influence upon society. The law confides in the integrity and good sense of the jury, under the supervision and control of the court, to prevent abuse upon the one hand and to secure justice upon the other.

I have made these general remarks upon the subject of damages, because this case is to go back for a new trial. Nothing that I have said, however, is intended to indicate an opinion as to the conduct of the defendant. That is a matter for the consideration of the jury alone.

The result is, that the second instruction asked by the 489 *defendant ought not to have been given. But the refusal to give it without explanation was calculated to mislead the jury, by creating the impression that they might enter into a conjectural estimate of the profits lost by the plaintiff, and make that the measure of damages. The court should, therefore, either have accompanied the refusal with an explanation of the purpose for which the profits of the plaintiff's business were to be considered by the jury, or should have given an instruction embodying the proper rule of damages.

It is unnecessary to notice the questions

raised by the last bill of exceptions. I am of opinion that the judgment should be reversed.

The other judges concurred in the opinion of JOYNES, J.

Judgment reversed.

490 *Clarkson & als. v. Booth.*

April Term, 1867. Richmond.

1. **Wills—Slaves—Case at Bar.**—Bequest of slaves to a daughter B and her husband A. If B die having no bodily heir, she and A to enjoy them during their life, but not to remove them out of the state, and at their death to be equally divided among the rest of testator's children. B survives her husband, sells the slaves, and dies never having had a child. **HOLD:**

1. **Same—Same—Contingent Limitation—Valid.**—The contingent limitation to the other children is valid; and all the children alive at the death of the testator take equally.

2. **Same—Same—Death of Remaindermen during Life of Life Tenant—Effect.**—Some of the children having died in the lifetime of B, their personal representatives and the surviving children are tenants in common of the slaves, and must join in the action to recover them.

3. **Slaves—Sale by Life Tenant—Suit by Personal Representatives of Deceased Remaindermen.**—B and the purchaser from her held not adversely but in subordination to the rights of the remaindermen, and on the death of B the possession in law vested in the surviving children and the personal representatives of the deceased children, whether the personal representatives had then been or were afterwards appointed; and they sue in their own right and not as representatives.

*In *Elys v. Wynne*, 22 Gratt. 234, there was a devise to Sarah Dougherty and the heirs of her body, but should she die without heirs, the land was to descend to the other heirs of the testator. Sarah Dougherty sold the land and conveyed it with general warranty, then died without having had a child. In an action of ejectment by the heirs at law of the testator against the purchasers, it was claimed that the action of the heirs was barred by the adversary possession of the defendant; that, the adversary possession commenced from the time of the execution of the deed from Dougherty to the purchasers. The court said: "The deed aforesaid certainly conveys the land in absolute fee simple to the said grantee, with covenant of general warranty. At the time of the conveyance, the grantors, in right of the wife, were seized of an estate in fee, defeasible by the death of the wife without issue living at her death. Had she left issue living at her death, the estate in fee would thenceforward have been indefeasible. Probably, when the deed was executed, it was expected that she would leave issue living at her death. At all events, the deed, however absolute and unconditional on its face, could have no greater effect than to invest the grantee with the title of the grantors, and it invested him with that title, even though it may have professed to convey more. The effect of the conveyance, as to the parties

4. **Same—Same—Same—Abatement.**†—The personal representative of one of the children dying after the action brought. It abates as to him and cannot be revived in the name of another personal representative, but must proceed in the name of the survivors in the action.

5. **Misjoinder of Parties—Surplusage—Case at Bar.**‡—One person being personal representative of several of the children, he is but one plaintiff, and though one of his intestates died after B, and he is described as the personal representative of each intestate, that is surplusage, and there is no misjoinder of plaintiffs.

491 *6. Clerical Errors—Correction of—Case at Bar. §

—It is intended to commit the estate of David C to the sergeant of L, but by a clerical mistake the name is written Daniel. After action brought by the sergeant under this committal, the court, on his motion, corrects the mistake by an order entered *nunc pro tunc*. This order relates back to the first, and the estate of David was well committed.

This is an action of detinue brought for the recovery of slaves. The following is a statement of the case:

John Clarkson by his will, dated and admitted to probate in 1817, made a bequest in the following words: "I give and bequeath to my well beloved daughter Betsey Taylor and Major Abram Taylor her husband, Mealy and her children, by them freely to be possessed and enjoyed; and if it so happens the above Betsey Taylor die having no bodily heir, that she and Major Abram Taylor is to enjoy them during their life, but is not to remove the said negroes out of this state, and at their death to be equally divided among the rest of my children." Abram Taylor died in the year 1819, and Betsey Taylor on the 27th day of October, 1849, without ever having had issue. The rest of the testator's children living at the time of his death were James Clarkson, William Clarkson, Frances Carter, Catharine Jones, Lucy Dodd, Mary Bellen-ger, David Clarkson and Anselm Clarkson. All of them except the two last, David and

claiming under the contingent limitation over, is precisely the same as if the conveyance had been expressly subject to such limitation. Until the death of Sarah Dougherty, without issue living at her death, the heirs at law of the testator had no right of action for the land. Their right of action then and thereby accrued, and the act of limitation could begin to operate against them only from that time. Sarah Dougherty and her assigns held the land in privity with the title of those claiming under the contingent limitation over, and could not hold adversely against it during her life. This view is fully sustained by the decision of this court in *Clarkson v. Booth*, 17 Gratt. p. 490. We are, therefore, of opinion that the action is not barred by adversary possession, or the act of limitations."

See also, the principal case cited in *Austin v. Brown*, 37 W. Va. 639, 17 S. E. Rep. 209.

†**Abatement.**—See principal case cited in *Rowe v. Pulp Co.*, 42 W. Va. 554, 26 S. E. Rep. 321.

‡**Descriptive Persons—Surplusage.**—See *foot-note* to *Harvey v. Skipwith*, 16 Gratt. 393.

§See *foot-note* to *Price v. Com.*, 33 Gratt. 819.

were, therefore, properly recoverable, as natural, proximate and necessary consequences of the acts of the defendant. In *Downell v. Jones*, 13 Alab. R. 490, such damages were held to be recoverable as general damages for maliciously suing out an attachment against a merchant, which was levied on his stock of goods.

In order to ascertain the damages resulting from the interruption or embarrassment of the plaintiff's business, the nature and extent of the business, and whether profitable or unprofitable, are proper subjects of inquiry. Without information on these points, the jury would be without any guide to their discretion in the assessment of damages. But in such a case the probable profits of the business are not the measure of damages. They are necessarily dependent on contingencies, and, therefore, as a general rule, not recoverable as damages. 8 Gratt. 16; 7 Cush. R. 516; 13 How. U. S. R. 307.

But while the probable profits of the business do not furnish the measure of damages, they may be proved to the jury by general evidence, as well as the extent and character of the business, as affording the best guide to the jury of which the nature of the case admits, in the exercise of their judgment in the assessment of damages. Such evidence tends to show the character and degree of the injury for which amends is to be made. *Ingram v. Lawson*, 6 Bing. N. Ca. 212 (37 Eng. C. L. R. 350); *Downell v. Jones*, 17 Alab. R. 689; *Wade v. Leroy*, 20 How. U. S. R. 34; *Nebraska City v. Campbell*, *2 Black's U. S. R. 590; *Brown v. Smith*, 12 Cush. R. 366.

When the act complained of is accompanied by circumstances of aggravation, they may be proved under the general allegation of *alia enormia*, without further specification, when they do not afford a substantial ground of action. They give character and quality to the act complained of, and show the degree of the injury, and could not be redressed at all if not allowed to be proved as incidents of the trespass complained of. 2 Saund. Pl. & Evid. 1121; *Sampson v. Coy*, 15 Mass. R. 493; *Faulkner v. Alderson*, Gilm. 221. Thus, the facts that the defendant entered the store of the plaintiff in the night and by collusion with his clerk, not to mention other facts which might have been found by the jury from the evidence in this case, were admissible in evidence, and proper subjects for the consideration of the jury in estimating the damages.

When the trespass is accompanied by circumstances of aggravation, which are proper to be considered by the jury, the theory of compensation, properly speaking, fails as a rule of damages. The injury arising from these circumstances does not, in its nature, admit of definite estimate, and it is impossible to fix its equivalent in damages. But even those who contend for the theory of compensation as the rule of damages in all cases, concede that damages may be given, in such cases, in the dis-

cretion of the jury, proportionate to the character and extent of the injury and the circumstances of aggravation; though they insist that they must be restricted to what is necessary to compensate the plaintiff: a restriction, in the nature of things, wholly indefinite. Others contend that the jury in such cases are not limited by the rule of compensation, but may give what are called

indifferently exemplary, punitive or vindictive damages; for the sake of punishment and example. The discussion as to the theory of damages has been conducted with great learning and ability by Prof. Greenleaf in favor of the rule of compensation and by Mr. Sedgwick against it. 2 Greenl. Ev. § 253; Boast. L. Rep. April, 1847; Id. June, 1847; Sedgwick on Damages. Prof. Parsons agrees with Prof. Greenleaf. 3 Parson's Cont. chap. 8. The views of Mr. Sedgwick are sustained by the Supreme court of the United States and by the courts of most of the states.

But if the jury are allowed to give damages for causes of aggravation which do not admit of definite estimate, which all admit, and if the court will not interfere unless the damages are so excessive as to indicate that the jury were actuated by partiality or prejudice, which is a well settled rule, it does not seem to be a matter of any practical importance whether the damages are given with a view to compensation, or with a view to punishment. If compensation is the rule, there is no measure for it except the discretion of the jury, and if punishment and example are the rule, the damages are equally within the discretion of the jury. Upon whatever theory it rests, this right of the jury to give damages in proportion to the circumstances of aggravation and outrage, is necessary to secure full reparation and amends to the party injured, and exerts a wholesome influence upon society. The law confides in the integrity and good sense of the jury, under the supervision and control of the court, to prevent abuse upon the one hand and to secure justice upon the other.

I have made these general remarks upon the subject of damages, because this case is to go back for a new trial. Nothing that I have said, however, is intended to indicate an opinion as to the conduct of the defendant. That is a matter for the consideration of the jury alone.

The result is, that the second instruction asked by the defendant ought not to have been given. But the refusal to give it without explanation was calculated to mislead the jury, by creating the impression that they might enter into a conjectural estimate of the profits lost by the plaintiff, and make that the measure of damages. The court should, therefore, either have accompanied the refusal with an explanation of the purpose for which the profits of the plaintiff's business were to be considered by the jury, or should have given an instruction embodying the proper rule of damages.

It is unnecessary to notice the questions

raised by the last bill of exceptions. I am of opinion that the judgment should be reversed.

The other judges concurred in the opinion of JOYNES, J.

Judgment reversed.

490

Clarkson & als. v. Booth,

April Term, 1867, Richmond.

1. **Wills—Slaves—Case at Bar.**—Bequest of slaves to a daughter B and her husband A. If B die having no bodily heir, she and A to enjoy them during their life, but not to remove them out of the state, and at their death to be equally divided among the rest of testator's children. B survives her husband, sells the slaves, and dies never having had a child. **HOLD:**

1. **Same—Same—Contingent Limitation—Valid.**—The contingent limitation to the other children is valid; and all the children alive at the death of the testator take equally.

2. **Same—Same—Death of Remaindermen during Life of Life Tenant—Effect.**—Some of the children having died in the lifetime of B, their personal representatives and the surviving children are tenants in common of the slaves, and must join in the action to recover them.

3. **Slaves—Sale by Life Tenant—Suit by Personal Representatives of Deceased Remaindermen.**—B and the purchaser from her held not adversely but in subordination to the rights of the remaindermen, and on the death of B the possession in law vested in the surviving children and the personal representatives of the deceased children, whether the personal representatives had then been or were afterwards appointed; and they sue in their own right and not as representatives.

*In *Elys v. Wynne*, 22 Gratt. 224, there was a devise to Sarah Dougherty and the heirs of her body, but should she die without heirs, the land was to descend to the other heirs of the testator. Sarah Dougherty sold the land and conveyed it with general warranty, then died without having had a child. In an action of ejectment by the heirs at law of the testator against the purchasers, it was claimed that the action of the heirs was barred by the adversary possession of the defendant; that, the adversary possession commenced from the time of the execution of the deed from Dougherty to the purchasers. The court said: "The deed aforesaid certainly conveys the land in absolute fee simple to the said grantee, with covenant of general warranty. At the time of the conveyance, the grantors, in right of the wife, were seized of an estate in fee, defeasible by the death of the wife without issue living at her death. Had she left issue living at her death, the estate in fee would thenceforward have been indefeasible. Probably, when the deed was executed, it was expected that she would leave issue living at her death. At all events, the deed, however absolute and unconditional on its face, could have no greater effect than to invest the grantee with the title of the grantors, and it invested him with that title, even though it may have professed to convey more. The effect of the conveyance, as to the parties

4. **Same—Same—Same—Abatement**†—The personal representative of one of the children dying after the action brought, it abates as to him and cannot be revived in the name of another personal representative, but must proceed in the name of the survivors in the action.

5. **Misjoinder of Parties—Surplusage—Case at Bar.**—One person being personal representative of several of the children, he is but one plaintiff, and though one of his intestates died after B, and he is described as the personal representative of each intestate, that is surplusage, and there is no misjoinder of plaintiffs.

491

*6. Clerical Errors—Correction of—Case at Bar.‡

—It is intended to commit the estate of David C to the sergeant of L, but by a clerical mistake the name is written Daniel. After action brought by the sergeant under this committal, the court, on his motion, corrects the mistake by an order entered *nunc pro tunc*. This order relates back to the first, and the estate of David was well committed.

This is an action of detinue brought for the recovery of slaves. The following is a statement of the case:

John Clarkson by his will, dated and admitted to probate in 1817, made a bequest in the following words: "I give and bequeath to my well beloved daughter Betsey Taylor and Major Abram Taylor her husband, Mealy and her children, by them freely to be possessed and enjoyed; and if it so happens the above Betsey Taylor die having no bodily heir, that she and Major Abram Taylor is to enjoy them during their life, but is not to remove the said negroes out of this state, and at their death to be equally divided among the rest of my children." Abram Taylor died in the year 1819, and Betsey Taylor on the 27th day of October, 1849, without ever having had issue. The rest of the testator's children living at the time of his death were James Clarkson, William Clarkson, Frances Carter, Catharine Jones, Lucy Dodd, Mary Bellenberger, David Clarkson and Anselm Clarkson. All of them except the two last, David and

claiming under the contingent limitation over, is precisely the same as if the conveyance had been expressly subject to such limitation. Until the death of Sarah Dougherty, without issue living at her death, the heirs at law of the testator had no right of action for the land. Their right of action then and thereby accrued, and the act of limitation could begin to operate against them only from that time. Sarah Dougherty and her assigns held the land in privity with the title of those claiming under the contingent limitation over, and could not hold adversely against it during her life. This view is fully sustained by the decision of this court in *Clarkson v. Booth*, 17 Gratt. p. 490. We are, therefore, of opinion that the action is not barred by adversary possession, or the act of limitations."

See also, the principal case cited in *Austin v. Brown*, 37 W. Va. 630, 17 S. E. Rep. 203.

†**Abatement.**—See principal case cited in *Rowe v. Pulp Co.*, 42 W. Va. 554, 26 S. E. Rep. 321.

‡**Descriptio Personae—Surplusage.**—See foot-note to *Harvey v. Skipwith*, 16 Gratt. 393.

§See foot-note to *Price v. Com.*, 33 Gratt. 819.

Anselm, died before Betsey Taylor, and David died before the institution of this suit, but whether before or after the death of Betsey Taylor was a fact not known or ascertained in the cause. Anselm was alive at the time of the institution of the suit and the rendition of the judgment. At different periods in the lifetime of Betsey Taylor the following named personal representatives of the following named children of the testator were duly appointed and qualified as such, viz: Nelson C. Clarkson as executor *of James Clarkson, Peter J. Hill as administrator with the will

annexed of Catharine Jones, and James Smiley as administrator of William Clarkson; and administration de bonis non of the estate of Mary Bellenger, was duly committed to Henry Dunnington as sergeant of the corporation of Lynchburg. After the death of Betsey Taylor and before the institution of the suit, to wit, in August, 1854, by an order of the Hustings court of Lynchburg, the estates of Lucy Dodd and of David Clarkson by the name of Daniel Clarkson, were committed to the hands of said Dunnington, sergeant as aforesaid, for administration, according to law. After the institution of the suit, to wit, on the 9th of March, 1859, by another order of the same court, reciting that "it appearing to the satisfaction of the court that there was a clerical error in the order of the 9th of August, 1854, committing the estate of Daniel Clarkson to Henry Dunnington, the sergeant of the city of Lynchburg, when in fact it was the estate of David Clarkson that was so committed to said sergeant; and that said error was wholly clerical; and said Dunnington, sergeant as aforesaid, having since that time continued to act as administrator of said David Clarkson, under said order," the said court, on the motion of the said Dunnington, corrected the said error, nunc pro tunc, by so amending the said order of the 9th of August, 1854, as to insert therein the name of "David" instead of that of "Daniel."

Abram Taylor used and employed the slaves Mealy and her children as his own during his life, and Betsey Taylor after his death used and employed them as her own while in her possession, some of them being sold by her, and others being sold by the sheriff under an execution against her. She sold some of them to persons who carried them to North Carolina. In 1841 she sold

Edmund, a descendant of Mealy, to the defendant Booth, *but at what price or for what period, whether for her own life only or for the life of the slave, does not plainly appear; though it is probable from the circumstances that the latter was the fact. The defendant remained in possession of Edmund from the time of the sale until after the institution of the action, and was still in possession at the trial thereof. On the 27th of September, 1854, the action was brought by Anselm Clarkson, Robert C. Jones executor of Frances Carter, Nelson C. Clarkson administrator of James Clarkson, Peter J. Hill administra-

tor of Catharine Jones, James Smiley administrator of William Clarkson, Henry Dunnington, sergeant of the city of Lynchburg, and as such administrator of Lucy Dodd, the same Henry Dunnington, sergeant as aforesaid, and as such administrator of Mary Bellenger, and the same Henry Dunnington, sergeant as aforesaid, and as such administrator of David Clarkson, against Moses Booth. The declaration is in the common form used in the action of detinue, and claims Edmund and four other slaves by name. The general issue was joined. And in October, 1859, after the action had been pending several years, the plaintiff Robert C. Jones executor of Frances Carter, having died, the case abated as to him, and then came on to be tried by a jury, when a verdict was rendered for the plaintiffs for the slave Edmund of the value of \$1,400, and for damages for the detention of said slave, assessed at \$1,250, and for the defendant as to the other slaves in the declaration mentioned. On the trial the court gave several instructions asked for by the defendant and refused to give several asked for by the plaintiffs; and they excepted to the opinions of the court thus given against them. The effect of these opinions, so far as it is material to be stated, is, that the right of action for the slaves in controversy survived to Anselm Clarkson, and was in him alone, and that the plaintiffs could

not recover *them in the suit; and also that the order of the Hustings court of Lynchburg of the 9th of March, 1859, made for the purpose of correcting a clerical error in the order of the same court of the 9th of August, 1854, as aforesaid, does not relate back so as to make Henry Dunnington, as sergeant of the city of Lynchburg, the personal representative of David Clarkson at the time of the institution of the suit, which could not therefore be maintained in the name of said Dunnington as such representative. After the verdict was rendered, a motion was made by the defendant to set it aside and grant a new trial, which motion the court sustained; and the plaintiffs excepted. The facts proved on the trial were certified in the bill of exceptions, at the conclusion of which it was assigned as the reason for setting aside the verdict and granting a new trial, that the court was of opinion that there was a misjoinder of the plaintiffs in the suit, and that the jury disregarded the instructions of the court. On the 20th of October, 1860, the case came on again to be tried, when a verdict was rendered for the defendant. On this trial the same instructions were asked for, and given and refused, as on the former trial; and the plaintiffs again excepted. Judgment for the defendant having been given on the verdict, and the plaintiffs obtained a supersedeas thereto from this court.

Garland, for the appellants.

There was no counsel for the appellee.

MONCURE, P., delivered the opinion of the court:

The court is of opinion that by the will of John Clarkson the slaves Mealy and her children, which were thereby given to his daughter Betsey Taylor and her husband Abram Taylor, were limited at the death of the survivor of them, to the rest of the testator's children, upon the
 495 *contingency of the death of his said daughter without issue living at her death. Although the words "and if it so happens that above Betsey Taylor die having no bodily heir," immediately following the bequest to her and her husband, might, standing by themselves and unexplained by anything that follows them in the will, import an indefinite failure of issue, yet followed as they are by the words "that she and Major Abram Taylor is to enjoy them during their life, but is not to remove the said negroes out of this state, and at their death to be equally divided among the rest of my children," an intention is unmistakably indicated to confine the contemplated contingency to the period of their death, or rather that of the survivor of them. In the event of the happening of such contingency, they are to be regarded as having been mere tenants for life, expressly restrained from removing the negroes out of the state; and at the termination of the life estate, or, in the language of the will, "at their death" (words which are very significant), the negroes are directed to be equally divided among the rest of the children.

The court is further of opinion that after the death of the testator and before the death of his said daughter, the contingent executory limitation aforesaid to the rest of his children created such an interest in them as that the respective portions of any of them dying during that period devolved on their personal representatives respectively, and at the death of the said Betsey Taylor, who survived her said husband and died without ever having had issue, such of the rest of the testator's children as were then living, and the personal representatives of such of them as were then dead, were tenants in common of the said slaves and their increase, or such of them as were then in existence, and as such were entitled to the possession thereof, and in such possession,
 496 at least constructively, *and were entitled to maintain a joint action for any subsequent wrongful detention or conversion of the same or any part thereof. 1 Lomax on Ex'rs, p. 319, marg.; 1 Tho. Co. Lit. 783; 3 Rob. Pr., new ed., 163; Rose's adm'x v. Burgess, 10 Leigh 186, and especially the opinion of Stanard, J., in that case. As tenants in common of personal property must join in an action for an injury to such property, and as a personal representative of a deceased tenant in common becomes a tenant in common with the survivors, it follows as a necessary consequence that he must join with them in such an action. The rule is different where two or more persons are jointly entitled, as parties or otherwise, to a chose in action, and one of them dies. There the remedy survives, though the right does not, and the

action must be brought in the name of the survivors only. This was long a mooted question, and was at one time held otherwise in England. But it was decided in the case of *Martin v. Crompe*, 1 Lord Raym. R. 340, that the action must be in the name of the survivors alone, Lord Holt assigning as a reason that it would make strange confusion that one party should sue in his own right and another in another's. This decision had ever since been held in that country to be undoubted law, as was said by Parke, B., in *Buckley v. Barber*, 1 Eng. L. & E. R. 506; and the same doctrine is firmly established in this country. 3 Rob. Pr., new ed., p. 164, and authorities cited. There is this difference, then, in regard to the proper persons to be made plaintiffs in an action for the wrongful detention or conversion of personal property held by tenants in common, between a case in which the death of one of them occurs before, and a case in which such death occurs after, the wrongful act; that in the former case the action for such act must be brought in the joint names of the survivors and
 497 the personal representative of *the deceased tenant in common, while in the latter it must be brought in the names of the survivors only; and where it is properly brought in the joint names of the survivors and the personal representative of the deceased tenant, and one of them dies pending the action, whether he be such personal representative or one of the survivors, it abates as to him and proceeds in the names of the surviving plaintiffs only; so that if the person dying be such personal representative, the action is not to be revived in the name of an administrator de bonis non of the deceased tenant in common. In fact, there is no difference in the rights in which the plaintiffs sue where one of them is a personal representative of a deceased tenant in common and the others are the surviving tenant. All of them sue in suo jure, though the description of personal representative of a decedent be added to the name of one of them. Such matter of description is unnecessary but harmless, and may be treated as surplusage. 2 Lom. on Ex'rs, 371, marg.; 3 Rob. Pr., new ed., 518; *Rose's adm'x v. Burgess*, supra; *Harvey v. Skipwith, &c.*, 16 Gratt. 393. Persons cannot join as plaintiffs in an action at law in different rights—the one as a personal representative and the other in his own right—for the reason assigned by Lord Holt as before mentioned, "that it would make strange confusion" to do so. A personal representative of a deceased tenant in common must have possession of the subject held in common, actual or constructive, when the wrong is done for which the action is brought, to entitle him to join with the surviving tenants in common as plaintiffs in the action. Title and possession make them tenants in common, and entitle them to maintain the joint action suo jure, even though one of them becomes entitled by being a personal representative, while the others are entitled in their

498 own right. The *possession of one tenant in common is the possession of all who may be entitled as co-tenants with him.

It is a rule of law that the property of personal chattels draws to it the possession, unless they be in the actual adversary possession of another. 1 Lom. on Ex'rs, 314, marg. A personal representative may, at his election, sue as such, or in his own right (of course, in the latter case, for the benefit of the estate he represents), for an injury to the goods of the deceased after his death, unless such representative be tenant in common of those goods with another, in which case, we have seen, they must jointly sue in their own right. A personal representative being considered in law as the owner of the goods of the deceased from the time of his death, may declare upon this constructive possession, though he may never have had actual possession before the tort committed; nor will it make any difference whether the injury was done before probate or administration granted, for they relate back to the death of the deceased. *Ibid.*

The court is further of opinion that the possession of the said slaves or any of them by the said Betsey Taylor during her life was not adverse to, but consistent with the title of the rest of the testator's children, and that the sale by her of a portion of the said slaves to the defendant Moses Booth, even if intended to pass the absolute estate, operated to pass the life estate only of the said Betsey Taylor in the same, and was null and void for any other or further purpose. And the said Moses Booth, after the said sale and until and at the time of the death of the said Betsey Taylor, continued to hold the slaves sold to him as aforesaid consistently with, and not adversely to the right and title of the rest of the children; and such of the said children as were alive at her death and the personal representatives of such of them as were then dead

499 (though some of the said representatives *may not have been appointed or qualified until after that time), eo instanti became entitled to the possession of the said slaves, and by construction of law was in the possession thereof as tenants in common. 1 Rob. Pr., new ed., 508-510, and cases cited. As was said by this court in *Henry v. Graves*, 16 Gratt. 244, 254-5, the particular estate and remainder made together but one absolute estate in the slaves. The assent to the legacy of the particular estate enured to the benefit of the remaindermen, who, though not in actual possession of the remainder during the existence of the particular estate, yet had all the possession of which a remainder is susceptible. The remainder was not a mere chose in action, but at most a quasi chose in action. No action was necessary to reduce it into possession, but at the termination of the life estate it would fall to the possession of the remaindermen by operation of law." To be sure if the life tenant, or the assignee of the life tenant (who by the assignment

becomes a tenant per auter vie), holds, uses and enjoys the property as his own after the termination of the life estate, such possession becomes adverse to the remaindermen and is a wrongful conversion of their property to his use, from the time of which conversion the act of limitations will begin to run against them; as was held by this court in *Layne v. Norris's adm'r*, 16 Gratt. 236. But there must be an instant of time, if not in fact, at least in contemplation of law, between the termination of the life estate and such subsequent wrongful conversion of the property by the life tenant, and that instant of time is sufficient to make the conversion a violation and invasion as well of the possession as the property of the remaindermen. Until the termination of the life estate the life tenant cannot hold adversely to the remaindermen, but must hold in subordination to their title. When the life estate terminates the title and right of possession are united

500 in them, and though they have *not actual, yet they have constructive possession of the property. The law does not, because it cannot, operate an actual transfer of the property from the hands of the life tenant, where it is necessarily found at the termination of the life estate, to the hands of the remaindermen, but it makes his possession their possession, until he wrongfully detains or converts the property; which act, as before stated, is an invasion of their possession as well as of their property. The law will not presume that they intend such a wrong until it is actually perpetrated, and when it is perpetrated it will not relate back to the termination of the life estate, so as to displace the intermediate constructive possession of the remaindermen, which was incident and adhered to their title. This is perfectly consistent with the decision of this court in *Layne v. Norris's adm'r*, supra, as will plainly appear by referring to the reasons on which that decision was founded.

The court is further of opinion that the testator's children, James Clarkson, William Clarkson, Frances Carter, Catharine Jones, Lucy Dodd and Mary Bellenger, having died before the said Betsey Taylor, their personal representatives were tenants in common of the said slaves, or such of them as were in existence when the life estate fell in, with the testator's son Anselm Clarkson who survived the said Betsey Taylor, and were properly joined with him as plaintiffs in this action. Whether the personal representative of the testator's son David Clarkson was also one of the tenants in common at that time and was properly joined as one of the plaintiffs in the action, depends upon whether he also died before the said Betsey Taylor; a fact which is represented in the record as being unknown. But if it be necessary to support the action, it ought to be presumed that he died before her.

The court is further of opinion that the insertion of the name "Daniel" instead of that of "David," in the order of the Hus-

tings court of Lynchburg of the 9th August, *1854, was a mere clerical error, which the said court at a subsequent term had a right to correct *nunc pro tunc*, and did so correct by the order of March 9th, 1859; and that by the former order thus corrected the estate of said David Clarkson was duly committed to the hands of Henry Dunnington, sergeant of the city of Lynchburg, for administration as of the said 9th of August, 1854.

But the court is further of opinion that even if David Clarkson in fact died after the said Betsey Taylor, or if Henry Dunnington were not the legal representative of said David Clarkson, neither of these facts, nor both of them together, would affect the right of the plaintiffs to maintain this action, inasmuch as the same Henry Dunnington is named as a plaintiff by the description of "sergeant of the city of Lynchburg and as such administrator of Lucy Dodd," and of "sergeant as aforesaid and as such administrator of Mary Bellenger," as well as by the description of "sergeant as aforesaid and as such administrator of David Clarkson," all of which is mere description of the person and may be stricken out as surplusage; the said Henry Dunnington being but one plaintiff, suing in his own name and right by the descriptions aforesaid.

The court is further of opinion that the plaintiff Robert C. Jones, executor of Frances Carter, having died pending the action, it was properly abated as to him, and further proceeded with in the name of the other plaintiffs.

And the court is therefore of opinion that the Circuit court erred in such and so much of its rulings as are contrary to the foregoing opinion, and especially in setting aside the first verdict of the jury and granting a new trial, instead of rendering a final judgment for the plaintiffs upon said verdict.

Therefore it is considered that the said judgment of the Circuit court be reversed and annulled, and that the

502 *plaintiffs recover against the defendant their costs by them expended in the prosecution of their writ of superseas aforesaid here. And this court proceeding to give such judgment as the said Circuit court ought to have given, it is further considered that all the proceedings in the action subsequent to the said first verdict of the jury be set aside and annulled, and that the plaintiffs recover against the defendant the negro slave Edmund in the said verdict mentioned, of the value therein mentioned, if he may be had; but if not, then the value aforesaid, together with his damages assessed by the jury in their said verdict, and their costs by them about their suit in the said Circuit court expended. But this judgment is to be without prejudice to any question which may arise in regard to the liability of the defendant for the alternative value of the said slave: this court only intending to give such judgment as the Circuit court ought to have given in

the condition in which the case was when the judgment of that court was rendered, without deciding whether the said liability of the defendant is affected, and if so, to what extent, by the provision of the constitution in regard to the abolition of slavery, or by anything else which has transpired since the rendition of the said judgment—it being considered premature by the court to decide that question now, when the parties have not been heard upon it, and facts which may materially affect it have not been brought into the record. If the defendant shall be advised to raise the question in the Circuit court, he will have an opportunity to do so (notwithstanding this judgment), by motion to quash any execution which may be issued upon the said judgment, as to the said slave or his alternative value, or otherwise, as he may be advised. Which is ordered to be certified to the said Circuit court.

Judgment reversed.

503 *Penn & als. v. Whitehead & als.

June Term, 1867, Richmond.

[94 Am. Dec. 478.]

1. **Married Women—Separate Estate—Engaging in Business—Right to Profits.**—A married woman may engage in trade on her separate account, and enter into partnership for that purpose, by the consent of her husband; and she will be entitled to the profits of the trade against her husband, even though his agreement be merely voluntary; and against his creditors, at least to some extent, if the agreement be founded on valuable consideration paid by or for the wife.

2. **Same—Same—Same—Same.**—A married woman having a separate estate, may engage in trade with the consent of her husband, and may to the extent of her power over it, subject her estate to the payment of the debts; and she will be entitled to the profits of the trade as against her husband and his creditors, to the extent, at least, to which such profits may not be due to the labor, skill, capital or credit furnished by her husband.

3. **Same—Same—Same—Same.**—Where the husband furnishes all or a portion of the labor and skill or a portion of the capital and credit used in carrying on the business, the wife will be entitled even as against his creditors, to such portion of the profits as will compensate her for what she has contributed to the business either in the shape of capital or credit. To the extent to which a just apportionment can, it will be made.

4. **Same—Same—Alienation.**—If the power to dispose of or charge the wife's separate estate is not de-

***Married Women—Separate Estate—Engaging in Business—Right to Profits.**—The principal case is cited in the following cases: *Atwood v. Dolan*, 34 W. Va. 561, 12 S. E. Rep. 604; *Stewart v. Stout*, 38 W. Va. 483, 18 S. E. Rep. 728; *Carey v. Burruss*, 20 W. Va. 579; *Jones v. Reid*, 12 W. Va. 865, and cases cited; *Trapnell v. Conklyn*, 37 W. Va. 252, 16 S. E. Rep. 573. In *Campbell v. Bowles*, 30 Gratt. 668, the principal case is distinguished. See also, *Alsop v. Catlett*, 97 Va. 390, 34 S. E. Rep. 48, where the principal case is cited.

†**Same—Same—Alienation.**—In the *foot-note* to *Darnall v. Smith*, 26 Gratt. 878, it is said: "The cases on

nied either expressly or by implication, she has the power as an incident to the separate estate.

5. **Same—Same—Life Interest—Right to Charge.**—Property is conveyed to a trustee, on a consideration flowing from the wife, for her separate use for life, to remain in her possession for the support of herself and her issue and family, and for no other purpose; and with power to dispose of it by will among her family. She has the power to charge her life estate with payment of the debts of the business in which she has engaged.

504 *6. **Same—Same—Debts Paid Out of Profits.**—In such a case the wife is entitled to have the debts of the business paid out of the assets in exoneration of her separate life estate.

7. **Same—Same—Engaging in Business—Liability of Stock for Debts.**—A wife being without any adequate means of support for herself and family, and her husband being insolvent, she, with his consent and for the purpose of obtaining a support, engaged in a mercantile business for her separate use by the aid of her friends in loaning her money or selling her goods on the credit of the business. Her stock in trade will be liable for the payment of her debts thus contracted, and so liable preferably to the proper debts of her husband; even though the necessary labor and skill employed in conducting the business was furnished by him and his minor sons.

8. **Same—Claim of Husband for Services—Priority of Creditors.**—In such a case any claim which the husband may have for the services of himself and his minor sons, will be subordinate to the claims of the creditors of the concern to priority of payment out of the assets.

9. **Infant Partners—Release of Services.**—An infant may be a partner, and his father though indebted and insolvent, may release to his son all claim to

his services; and the consent of the father to the son's becoming a partner is a release of his services.

10. **Married Women—Engaging in Business—Services of Insolvent Husband.**—A business in which the wife is engaged with the consent of the husband, is carried on by the labor and skill of her husband and his minor sons; and he is indebted and insolvent. The profits of the business after paying off its debts and expenses, are liable to the creditors of the husband.

11. **Same—Same—Expenses.**—The expenses of the support of the husband and his wife and family are a part of the necessary expenses of the business, without which there could be no profits.

This case was before this court in 1855, and is reported in 12 Grattan 74. The pleadings and interlocutory decree from which the appeal was taken are stated in that report. After the cause went back to the Circuit court Beverly Hargrove and others filed their bill in the same court, against the defendants in the first case, claiming to be creditors of Floyd L. Whitehead, and seeking to subject the same fund to the payment of their debts. And

505 *they charge that the said concerns were conducted without making public the names of the parties and principals, as required by the 13th section of ch. 145 of the Code of Virginia. The defendants answered, referring to the first suit and asking that the two might be united, and asking that their answers in the said first suit may be taken as their answers in this. A number of the creditors of Floyd L. Whitehead, agent, and Floyd L. Whitehead, agent, & Son, filed their petition in the cause setting up their claims, and alleging that they knew that Floyd L. Whitehead was insolvent, and that they would not have trusted him upon his own responsibility, but that their debts were contracted on the faith and credit of said firms. They were unaware of any fraud on the part of Whitehead, if there was any, which they do not believe, and certainly there was none on their own part.

It appears that Floyd L. Whitehead, failed in business in 1842, when he conveyed his property to trustees for the payment of debts; and at the same time, in consideration of Mrs. Whitehead's joining in the conveyance of his real estate, he conveyed to Charles Williams, the brother of Mrs. Whitehead, some slaves and other personal property, in trust for her separate use during her life, to remain in her possession for the support and maintenance of herself and her issue and family, and for no other purpose whatever: but that the trustee might, with her consent, dispose of any part of the property and invest it in other property, in trust for Whitehead; and after her death to her children, and if none to her heirs: provided, however, that she should have the power to convey the same or any part thereof by will to such person or persons as she should choose, but not out of her own or her husband's family.

At the time this deed was made,

this subject have been collected in annotations to *Leake v. Benson*, 29 Gratt. 158; *Garland v. Pamplin*, 32 Gratt. 306; *Irvine v. Greever*, 32 Gratt. 411; *Justis v. English*, 30 Gratt. 556; *Ropp v. Minor*, 33 Gratt. 97; *Frank v. Lillienfeld*, 33 Gratt. 377. These cases with their notes are practically exhaustive of the law in Virginia on this still important subject." See also, the following cases citing the principal case: *Patton v. Merchants' Bank of Charleston*, 12 W. Va. 606; *Haymond v. Jones*, 33 Gratt. 338; *Radford v. Carwile*, 18 W. Va. 654; *Mauzy v. Mauzy*, 79 Va. 539; *Dulin v. McCaw*, 39 W. Va. 724, 20 S. E. Rep. 683.

In *Walke v. Moore*, 95 Va. 733, 30 S. E. Rep. 374, where there was a conveyance to a trustee for a woman and her children, the court said: "The first question to be considered is whether the children of Virginia Baughan took under the trust a joint estate with her in the land, or whether she took an equitable estate in fee to the exclusion of the children. Its determination is not wholly free from doubt or difficulty, but it is not perceived how the case can be reasonably distinguished from that class of cases headed by *Wallace v. Dold*, 8 Leigh 258, and followed by *Stinson v. Day*, 1 Rob. 435; *Penn v. Whitehead*, 17 Gratt. 503; *Leake v. Benson*, 29 Gratt. 153; *Bain & Bro. v. Buff*, 76 Va. 371; *Mauzy v. Mauzy*, 79 Va. 537; *Waller v. Catlett*, 88 Va. 200, 2 S. E. Rep. 280; *Stace v. Bumgardner*, 89 Va. 418, 16 S. E. Rep. 252; and *Nye v. Lovitt*, 92 Va. 710, 24 S. E. Rep. 345." See also, *Richardson v. Seever*, 84 Va. 270, 4 S. E. Rep. 712, citing the principal case.

In *Riley v. Deitrick*, 85 Va. 44, 6 S. E. Rep. 615, the principal case is distinguished.

506 Floyd L. Whitehead *was and continues to be wholly and notoriously insolvent, and besides himself and Mrs. Whitehead, his family consisted of four children by a former wife and three by the present, all of whom were minors; and the only property for the support of that family was that conveyed as herein stated, amounting in value to little more than one thousand dollars, and a few slaves lent to Mrs. Whitehead by her father. This not being sufficient for their support, on the 1st of April, 1846, Floyd L. Whitehead, as agent of Williams, trustee of Mrs. Whitehead, purchased of H. W. Heath & Co. their stock of goods, amounting to \$1,263.83, for which he executed bonds payable in one, two and three years. These bonds were signed by him as agent for C. Williams, trustee of Maria P. Whitehead, and also by Whitehead individually. On the same day of April Mrs. Whitehead executed a paper under seal, by which she pledged her trust property for the payment of the debt to Heath. And this paper, with an endorsement upon it by Floyd L. Whitehead approving the same, was duly acknowledged before two justices of the peace, and admitted to record in the clerk's office of the County court of Nelson county. Soon after this purchase, viz: the 26th of April, the trustee Williams, living in the county of Botetourt, the County court of Nelson, at the instance of Mrs. Whitehead and with his consent, removed him, and appointed Floyd L. Whitehead in his place.

On the 28th of March previous, Heath leased to Whitehead, as agent of Mrs. Whitehead, his storehouse and lot, called Fleetwood, where Heath & Co. had been doing business, for three years, at an annual rent of one hundred and sixty-five dollars. At this place Floyd L. Whitehead, as agent of Mrs. Whitehead, carried on business as a merchant until 1850, assisted by his two sons, Alexander and Kincaid, both of whom were minors. In 507 *1850 Alexander was admitted as a partner in the concern, he being then nineteen years old, and the business was carried on under the name of Floyd L. Whitehead, agent, & Son, until 1852, when it was closed. In January, 1853, Penn filed his bill.

When the cause went back from this court, a decree was made in May, 1855, directing a commissioner to take various accounts, and among them, 1st. An account of the debts of the plaintiffs; 2d. An account of all the debts due and owing by the two concerns of F. L. Whitehead, agent, and F. L. Whitehead, agent, & Son; 3d. An account of the assets of each of the said concerns; and, 4th. An account of the profits of said concerns; and showing how much of said profits is the fruits of the labor and skill of F. L. Whitehead and his minor sons; and apportioning the profits of the last concern, one-third to Alexander R. Whitehead and two-thirds to M. P. Whitehead's trustee or agent.

In September, 1859, the commissioner

made his report. He stated the plaintiffs' debts at \$11,366.27; the debts due and owing by F. L. Whitehead, agent, which had been presented, amounted to \$6,415.38, beside a number appearing on the books whose claims were not filed; the debts owing by F. L. Whitehead, agent, & Son, which had been presented, amounted to \$12,374.32, beside a number appearing on their books which had not been filed. There had been collected by the receiver, of the assets of the first concern, \$3,332.22, and of the second concern \$1,600.29; and there were debts due to the first, reported good, \$8,042.15, and doubtful, \$2,152.35; and of the second, reported good, \$9,770.54, and doubtful, \$1,525.03. The whole assets of the first concern was reported at \$13,943.62, and of the second at \$11,688.60. The apparent profits of the first concern was reported at \$7,558.24, to be increased possibly 508 from *doubtful or bad debts; the apparent loss of the second, \$685.72, to be diminished from doubtful debts. It appears that F. L. Whitehead was debtor on the books of the first concern to the amount of \$2,076.28 of principal, and on the second to \$1,082.48; and these debts were included in the commissioner's report of assets.

The cause came on again to be heard on the 10th day of May, 1860, when the court held, 1st. That the creditors of the concern of F. L. Whitehead, agent, and F. L. Whitehead, agent, & Son, were entitled to full satisfaction out of the assets of said concerns. 2d. That the plaintiffs in the order in which they obtained their liens upon the residue, if any there shall be, will be entitled to such residue. 3d. That whether or not the creditors of the latter concern, in case they are not paid out of the assets, shall be allowed to go upon any surplus profits of the first, after its debts are paid, would not then be passed upon. And the court then proceeded to decree the payment of a dividend to the creditors of the first concern of fifty per cent., and of the second concern of twenty per cent., to be paid out of the fund in the hands of the receiver of the court. And thereupon Thomas L. Penn and Fitzpatrick's representatives, two of the plaintiffs, applied to this court for an appeal from the decree; which was allowed.

Tucker, for the appellants.

Green, for the appellees.

MONCURE, P., delivered the opinion of the court:

When Floyd L. Whitehead commenced his mercantile business as agent of his wife Maria P. Whitehead in March or April, 1846, he was insolvent, having a short time before taken the oath of an insolvent debtor.

He had a large family, consisting, 509 besides himself and his *wife, of six children; three of whom were by a former marriage, and all of whom were under age, some of them being of very tender years. The family had no means of subsistence but what could be derived from

a small separate estate, which had been settled on the wife by her husband, in consideration of her relinquishing her contingent right of dower in certain real estate conveyed by him to others, and from the use of a few slaves loaned to her by her father. These means being wholly inadequate for the purpose, it seems to have been determined by the husband and wife to endeavor to supply the deficiency by her engaging in a mercantile business on the credit of her separate estate, to be carried on by him as her agent. And accordingly, H. W. Heath, who had been doing business as a merchant on his lot of land called Fleetwood in the county of Nelson, being about, or anxious, to close his business, leased to her, or her husband as her agent, the said lot of land for three years, at the annual rent of \$165, and sold to her, or her said agent for her, his stock of goods remaining on hand, amounting, per invoice, to \$1,263.83, on a credit of six, twelve and eighteen months; the invoice being made out in the name of her brother Charles Williams, trustee in the deed of settlement; and the lease for the lot, and the bonds for the purchase money of the goods, being executed by her husband as her agent, and the bonds also, it seems, by him as her surety. About the same time, to wit, on the 1st of April, 1846, she executed a deed declaring that the said arrangement was made with her consent, and pledging her separate estate to secure the payment of the money due to Heath; which deed was also executed by her husband, and was acknowledged by both of them and duly recorded. Shortly after the business was commenced, to wit, on the 26th of May, 1846, her husband was appointed trustee instead of her brother, by a decree of the County court of

510 *Nelson, in a friendly suit brought for that purpose. The business was carried on by her husband as her agent for four years and five or six months; at the expiration of which time she entered into partnership with Alexander R. Whitehead the oldest son of her husband, then about nineteen years of age; and thenceforward the business was conducted in the name of Floyd L. Whitehead, agent, & Son, and was continued about two years longer, until some time in the fall of 1852, when it was closed. No service was rendered by the wife in carrying on the business, which was conducted almost exclusively by her husband and his two oldest sons, Alexander and Kincaid, both of whom were minors. It seems to have been quite successful; especially while it was conducted solely in his name as agent of his wife, during which period a tract of land and a slave and other personal estate were acquired by means of the supposed profits of the business; and at all events it answered the chief purpose for which it was undertaken—that of affording adequate means for the comfortable support of the family. It was commenced and carried on without any cash capital, and exclusively or mainly on credit. No credit was given to the husband, who was deeply

involved in debt, and seems to have been regarded as hopelessly insolvent. But credit was exclusively given to the wife, on account of her supposed separate estate, and of the stock in trade and the prospective profits of the business carried on in her name and for her benefit; and also to Alexander R. Whitehead after he became a partner; he being young and uninvolved in debt, and also, it seems, industrious, capable, and attentive to business. At the close of the business and at the commencement of this litigation, in 1852, both concerns were heavily in debt; and it is doubtful whether the assets of the concern of "Floyd L. Whitehead, agent," will be much, if any, more than sufficient to pay its

511 debts; while *the assets of the concern of "Floyd L. Whitehead, agent, & Son," will probably not be sufficient for the payment of its debts. The question in controversy now to be decided in this case is as to the proper application to be made of these assets; that is, whether they should first be applied to the payment of the debts of the said concerns respectively, or to the payment of the individual debts due by Floyd L. Whitehead, before the commencement of the business, to the appellants, who insist that the said assets constitute a part of his estate quoad his creditors, and that they, the appellants, have acquired liens upon the said assets by virtue of decrees obtained and execution issued against him.

If this question were to be solved according to the dictates of natural justice, there would seem to be little difficulty in answering it; and supposing the facts to be as before stated and all the parties to have acted bona fide, the answer would be, that those creditors who furnished the means of acquiring the property, and relied solely or mainly upon it for their reimbursement, are entitled to priority over creditors who furnished none of those means, and did not trust their debtor on the faith of any such property. The question is to be solved, however, not by the rules of natural justice, but upon settled principles of law and equity; and the inquiry now to be made is, what answer do those principles give to the questions?

In this case there was certainly no fraud, actual or constructive, on the part of the creditors, or any of them, of the mercantile concerns aforesaid, in dealing with or giving credit to the said concerns. Nor does it appear that there was any actual or constructive fraud on the part of Alexander R. Whitehead in any of these transactions. Nor does it appear that any fraud was actually intended by F. L. Whitehead and wife or either of them in making and executing the arrangements aforesaid.

512 *they are fraudulent and void as to his creditors, it is because they are so by construction and intentment of law, from the very nature of the transactions in themselves. But whether fraudulent actually or by construction of law, the effect is precisely the same.

Where all the parties to a fraudulent transaction are sui juris, it is null and void as to all of them, though it may have been founded on valuable consideration. It is not valid even to the extent of such consideration. But this is not the case in regard to a feme covert, who may be a party to such a transaction, and have given value, or relinquished a right or interest, or incurred a loss or risk, in consideration thereof. In such a case the transaction is valid as to her, to the extent of affording compensation for the value given, or right or interest relinquished, or indemnity for the loss or risk incurred, as aforesaid. The participation of a wife in the fraud of her husband, will not impair her rights. *Quarles v. Lacy*, 4 Munf. 251; *Blanton v. Taylor*, Gilm. 209; *Taylor v. Moore*, 2 Rand. 563.

A married woman may engage in trade on her separate account, and enter into a partnership for that purpose, by the consent of her husband, and she will be entitled to the profits of the trade against her husband, even though his agreement be merely voluntary; and against his creditors (at least to some extent) if the agreement be founded on valuable consideration paid by or for the wife. A married woman who has a separate personal estate is regarded as a feme sole as to such estate, and may dispose of it and make it liable for her debts, subject, however, to such restrictions as may be imposed upon her by the instrument creating the estate. To the extent of her power of disposition over her separate estate, she may, at least with the consent of her husband, engage in trade,

either solely or in partnership with
513 another, and make *her separate estate liable for the debts incurred in conducting the business. And she will be entitled to the profits of the trade as against her husband, and also as against his creditors, to the extent at least to which such profits may not be due to labor, skill, capital or credit furnished by the husband. Story on Part. §§ 11, 12; 2 Story's Eq. §§ 1385-7; 2 Roper on Husband and Wife, ch. 18, § 4, pp. 167-175. Where he furnishes all or a portion of the labor, or a portion of the capital or credit, used in carrying on the business the wife will be entitled, even as against his creditors, to such portion of the profits as will compensate her for what she may have contributed to the business either in the shape of capital or credit; at least provided there can be an apportionment of the profits according to the respective contributions of the parties. It may be impossible in some cases to make a complete apportionment. But to the extent to which a just apportionment can, it will be made by a court of equity.

The appellants contend that in this case the wife in fact contributed nothing to the business, and the husband everything in the shape of labor and skill of himself and his minor sons. She certainly contributed no part of the labor and skill with which the business was carried on; and the appellants insist that she had no separate estate which

she could charge with debts on account of the business, and could, therefore, have had no credit to contribute. If she had such estate, she certainly intended to charge, and did charge it, with the payment of the said debts. She did so expressly, by deed duly recorded, at least in regard to the debt to Heath & Co. for the purchase of the goods with which the business was commenced. Had she not such an estate? The property was expressly conveyed to her separate use for life, and the only question is as to

her power to dispose of her life
514 *estate or charge it with the payment of her debts. No such power is expressly given or denied to her by the deed. If such a power be not denied, either expressly or by implication, it is given as an incident to the separate estate. It may be denied by implication, and the question is, whether, looking to the whole instrument and the circumstances under which it was made, it was intended by the parties to exclude such a power. The consideration paid by the wife for her separate estate in this case flowed entirely from her. It was her contingent dower right in the real estate conveyed by her husband. She doubtless might have had the subject of the separate estate conveyed absolutely and exclusively to her use instead of for life only. The interest conveyed is as nearly absolute as it well could be. To be sure the use is expressly limited to her for life, but any part of the subject may at any time be sold by the trustee with her consent, and the proceeds of sale invested in other property in trust for her, and after her death the subject is to be conveyed to her descendants, if any, and if none, to her heirs at law: "provided always, that the said Maria P. shall have the power and authority to convey the said property, or any part thereof, by will, to such person or persons as she shall choose, but not out of her own family or the family of her said husband." There can be no doubt, I suppose, but that the deed conveys the estate to her use exclusively during her life, notwithstanding the terms in which the use is declared; that is, "to the separate use and benefit of the said Maria P. Whitehead for and during her natural life, and shall remain in her possession for the support and maintenance of the said Maria P. and her issue and family, and for no other purpose whatever." These latter words, "for the support and maintenance of the said Maria P. and her issue and family, and for no other purpose

515 whatever," *seem to have been intended only to show the motive and purpose for directing the property to remain in her possession instead of that of the trustee, and more plainly to exclude any claim or control of the husband or liability for his debts, and not to limit or curtail the separate use and benefit for life immediately before, in the same sentence, expressly given to her, nor to give to her "issue and family" any interest in the subject, in law or equity, during her life. There is a much plainer indication of an

arms," and without the knowledge and against the consent of the plaintiff, entered the store of the plaintiff, and then and there from the said store took and carried away a large quantity of the goods and chattels of the said plaintiff, to wit, &c., of the value, &c., and other wrongs to the said plaintiff, then and there did, to the damage of the plaintiff \$10,000. To this declaration there was a demurrer, which was overruled. There was a trial on the plea of not guilty in 1857, when the jury did not agree, and a subsequent trial in 1859, upon which there was a verdict and judgment for the plaintiff for \$10,000.

The first error assigned is, that the case was tried while there were pending and undisposed of a demurrer to a special plea filed by the defendant, and a motion to exclude another special plea subsequently tendered by him.

The substantial matter of these pleas are the same. They set up in bar of the further prosecution of the suit, the fact that the plaintiff had, after the institution of the suit, taken the oath of insolvency, by virtue of which his interest in the subject matter of controversy had become vested, as alleged in the first plea, in the sergeant of Richmond, and as alleged in the second, in the sheriff of Henrico. But these pleas presented no bar to the action. The action was properly brought in the name of the plaintiff before he took the oath of insolvency, and it might properly proceed in his name afterwards, whatever rights in respect to the subject matter vested, by the insolvent proceedings, in the sergeant of Richmond or sheriff of Henrico. The irregularity in failing to dispose of the questions raised upon these pleas, affords, therefore, no ground to reverse the judgment. *Creel v. Brown*, 1 Rob. R. 255, and cases cited.

481 *The next error assigned is the refusal of the court to exclude certain depositions. When the case was called for trial in 1859, the counsel for the defendant moved the court to exclude these depositions, on the ground that they had been taken without a commission (being taken out of the state) and without notice. A commission was produced, which had not been annexed to the depositions, but no notice was proved. One of the counsel for the plaintiff made affidavit that these depositions had been read on the former trial, but it was not proved or stated whether they were read without objection, except so far as appeared from the fact that no exception was then taken on the ground of their admission.

If the defendant allowed these depositions to be read on the former trial without objection, as may be inferred to be the fact, he must be considered as waiving objection to them. If the objection was made and overruled, the failure of the defendant to except to the opinion of the court was equally a waiver of the objection. If the defendant desired to renew the objection afterwards, which he might do unless the death of the witnesses or some other reason

made it unjust to the plaintiff to allow it, he should have done so in convenient time, and made it known to the plaintiff, so as to enable him to supply the proof of notice, if he could, or to take the depositions again. To spring the objection upon the eve of a second trial, eight years after it has been thus distinctly waived, and when nothing had been done in the meantime to indicate that it was to be relied on, was a surprise upon the plaintiff, and tended to defeat the ends of justice. The object evidently was to delay the trial, and not to protect the just rights of the defendant. Under these circumstances, the Circuit court did not err in overruling the motion to exclude the depositions.

Upon the final trial sundry instructions were given to the jury, on motion of the plaintiff, and excepted to by the defendant. These require no particular notice; for while they are assigned as error, no objection is specified, and the assignment of error is evidently not relied on. And I do not think that any valid objection can be made to either of these instructions.

The defendant also excepted to the refusal of the court to give two instructions moved by him. The first of these instructions consists of two parts, which must be considered separately, as they relate to distinct subjects. The first part relates to the goods which were obtained by Peshine and Gouldthwait from Leonard by purchase in payment of their own debts. In respect to these goods, the court was asked to say to the jury that the defendant was not liable if the goods were in the possession of Leonard, with authority from the plaintiff to sell them, not restricted by a prohibition to sell to the defendant and Gouldthwait, and if they bought them from Leonard.

But this instruction was not appropriate to the evidence before the jury, and was calculated to mislead them, by confining their attention to the mere form of the transaction, without regard to its real character and substance. For the evidence tended to prove that the defendant and Gouldthwait entered the store of the plaintiff by an arrangement with Leonard, his clerk, after it had been closed for the night, and without the knowledge of the plaintiff, and that during the night they made the purchase from Leonard in payment of their debts, after the failure of their efforts to effect a settlement with the plaintiff. The jury might well have believed that this whole transaction was a fraud upon the plaintiff, and that whatever authority Leonard had to make sales of the plaintiff's goods in general and in the course of trade, he had none to make this particular sale, and that the defendant knew it.

483 *The other part of this instruction relates to the goods that were designed for other creditors of the plaintiff, and it asked the court to say that if these goods were packed up and sent off by Leonard, the defendants are not liable on account of

them, unless the plaintiff proves to the satisfaction of the jury that they aided, assisted and concurred in their being so taken and sent away.

[This instruction speaks of the "defendants," when there was but one defendant then before the court, but that does not affect the principle.]

As we have heard no argument in this case, we do not know the ground upon which the propriety of this part of the instruction was objected to. It may be that the court treated the first instruction as an entirety, and refused to give it in consequence of the defect in the first part of it. But the two branches of the instruction are really independent of each other. They relate to different subject matters. The propositions embraced in them are as distinct as if they had been propounded as distinct instructions, and the fact that they are grouped together as one instruction cannot prevent the court from regarding them in their true character. If, therefore, this latter branch of the instruction stated the law correctly in relation to the subject to which it applied, it should have been severed from the other part and given to the jury.

At first this part of the instruction seemed to me to require the plaintiff to prove the express concurrence and co-operation of the defendant with Leonard in respect to these particular goods, and to imply that, in the absence of such proof, his presence and general complicity in the transactions of that night would not have authorized the jury to hold him responsible. But upon further consideration, I do not think this is the true meaning of the instruction. It does not indicate what sort of

evidence is necessary to prove that the defendant aided, assisted and concurred in the act of Leonard; it only affirms that the defendant is not liable for that act, unless it is shown in some way that he aided, assisted or concurred in doing it. I can see no objection to this proposition. And as the burden was on the plaintiff to make out his case, it was for him, of course, to prove such aid, assistance and concurrence by the defendant as was necessary to make him responsible for the act of Leonard.

The court erred, therefore, in refusing to give the second part of the first instruction.

The second instruction asked for by the defendant declares that the plaintiff cannot recover in this action for injury to his credit or business standing, or the loss of profits which might have been made in his business, even though the jury should think that such injury or loss resulted from the acts of the defendant.

It does not appear how far the counsel for the defendant thought the jury could properly go in awarding damages in this case. It may be inferred from this proposed instruction that they insisted on restricting the damages to the value of the goods taken by the defendant, or by Leonard with his concurrence. Such is the rule of damages

in an action of trespass to property committed without circumstances of aggravation, as for example in trespass de bonis asportatis, for goods taken under a bona fide claim of title. *Sedgwick on Dam.* 454; *Knight v. Egerton*, 7 Excheq. R. 407. Where that rule applies, no right of the plaintiff is violated except the right of property, and, therefore, the value of the property measures the full extent of the injury.

When the trespass is committed without fraud, malice, oppression or other special aggravation, the object of the law, it is generally said, is to give compensation for injury suffered, and damages are restricted to that object. *Where the loss is merely pecuniary, and admits of definite estimate, it is proper enough to speak of compensation, which implies the notion of equivalents. But that word becomes inappropriate, where the injury is not merely pecuniary, and does not admit of definite estimate. The use of this word has, I apprehend, been productive of no little confusion in discussions relating to this branch of the law. It would be more appropriate to say that the object of the law is to give amends or reparation. The injury done depends upon the rights that are violated, and the extent of the violation, and the amends or reparation in damages must be measured accordingly. This view of the subject, however, is rather curious than important in the present case.

Whatever be the true theory of damages in such a case, it is well settled that the plaintiff is entitled to recover all such damages as are the natural and proximate result of the wrongful act complained of. But where special damages, as in the present case, are not claimed, he can only recover such damages as are not only the natural and proximate result, but also the necessary result of the act complained of. The law implies from the statement of the injury, that it produced all such consequences as naturally and necessarily flow from such an act. And the real object of the evidence is not to prove the existence of the damage but to ascertain its extent.

The question, then, is whether such damages as are contemplated in this instruction, fall within the description of natural and necessary consequences of the acts complained of. That such acts are well calculated to injure the credit and business standing of a merchant, and that such will always be their effect, to a greater or less extent, seems too obvious to require proof by argument or illustration. They involve an imputation, in the harshest form, upon his credit and also upon his integrity.

And *to take away a large part of a merchant's stock of goods, if it does not break up and destroy his business, must, to a greater or less extent, injure it, by impairing the means of carrying it on and diminishing its profits.

The damages resulting from injury to the credit and business standing of the plaintiff, and from the injury to his business,

were, therefore, properly recoverable, as natural, proximate and necessary consequences of the acts of the defendant. In *Downell v. Jones*, 13 Alab. R. 490, such damages were held to be recoverable as general damages for maliciously suing out an attachment against a merchant, which was levied on his stock of goods.

In order to ascertain the damages resulting from the interruption or embarrassment of the plaintiff's business, the nature and extent of the business, and whether profitable or unprofitable, are proper subjects of inquiry. Without information on these points, the jury would be without any guide to their discretion in the assessment of damages. But in such a case the probable profits of the business are not the measure of damages. They are necessarily dependent on contingencies, and, therefore, as a general rule, not recoverable as damages. 8 Gratt. 16; 7 Cush. R. 516; 13 How. U. S. R. 307.

But while the probable profits of the business do not furnish the measure of damages, they may be proved to the jury by general evidence, as well as the extent and character of the business, as affording the best guide to the jury of which the nature of the case admits, in the exercise of their judgment in the assessment of damages. Such evidence tends to show the character and degree of the injury for which amends is to be made. *Ingram v. Lawson*, 6 Bing. N. Ca. 212 (37 Eng. C. L. R. 350); *Downell v. Jones*, 17 Alab. R. 689; *Wade v. Leroy*, 20 How. U. S. R. 34; *Nebraska City v. Campbell*, *2 Black's U. S. R. 590; *Brown v. Smith*, 12 Cush. R. 366.

When the act complained of is accompanied by circumstances of aggravation, they may be proved under the general allegation of *alia enormia*, without further specification, when they do not afford a substantial ground of action. They give character and quality to the act complained of, and show the degree of the injury, and could not be redressed at all if not allowed to be proved as incidents of the trespass complained of. 2 Saund. Pl. & Evid. 1121; *Sampson v. Coy*, 15 Mass. R. 493; *Faulkner v. Alderson*, Gilm. 221. Thus, the facts that the defendant entered the store of the plaintiff in the night and by collusion with his clerk, not to mention other facts which might have been found by the jury from the evidence in this case, were admissible in evidence, and proper subjects for the consideration of the jury in estimating the damages.

When the trespass is accompanied by circumstances of aggravation, which are proper to be considered by the jury, the theory of compensation, properly speaking, fails as a rule of damages. The injury arising from these circumstances does not, in its nature, admit of definite estimate, and it is impossible to fix its equivalent in damages. But even those who contend for the theory of compensation as the rule of damages in all cases, concede that damages may be given, in such cases, in the dis-

cretion of the jury, proportionate to the character and extent of the injury and the circumstances of aggravation; though they insist that they must be restricted to what is necessary to compensate the plaintiff: a restriction, in the nature of things, wholly indefinite. Others contend that the jury in such cases are not limited by the rule of compensation, but may give what are called indifferently exemplary, punitive or vindictive damages, for the sake of punishment and example. The discussion as to the theory of damages has been conducted with great learning and ability by Prof. Greenleaf in favor of the rule of compensation and by Mr. Sedgwick against it. 2 Greenl. Ev. § 253; Bost. L. Rep. April, 1847; Id. June, 1847; Sedgwick on Damages. Prof. Parsons agrees with Prof. Greenleaf. 3 Parson's Cont. chap. 8. The views of Mr. Sedgwick are sustained by the Supreme court of the United States and by the courts of most of the states.

But if the jury are allowed to give damages for causes of aggravation which do not admit of definite estimate, which all admit, and if the court will not interfere unless the damages are so excessive as to indicate that the jury were actuated by partiality or prejudice, which is a well settled rule, it does not seem to be a matter of any practical importance whether the damages are given with a view to compensation, or with a view to punishment. If compensation is the rule, there is no measure for it except the discretion of the jury, and if punishment and example are the rule, the damages are equally within the discretion of the jury. Upon whatever theory it rests, this right of the jury to give damages in proportion to the circumstances of aggravation and outrage, is necessary to secure full reparation and amends to the party injured, and exerts a wholesome influence upon society. The law confides in the integrity and good sense of the jury, under the supervision and control of the court, to prevent abuse upon the one hand and to secure justice upon the other.

I have made these general remarks upon the subject of damages, because this case is to go back for a new trial. Nothing that I have said, however, is intended to indicate an opinion as to the conduct of the defendant. That is a matter for the consideration of the jury alone.

The result is, that the second instruction asked by the defendant ought not to have been given. But the refusal to give it without explanation was calculated to mislead the jury, by creating the impression that they might enter into a conjectural estimate of the profits lost by the plaintiff, and make that the measure of damages. The court should, therefore, either have accompanied the refusal with an explanation of the purpose for which the profits of the plaintiff's business were to be considered by the jury, or should have given an instruction embodying the proper rule of damages.

It is unnecessary to notice the questions

raised by the last bill of exceptions. I am of opinion that the judgment should be reversed.

The other judges concurred in the opinion of JOYNES, J.

Judgment reversed.

490

Clarkson & als. v. Booth.

April Term, 1867. Richmond.

1. **Wills—Slaves—Case at Bar.**—Bequest of slaves to a daughter B and her husband A. If B die having no bodily heir, she and A to enjoy them during their life, but not to remove them out of the state, and at their death to be equally divided among the rest of testator's children. B survives her husband, sells the slaves, and dies never having had a child. **Held:**

1. **Same—Same—Contingent Limitation—Valid.**—The contingent limitation to the other children is valid; and all the children alive at the death of the testator take equally.

2. **Same—Same—Death of Remaindermen during Life of Life Tenant—Effect.**—Some of the children having died in the lifetime of B, their personal representatives and the surviving children are tenants in common of the slaves, and must join in the action to recover them.

3. **Slaves—Sale by Life Tenant—Suit by Personal Representatives of Deceased Remaindermen.**—B and the purchaser from her held not adversely but in subordination to the rights of the remaindermen, and on the death of B the possession in law vested in the surviving children and the personal representatives of the deceased children, whether the personal representatives had then been or were afterwards appointed; and they sue in their own right and not as representatives.

*In *Elys v. Wynne*, 23 Gratt. 224, there was a devise to Sarah Dougherty and the heirs of her body, but should she die without heirs, the land was to descend to the other heirs of the testator. Sarah Dougherty sold the land and conveyed it with general warranty, then died without having had a child. In an action of ejectment by the heirs at law of the testator against the purchasers, it was claimed that the action of the heirs was barred by the adversary possession of the defendant; that, the adversary possession commenced from the time of the execution of the deed from Dougherty to the purchasers. The court said: "The deed aforesaid certainly conveys the land in absolute fee simple to the said grantee, with covenant of general warranty. At the time of the conveyance, the grantors, in right of the wife, were seized of an estate in fee, defeasible by the death of the wife without issue living at her death. Had she left issue living at her death, the estate in fee would thenceforward have been indefeasible. Probably, when the deed was executed, it was expected that she would leave issue living at her death. At all events, the deed, however absolute and unconditional on its face, could have no greater effect than to invest the grantee with the title of the grantors, and it invested him with that title, even though it may have professed to convey more. The effect of the conveyance, as to the parties

4. **Same—Same—Same—Abatement.**†—The personal representative of one of the children dying after the action brought, it abates as to him and cannot be revived in the name of another personal representative, but must proceed in the name of the survivors in the action.

5. **Misjoinder of Parties—Surplusage—Case at Bar.**‡—One person being personal representative of several of the children, he is but one plaintiff, and though one of his intestates died after B, and he is described as the personal representative of each intestate, that is surplusage, and there is no misjoinder of plaintiffs.

491

*6. Clerical Errors—Correction of—Case at Bar.§

—It is intended to commit the estate of David C to the sergeant of L, but by a clerical mistake the name is written Daniel. After action brought by the sergeant under this commitment, the court, on his motion, corrects the mistake by an order entered *nunc pro tunc*. This order relates back to the first, and the estate of David was well committed.

This is an action of detinue brought for the recovery of slaves. The following is a statement of the case:

John Clarkson by his will, dated and admitted to probate in 1817, made a bequest in the following words: "I give and bequeath to my well beloved daughter Betsey Taylor and Major Abram Taylor her husband, Mealy and her children, by them freely to be possessed and enjoyed; and if it so happens the above Betsey Taylor die having no bodily heir, that she and Major Abram Taylor is to enjoy them during their life, but is not to remove the said negroes out of this state, and at their death to be equally divided among the rest of my children." Abram Taylor died in the year 1819, and Betsey Taylor on the 27th day of October, 1849, without ever having had issue. The rest of the testator's children living at the time of his death were James Clarkson, William Clarkson, Frances Carter, Catharine Jones, Lucy Dodd, Mary Belleneger, David Clarkson and Anselm Clarkson. All of them except the two last, David and

claiming under the contingent limitation over, is precisely the same as if the conveyance had been expressly subject to such limitation. Until the death of Sarah Dougherty, without issue living at her death, the heirs at law of the testator had no right of action for the land. Their right of action then and thereby accrued, and the act of limitation could begin to operate against them only from that time. Sarah Dougherty and her assigns held the land in privity with the title of those claiming under the contingent limitation over, and could not hold adversely against it during her life. This view is fully sustained by the decision of this court in *Clarkson v. Booth*, 17 Gratt. p. 490. We are, therefore, of opinion that the action is not barred by adversary possession, or the act of limitations."

See also, the principal case cited in *Austin v. Brown*, 87 W. Va. 699, 17 S. E. Rep. 209.

†**Abatement.**—See principal case cited in *Rowe v. Pulp Co.*, 42 W. Va. 554, 26 S. E. Rep. 821.

‡**Descriptio Personæ—Surplusage.**—See foot-note to *Harvey v. Skipwith*, 16 Gratt. 393.

§See foot-note to *Price v. Com.*, 33 Gratt. 819.

Anselm, died before Betsey Taylor, and David died before the institution of this suit, but whether before or after the death of Betsey Taylor was a fact not known or ascertained in the cause. Anselm was alive at the time of the institution of the suit and the rendition of the judgment. At different periods in the lifetime of Betsey Taylor the following named personal representatives of the following named children of the testator were duly appointed and qualified as

such, viz: Nelson C. Clarkson as executor *of James Clarkson, Peter J. Hill as administrator with the will annexed of Catharine Jones, and James Smiley as administrator of William Clarkson; and administration de bonis non of the estate of Mary Bellenger, was duly committed to Henry Dunnington as sergeant of the corporation of Lynchburg. After the death of Betsey Taylor and before the institution of the suit, to wit, in August, 1854, by an order of the Hustings court of Lynchburg, the estates of Lucy Dodd and of David Clarkson by the name of Daniel Clarkson, were committed to the hands of said Dunnington, sergeant as aforesaid, for administration, according to law. After the institution of the suit, to wit, on the 9th of March, 1859, by another order of the same court, reciting that "it appearing to the satisfaction of the court that there was a clerical error in the order of the 9th of August, 1854, committing the estate of Daniel Clarkson to Henry Dunnington, the sergeant of the city of Lynchburg, when in fact it was the estate of David Clarkson that was so committed to said sergeant; and that said error was wholly clerical; and said Dunnington, sergeant as aforesaid, having since that time continued to act as administrator of said David Clarkson, under said order," the said court, on the motion of the said Dunnington, corrected the said error, nunc pro tunc, by so amending the said order of the 9th of August, 1854, as to insert therein the name of "David" instead of that of "Daniel."

Abram Taylor used and employed the slaves Mealy and her children as his own during his life, and Betsey Taylor after his death used and employed them as her own while in her possession, some of them being sold by her, and others being sold by the sheriff under an execution against her. She sold some of them to persons who carried them to North Carolina. In 1841 she sold Edmund, a descendant of Mealy, to the defendant Booth, *but at what price or for what period, whether for her own life only or for the life of the slave, does not plainly appear; though it is probable from the circumstances that the latter was the fact. The defendant remained in possession of Edmund from the time of the sale until after the institution of the action, and was still in possession at the trial thereof. On the 27th of September, 1854, the action was brought by Anselm Clarkson, Robert C. Jones executor of Frances Carter, Nelson C. Clarkson administrator of James Clarkson, Peter J. Hill administra-

tor of Catharine Jones, James Smiley administrator of William Clarkson, Henry Dunnington, sergeant of the city of Lynchburg, and as such administrator of Lucy Dodd, the same Henry Dunnington, sergeant as aforesaid, and as such administrator of Mary Bellenger, and the same Henry Dunnington, sergeant as aforesaid, and as such administrator of David Clarkson, against Moses Booth. The declaration is in the common form used in the action of detinue, and claims Edmund and four other slaves by name. The general issue was joined. And in October, 1859, after the action had been pending several years, the plaintiff Robert C. Jones executor of Frances Carter, having died, the case abated as to him, and then came on to be tried by a jury, when a verdict was rendered for the plaintiffs for the slave Edmund of the value of \$1,400, and for damages for the detention of said slave, assessed at \$1,250, and for the defendant as to the other slaves in the declaration mentioned. On the trial the court gave several instructions asked for by the defendant and refused to give several asked for by the plaintiffs; and they excepted to the opinions of the court thus given against them. The effect of these opinions, so far as it is material to be stated, is, that the right of action for the slaves in controversy survived to Anselm Clarkson, and was in him alone, and that the plaintiffs could

not recover *them in the suit; and also that the order of the Hustings court of Lynchburg of the 9th of March, 1859, made for the purpose of correcting a clerical error in the order of the same court of the 9th of August, 1854, as aforesaid, does not relate back so as to make Henry Dunnington, as sergeant of the city of Lynchburg, the personal representative of David Clarkson at the time of the institution of the suit, which could not therefore be maintained in the name of said Dunnington as such representative. After the verdict was rendered, a motion was made by the defendant to set it aside and grant a new trial, which motion the court sustained; and the plaintiffs excepted. The facts proved on the trial were certified in the bill of exceptions, at the conclusion of which it was assigned as the reason for setting aside the verdict and granting a new trial, that the court was of opinion that there was a misjoinder of the plaintiffs in the suit, and that the jury disregarded the instructions of the court. On the 20th of October, 1860, the case came on again to be tried, when a verdict was rendered for the defendant. On this trial the same instructions were asked for, and given and refused, as on the former trial; and the plaintiffs again excepted. Judgment for the defendant having been given on the verdict, and the plaintiffs obtained a superseas thereto from this court.

Garland, for the appellants.

There was no counsel for the appellee.

MONCURE, P., delivered the opinion of the court:

The court is of opinion that by the will of John Clarkson the slaves Mealy and her children, which were thereby given to his daughter Betsey Taylor and her husband Abram Taylor, were limited at the death of the survivor of them, to the rest of the testator's children, upon the
495 *contingency of the death of his said daughter without issue living at her death. Although the words "and if it so happens that above Betsey Taylor die having no bodily heir," immediately following the bequest to her and her husband, might, standing by themselves and unexplained by anything that follows them in the will, import an indefinite failure of issue, yet followed as they are by the words "that she and Major Abram Taylor is to enjoy them during their life, but is not to remove the said negroes out of this state, and at their death to be equally divided among the rest of my children," an intention is unmistakably indicated to confine the contemplated contingency to the period of their death, or rather that of the survivor of them. In the event of the happening of such contingency, they are to be regarded as having been mere tenants for life, expressly restrained from removing the negroes out of the state; and at the termination of the life estate, or, in the language of the will, "at their death" (words, which are very significant), the negroes are directed to be equally divided among the rest of the children.

The court is further of opinion that after the death of the testator and before the death of his said daughter, the contingent executory limitation aforesaid to the rest of his children created such an interest in them as that the respective portions of any of them dying during that period devolved on their personal representatives respectively, and at the death of the said Betsey Taylor, who survived her said husband and died without ever having had issue, such of the rest of the testator's children as were then living, and the personal representatives of such of them as were then dead, were tenants in common of the said slaves and their increase, or such of them as were then in existence, and as such were entitled to the possession thereof, and in such possession, at least constructively, *and
496 were entitled to maintain a joint action for any subsequent wrongful detention or conversion of the same or any part thereof. 1 Lomax on Ex'rs, p. 319, marg.; 1 Tho. Co. Lit. 783; 3 Rob. Pr., new ed., 163; Rose's adm'x v. Burgess, 10 Leigh 186, and especially the opinion of Stanard, J., in that case. As tenants in common of personal property must join in an action for an injury to such property, and as a personal representative of a deceased tenant in common becomes a tenant in common with the survivors, it follows as a necessary consequence that he must join with them in such an action. The rule is different where two or more persons are jointly entitled, as parties or otherwise, to a chose in action, and one of them dies. There the remedy survives, though the right does not, and the

action must be brought in the name of the survivors only. This was long a mooted question, and was at one time held otherwise in England. But it was decided in the case of *Martin v. Crompe*, 1 Lord Raym. R. 340, that the action must be in the name of the survivors alone, Lord Holt assigning as a reason that it would make strange confusion that one party should sue in his own right and another in another's. This decision had ever since been held in that country to be undoubted law, as was said by Parke, B., in *Buckley v. Barber*, 1 Eng. L. & E. R. 506; and the same doctrine is firmly established in this country. 3 Rob. Pr., new ed., p. 164, and authorities cited. There is this difference, then, in regard to the proper persons to be made plaintiffs in an action for the wrongful detention or conversion of personal property held by tenants in common, between a case in which the death of one of them occurs before, and a case in which such death occurs after, the wrongful act; that in the former case the action for such act must be brought in the joint names of the survivors and
497 the personal representative of *the deceased tenant in common, while in the latter it must be brought in the names of the survivors only; and where it is properly brought in the joint names of the survivors and the personal representative of the deceased tenant, and one of them dies pending the action, whether he be such personal representative or one of the survivors, it abates as to him and proceeds in the names of the surviving plaintiffs only; so that if the person dying be such personal representative, the action is not to be revived in the name of an administrator de bonis non of the deceased tenant in common. In fact, there is no difference in the rights in which the plaintiffs sue where one of them is a personal representative of a deceased tenant in common and the others are the surviving tenant. All of them sue in suo jure, though the description of personal representative of a decedent be added to the name of one of them. Such matter of description is unnecessary but harmless, and may be treated as surplusage. 2 Lom. on Ex'rs, 371, marg.; 3 Rob. Pr., new ed., 518; *Rose's adm'x v. Burgess*, supra; *Harvey v. Skipwith, &c.*, 16 Gratt. 393. Persons cannot join as plaintiffs in an action at law in different rights—the one as a personal representative and the other in his own right—for the reason assigned by Lord Holt as before mentioned, "that it would make strange confusion" to do so. A personal representative of a deceased tenant in common must have possession of the subject held in common, actual or constructive, when the wrong is done for which the action is brought, to entitle him to join with the surviving tenants in common as plaintiffs in the action. Title and possession make them tenants in common, and entitle them to maintain the joint action suo jure, even though one of them becomes entitled by being a personal representative, while the others are entitled in their

498 own right. The *possession of one tenant in common is the possession of all who may be entitled as co-tenants with him.

It is a rule of law that the property of personal chattels draws to it the possession, unless they be in the actual adversary possession of another. 1 Lom. on Ex'rs, 314, marg. A personal representative may, at his election, sue as such, or in his own right (of course, in the latter case, for the benefit of the estate he represents), for an injury to the goods of the deceased after his death, unless such representative be tenant in common of those goods with another, in which case, we have seen, they must jointly sue in their own right. A personal representative being considered in law as the owner of the goods of the deceased from the time of his death, may declare upon this constructive possession, though he may never have had actual possession before the tort committed; nor will it make any difference whether the injury was done before probate or administration granted, for they relate back to the death of the deceased. *Ibid.*

The court is further of opinion that the possession of the said slaves or any of them by the said Betsey Taylor during her life was not adverse to, but consistent with the title of the rest of the testator's children, and that the sale by her of a portion of the said slaves to the defendant Moses Booth, even if intended to pass the absolute estate, operated to pass the life estate only of the said Betsey Taylor in the same, and was null and void for any other or further purpose. And the said Moses Booth, after the said sale and until and at the time of the death of the said Betsey Taylor, continued to hold the slaves sold to him as aforesaid consistently with, and not adversely to the right and title of the rest of the children; and such of the said children as were alive at her death and the personal representatives of such of them as were then dead (though some of the said representa-

499 tives *may not have been appointed or qualified until after that time), eo instanti became entitled to the possession of the said slaves, and by construction of law was in the possession thereof as tenants in common. 1 Rob. Pr., new ed., 508-510, and cases cited. As was said by this court in *Henry v. Graves*, 16 Gratt. 244, 254-5, the particular estate and remainder made together but one absolute estate in the slaves. The assent to the legacy of the particular estate enured to the benefit of the remaindermen, who, though not in actual possession of the remainder during the existence of the particular estate, yet had all the possession of which a remainder is susceptible. The remainder was not a mere chose in action, but at most a quasi chose in action. No action was necessary to reduce it into possession, but at the termination of the life estate it would fall to the possession of the remaindermen by operation of law." To be sure if the life tenant, or the assignee of the life tenant (who by the assignment

becomes a tenant per auter vie), holds, uses and enjoys the property as his own after the termination of the life estate, such possession becomes adverse to the remaindermen and is a wrongful conversion of their property to his use, from the time of which conversion the act of limitations will begin to run against them; as was held by this court in *Layne v. Norris's adm'r*, 16 Gratt. 236. But there must be an instant of time, if not in fact, at least in contemplation of law, between the termination of the life estate and such subsequent wrongful conversion of the property by the life tenant, and that instant of time is sufficient to make the conversion a violation and invasion as well of the possession as the property of the remaindermen. Until the termination of the life estate the life tenant cannot hold adversely to the remaindermen, but must hold in subordination to their title. When the life estate terminates the title and right of possession are united in them, and though they have

500 *not actual, yet they have constructive possession of the property. The law does not, because it cannot, operate an actual transfer of the property from the hands of the life tenant, where it is necessarily found at the termination of the life estate, to the hands of the remaindermen, but it makes his possession their possession, until he wrongfully detains or converts the property; which act, as before stated, is an invasion of their possession as well as of their property. The law will not presume that they intend such a wrong until it is actually perpetrated, and when it is perpetrated it will not relate back to the termination of the life estate, so as to displace the intermediate constructive possession of the remaindermen, which was incident and adhered to their title. This is perfectly consistent with the decision of this court in *Layne v. Norris's adm'r*, supra, as will plainly appear by referring to the reasons on which that decision was founded.

The court is further of opinion that the testator's children, James Clarkson, William Clarkson, Frances Carter, Catharine Jones, Lucy Dodd and Mary Bellenger, having died before the said Betsey Taylor, their personal representatives were tenants in common of the said slaves, or such of them as were in existence when the life estate fell in, with the testator's son Anselm Clarkson who survived the said Betsey Taylor, and were properly joined with him as plaintiffs in this action. Whether the personal representative of the testator's son David Clarkson was also one of the tenants in common at that time and was properly joined as one of the plaintiffs in the action, depends upon whether he also died before the said Betsey Taylor; a fact which is represented in the record as being unknown. But if it be necessary to support the action, it ought to be presumed that he died before her.

The court is further of opinion that the insertion of the name "Daniel" instead of that of "David," in the order of the Hus-

tings court of Lynchburg of the 9th August, *1854. was a mere clerical error, which the said court at a subsequent term had a right to correct *nunc pro tunc*, and did so correct by the order of March 9th, 1859; and that by the former order thus corrected the estate of said David Clarkson was duly committed to the hands of Henry Dunnington, sergeant of the city of Lynchburg, for administration as of the said 9th of August, 1854.

But the court is further of opinion that even if David Clarkson in fact died after the said Betsey Taylor, or if Henry Dunnington were not the legal representative of said David Clarkson, neither of these facts, nor both of them together, would affect the right of the plaintiffs to maintain this action, inasmuch as the same Henry Dunnington is named as a plaintiff by the description of "sergeant of the city of Lynchburg and as such administrator of Lucy Dodd," and of "sergeant as aforesaid and as such administrator of Mary Bellenger," as well as by the description of "sergeant as aforesaid and as such administrator of David Clarkson," all of which is mere description of the person and may be stricken out as surplusage; the said Henry Dunnington being but one plaintiff, suing in his own name and right by the descriptions aforesaid.

The court is further of opinion that the plaintiff Robert C. Jones, executor of Frances Carter, having died pending the action, it was properly abated as to him, and further proceeded with in the name of the other plaintiffs.

And the court is therefore of opinion that the Circuit court erred in such and so much of its rulings as are contrary to the foregoing opinion, and especially in setting aside the first verdict of the jury and granting a new trial, instead of rendering a final judgment for the plaintiffs upon said verdict.

Therefore it is considered that the said judgment of the Circuit court be reversed and annulled, and that the

502 *plaintiffs recover against the defendant their costs by them expended in the prosecution of their writ of *superseas* aforesaid here. And this court proceeding to give such judgment as the said Circuit court ought to have given, it is further considered that all the proceedings in the action subsequent to the said first verdict of the jury be set aside and annulled, and that the plaintiffs recover against the defendant the negro slave Edmund in the said verdict mentioned, of the value therein mentioned, if he may be had; but if not, then the value aforesaid, together with his damages assessed by the jury in their said verdict, and their costs by them about their suit in the said Circuit court expended. But this judgment is to be without prejudice to any question which may arise in regard to the liability of the defendant for the alternative value of the said slave: this court only intending to give such judgment as the Circuit court ought to have given in

the condition in which the case was when the judgment of that court was rendered, without deciding whether the said liability of the defendant is affected, and if so, to what extent, by the provision of the constitution in regard to the abolition of slavery, or by anything else which has transpired since the rendition of the said judgment—it being considered premature by the court to decide that question now, when the parties have not been heard upon it, and facts which may materially affect it have not been brought into the record. If the defendant shall be advised to raise the question in the Circuit court, he will have an opportunity to do so (notwithstanding this judgment), by motion to quash any execution which may be issued upon the said judgment, as to the said slave or his alternative value, or otherwise, as he may be advised. Which is ordered to be certified to the said Circuit court.

Judgment reversed.

503 *Penn & als. v. Whitehead & als.

June Term, 1867, Richmond.

[94 Am. Dec. 478.]

1. *Married Women—Separate Estate—Engaging in Business—Right to Profits.**—A married woman may engage in trade on her separate account, and enter into partnership for that purpose, by the consent of her husband; and she will be entitled to the profits of the trade against her husband, even though his agreement be merely voluntary; and against his creditors, at least to some extent. If the agreement be founded on valuable consideration paid by or for the wife.

2. *Same—Same—Same—Same.*—A married woman having a separate estate, may engage in trade with the consent of her husband, and may to the extent of her power over it, subject her estate to the payment of the debts; and she will be entitled to the profits of the trade as against her husband and his creditors, to the extent, at least, to which such profits may not be due to the labor, skill, capital or credit furnished by her husband.

3. *Same—Same—Same—Same.*—Where the husband furnishes all or a portion of the labor and skill or a portion of the capital and credit used in carrying on the business, the wife will be entitled even as against his creditors, to such portion of the profits as will compensate her for what she has contributed to the business either in the shape of capital or credit. To the extent to which a just apportionment can, it will be made.

4. *Same—Same—Alienation.*†—If the power to dispose of or charge the wife's separate estate is not de-

**Married Women—Separate Estate—Engaging in Business—Right to Profits.*—The principal case is cited in the following cases: *Atwood v. Dolan*, 84 W. Va. 581, 12 S. E. Rep. 694; *Stewart v. Stout*, 88 W. Va. 483, 18 S. E. Rep. 728; *Carey v. Burruss*, 20 W. Va. 579; *Jones v. Reid*, 12 W. Va. 365, and cases cited; *Trapnell v. Conklyn*, 37 W. Va. 253, 16 S. E. Rep. 573.

In *Campbell v. Bowles*, 30 Gratt. 663, the principal case is distinguished. See also, *Alsop v. Catlett*, 97 Va. 369, 34 S. E. Rep. 48, where the principal case is cited.

†*Same—Same—Alienation.*—In the foot-note to *Darnall v. Smith*, 26 Gratt. 878, it is said: "The cases on

nied either expressly or by implication, she has the power as an incident to the separate estate.

8. **Same—Same—Life Interest—Right to Charge.**—Property is conveyed to a trustee, on a consideration flowing from the wife, for her separate use for life, to remain in her possession for the support of herself and her issue and family, and for no other purpose; and with power to dispose of it by will among her family. She has the power to charge her life estate with payment of the debts of the business in which she has engaged.

- 504 *6. **Same—Same—Debts Paid Out of Profits.**—In such a case the wife is entitled to have the debts of the business paid out of the assets in exoneration of her separate life estate.

7. **Same—Same—Engaging in Business—Liability of Stock for Debts.**—A wife being without any adequate means of support for herself and family, and her husband being insolvent, she, with his consent and for the purpose of obtaining a support, engaged in a mercantile business for her separate use by the aid of her friends in loaning her money or selling her goods on the credit of the business. Her stock in trade will be liable for the payment of her debts thus contracted, and so liable preferably to the proper debts of her husband; even though the necessary labor and skill employed in conducting the business was furnished by him and his minor sons.

8. **Same—Claim of Husband for Services—Priority of Creditors.**—In such a case any claim which the husband may have for the services of himself and his minor sons, will be subordinate to the claims of the creditors of the concern to priority of payment out of the assets.

9. **Infant Partners—Release of Services.**—An infant may be a partner, and his father though indebted and insolvent, may release to his son all claim to

his services; and the consent of the father to the son's becoming a partner is a release of his services.

10. **Married Women—Engaging in Business—Services of Insolvent Husband.**—A business in which the wife is engaged with the consent of the husband, is carried on by the labor and skill of her husband and his minor sons; and he is indebted and insolvent. The profits of the business after paying off its debts and expenses, are liable to the creditors of the husband.

11. **Same—Same—Expenses.**—The expenses of the support of the husband and his wife and family are a part of the necessary expenses of the business, without which there could be no profits.

This case was before this court in 1855, and is reported in 12 Grattan 74. The pleadings and interlocutory decree from which the appeal was taken are stated in that report. After the cause went back to the Circuit court Beverly Hargrove and others filed their bill in the same court, against the defendants in the first case, claiming to be creditors of Floyd L. Whitehead, and seeking to subject the same fund to the payment of their debts. And 505 *they charge that the said concerns were conducted without making public the names of the parties and principals, as required by the 13th section of ch. 145 of the Code of Virginia. The defendants answered, referring to the first suit and asking that the two might be united, and asking that their answers in the said first suit may be taken as their answers in this. A number of the creditors of Floyd L. Whitehead, agent, and Floyd L. Whitehead, agent, & Son, filed their petition in the cause setting up their claims, and alleging that they knew that Floyd L. Whitehead was insolvent, and that they would not have trusted him upon his own responsibility, but that their debts were contracted on the faith and credit of said firms. They were unaware of any fraud on the part of Whitehead, if there was any, which they do not believe, and certainly there was none on their own part.

It appears that Floyd L. Whitehead, failed in business in 1842, when he conveyed his property to trustees for the payment of debts; and at the same time, in consideration of Mrs. Whitehead's joining in the conveyance of his real estate, he conveyed to Charles Williams, the brother of Mrs. Whitehead, some slaves and other personal property, in trust for her separate use during her life, to remain in her possession for the support and maintenance of herself and her issue and family, and for no other purpose whatever: but that the trustee might, with her consent, dispose of any part of the property and invest it in other property, in trust for Whitehead; and after her death to her children, and if none to her heirs: provided, however, that she should have the power to convey the same or any part thereof by will to such person or persons as she should choose, but not out of her own or her husband's family.

At the time this deed was made,

this subject have been collected in annotations to *Leake v. Benson*, 29 Gratt. 153; *Garland v. Pamplin*, 32 Gratt. 305; *Irvine v. Greever*, 32 Gratt. 411; *Justis v. English*, 30 Gratt. 556; *Ropp v. Minor*, 33 Gratt. 97; *Frank v. Lillienfeld*, 33 Gratt. 377. These cases with their notes are practically exhaustive of the law in Virginia on this still important subject." See also, the following cases citing the principal case: *Patton v. Merchants' Bank of Charleston*, 12 W. Va. 606; *Haymond v. Jones*, 33 Gratt. 338; *Radford v. Carwille*, 18 W. Va. 654; *Mauzy v. Mauzy*, 79 Va. 539; *Dulin v. McCaw*, 39 W. Va. 724, 20 S. E. Rep. 683.

In *Walke v. Moore*, 95 Va. 733, 30 S. E. Rep. 374, where there was a conveyance to a trustee for a woman and her children, the court said: "The first question to be considered is whether the children of Virginia Baughan took under the trust a joint estate with her in the land, or whether she took an equitable estate in fee to the exclusion of the children. Its determination is not wholly free from doubt or difficulty, but it is not perceived how the case can be reasonably distinguished from that class of cases headed by *Wallace v. Doid*, 3 Leigh 268, and followed by *Stinson v. Day*, 1 Rob. 435; *Penn v. Whitehead*, 17 Gratt. 503; *Leake v. Benson*, 29 Gratt. 153; *Bain & Bro. v. Buff*, 76 Va. 371; *Mauzy v. Mauzy*, 79 Va. 537; *Waller v. Catlett*, 83 Va. 200, 2 S. E. Rep. 280; *Stace v. Bumgardner*, 89 Va. 418, 16 S. E. Rep. 252; and *Nye v. Lovitt*, 92 Va. 710, 24 S. E. Rep. 345." See also, *Richardson v. Seevers*, 84 Va. 270, 4 S. E. Rep. 712, citing the principal case.

In *Rixey v. Deltrick*, 85 Va. 44, 6 S. E. Rep. 615, the principal case is distinguished.

506 Floyd L. Whitehead *was and continues to be wholly and notoriously insolvent, and besides himself and Mrs. Whitehead, his family consisted of four children by a former wife and three by the present, all of whom were minors; and the only property for the support of that family was that conveyed as herein stated, amounting in value to little more than one thousand dollars, and a few slaves lent to Mrs. Whitehead by her father. This not being sufficient for their support, on the 1st of April, 1846, Floyd L. Whitehead, as agent of Williams, trustee of Mrs. Whitehead, purchased of H. W. Heath & Co. their stock of goods, amounting to \$1,263.83, for which he executed bonds payable in one, two and three years. These bonds were signed by him as agent for C. Williams, trustee of Maria P. Whitehead, and also by Whitehead individually. On the same day of April Mrs. Whitehead executed a paper under seal, by which she pledged her trust property for the payment of the debt to Heath. And this paper, with an endorsement upon it by Floyd L. Whitehead approving the same, was duly acknowledged before two justices of the peace, and admitted to record in the clerk's office of the County court of Nelson county. Soon after this purchase, viz: the 26th of April, the trustee Williams, living in the county of Botetourt, the County court of Nelson, at the instance of Mrs. Whitehead and with his consent, removed him, and appointed Floyd L. Whitehead in his place.

On the 28th of March previous, Heath leased to Whitehead, as agent of Mrs. Whitehead, his storehouse and lot, called Fleetwood, where Heath & Co. had been doing business, for three years, at an annual rent of one hundred and sixty-five dollars. At this place Floyd L. Whitehead, as agent of Mrs. Whitehead, carried on business as a merchant until 1850, assisted by his two sons, Alexander and Kincaid, both of whom were minors. In 507 *1850 Alexander was admitted as a partner in the concern, he being then nineteen years old, and the business was carried on under the name of Floyd L. Whitehead, agent, & Son, until 1852, when it was closed. In January, 1853, Penn filed his bill.

When the cause went back from this court, a decree was made in May, 1855, directing a commissioner to take various accounts, and among them, 1st. An account of the debts of the plaintiffs; 2d. An account of all the debts due and owing by the two concerns of F. L. Whitehead, agent, and F. L. Whitehead, agent, & Son; 3d. An account of the assets of each of the said concerns; and, 4th. An account of the profits of said concerns; and showing how much of said profits is the fruits of the labor and skill of F. L. Whitehead and his minor sons; and apportioning the profits of the last concern, one-third to Alexander R. Whitehead and two-thirds to M. P. Whitehead's trustee or agent.

In September, 1859, the commissioner

made his report. He stated the plaintiffs' debts at \$11,366.27; the debts due and owing by F. L. Whitehead, agent, which had been presented, amounted to \$6,415.38, beside a number appearing on the books whose claims were not filed; the debts owing by F. L. Whitehead, agent, & Son, which had been presented, amounted to \$12,374.32, beside a number appearing on their books which had not been filed. There had been collected by the receiver, of the assets of the first concern, \$3,332.22, and of the second concern \$1,600.29; and there were debts due to the first, reported good, \$8,042.15, and doubtful, \$2,152.35; and of the second, reported good, \$9,770.54, and doubtful, \$1,525.03. The whole assets of the first concern was reported at \$13,943.62, and of the second at \$11,688.60. The apparent profits of the first concern was reported at \$7,558.24, to be increased possibly 508 from *doubtful or bad debts; the apparent loss of the second, \$685.72, to be diminished from doubtful debts. It appears that F. L. Whitehead was debtor on the books of the first concern to the amount of \$2,076.28 of principal, and on the second to \$1,082.48; and these debts were included in the commissioner's report of assets.

The cause came on again to be heard on the 10th day of May, 1860, when the court held, 1st. That the creditors of the concern of F. L. Whitehead, agent, and F. L. Whitehead, agent, & Son, were entitled to full satisfaction out of the assets of said concerns. 2d. That the plaintiffs in the order in which they obtained their liens upon the residue, if any there shall be, will be entitled to such residue. 3d. That whether or not the creditors of the latter concern, in case they are not paid out of the assets, shall be allowed to go upon any surplus profits of the first, after its debts are paid, would not then be passed upon. And the court then proceeded to decree the payment of a dividend to the creditors of the first concern of fifty per cent., and of the second concern of twenty per cent., to be paid out of the fund in the hands of the receiver of the court. And thereupon Thomas L. Penn and Fitzpatrick's representatives, two of the plaintiffs, applied to this court for an appeal from the decree; which was allowed.

Tucker, for the appellants.

Green, for the appellees.

MONCURE, P., delivered the opinion of the court:

When Floyd L. Whitehead commenced his mercantile business as agent of his wife Maria P. Whitehead in March or April, 1846, he was insolvent, having a short time before taken the oath of an insolvent debtor.

He had a large family, consisting, 509 besides himself and his *wife, of six children; three of whom were by a former marriage, and all of whom were under age, some of them being of very tender years. The family had no means of subsistence but what could be derived from

a small separate estate, which had been settled on the wife by her husband, in consideration of her relinquishing her contingent right of dower in certain real estate conveyed by him to others, and from the use of a few slaves loaned to her by her father. These means being wholly inadequate for the purpose, it seems to have been determined by the husband and wife to endeavor to supply the deficiency by her engaging in a mercantile business on the credit of her separate estate, to be carried on by him as her agent. And accordingly, H. W. Heath, who had been doing business as a merchant on his lot of land called Fleetwood in the county of Nelson, being about, or anxious, to close his business, leased to her, or her husband as her agent, the said lot of land for three years, at the annual rent of \$165, and sold to her, or her said agent for her, his stock of goods remaining on hand, amounting, per invoice, to \$1,263.83, on a credit of six, twelve and eighteen months; the invoice being made out in the name of her brother Charles Williams, trustee in the deed of settlement; and the lease for the lot, and the bonds for the purchase money of the goods, being executed by her husband as her agent, and the bonds also, it seems, by him as her surety. About the same time, to wit, on the 1st of April, 1846, she executed a deed declaring that the said arrangement was made with her consent, and pledging her separate estate to secure the payment of the money due to Heath; which deed was also executed by her husband, and was acknowledged by both of them and duly recorded. Shortly after the business was commenced, to wit, on the 26th of May, 1846, her husband was appointed trustee instead of her brother, by a decree of the County court of

510 *Nelson, in a friendly suit brought for that purpose. The business was carried on by her husband as her agent for four years and five or six months; at the expiration of which time she entered into partnership with Alexander R. Whitehead the oldest son of her husband, then about nineteen years of age; and thenceforward the business was conducted in the name of Floyd L. Whitehead, agent, & Son, and was continued about two years longer, until some time in the fall of 1852, when it was closed. No service was rendered by the wife in carrying on the business, which was conducted almost exclusively by her husband and his two oldest sons, Alexander and Kincaid, both of whom were minors. It seems to have been quite successful; especially while it was conducted solely in his name as agent of his wife, during which period a tract of land and a slave and other personal estate were acquired by means of the supposed profits of the business; and at all events it answered the chief purpose for which it was undertaken—that of affording adequate means for the comfortable support of the family. It was commenced and carried on without any cash capital, and exclusively or mainly on credit. No credit was given to the husband, who was deeply

involved in debt, and seems to have been regarded as hopelessly insolvent. But credit was exclusively given to the wife, on account of her supposed separate estate, and of the stock in trade and the prospective profits of the business carried on in her name and for her benefit; and also to Alexander R. Whitehead after he became a partner; he being young and uninvolved in debt, and also, it seems, industrious, capable, and attentive to business. At the close of the business and at the commencement of this litigation, in 1852, both concerns were heavily in debt; and it is doubtful whether the assets of the concern of "Floyd L. Whitehead, agent," will be much, if any, more than sufficient to pay its

511 debts; while *the assets of the concern of "Floyd L. Whitehead, agent, & Son," will probably not be sufficient for the payment of its debts. The question in controversy now to be decided in this case is as to the proper application to be made of these assets; that is, whether they should first be applied to the payment of the debts of the said concerns respectively, or to the payment of the individual debts due by Floyd L. Whitehead, before the commencement of the business, to the appellants, who insist that the said assets constitute a part of his estate quoad his creditors, and that they, the appellants, have acquired liens upon the said assets by virtue of decrees obtained and execution issued against him.

If this question were to be solved according to the dictates of natural justice, there would seem to be little difficulty in answering it; and supposing the facts to be as before stated and all the parties to have acted bona fide, the answer would be, that those creditors who furnished the means of acquiring the property, and relied solely or mainly upon it for their reimbursement, are entitled to priority over creditors who furnished none of those means, and did not trust their debtor on the faith of any such property. The question is to be solved, however, not by the rules of natural justice, but upon settled principles of law and equity; and the inquiry now to be made is, what answer do those principles give to the questions?

In this case there was certainly no fraud, actual or constructive, on the part of the creditors, or any of them, of the mercantile concerns aforesaid, in dealing with or giving credit to the said concerns. Nor does it appear that there was any actual or constructive fraud on the part of Alexander R. Whitehead in any of these transactions. Nor does it appear that any fraud was actually intended by F. L. Whitehead and wife or either of them in making and executing the arrangements aforesaid. If

512 *they are fraudulent and void as to his creditors, it is because they are so by construction and intentment of law, from the very nature of the transactions in themselves. But whether fraudulent actually or by construction of law, the effect is precisely the same.

Where all the parties to a fraudulent transaction are sui juris, it is null and void as to all of them, though it may have been founded on valuable consideration. It is not valid even to the extent of such consideration. But this is not the case in regard to a feme covert, who may be a party to such a transaction, and have given value, or relinquished a right or interest, or incurred a loss or risk, in consideration thereof. In such a case the transaction is valid as to her, to the extent of affording compensation for the value given, or right or interest relinquished, or indemnity for the loss or risk incurred, as aforesaid. The participation of a wife in the fraud of her husband, will not impair her rights. *Quarles v. Lacy*, 4 Munf. 251; *Blanton v. Taylor*, Gilm. 209; *Taylor v. Moore*, 2 Rand. 563.

A married woman may engage in trade on her separate account, and enter into a partnership for that purpose, by the consent of her husband, and she will be entitled to the profits of the trade against her husband, even though his agreement be merely voluntary; and against his creditors (at least to some extent) if the agreement be founded on valuable consideration paid by or for the wife. A married woman who has a separate personal estate is regarded as a feme sole as to such estate, and may dispose of it and make it liable for her debts, subject, however, to such restrictions as may be imposed upon her by the instrument creating the estate. To the extent of her power of disposition over her separate estate, she may, at least with the consent of her husband, engage in trade,

either solely or in partnership with
513 another, and make *her separate estate liable for the debts incurred in conducting the business. And she will be entitled to the profits of the trade as against her husband, and also as against his creditors, to the extent at least to which such profits may not be due to labor, skill, capital or credit furnished by the husband. *Story on Part. §§ 11, 12; 2 Story's Eq. §§ 1385-7; 2 Roper on Husband and Wife*, ch. 18, § 4, pp. 167-175. Where he furnishes all or a portion of the labor, or a portion of the capital or credit, used in carrying on the business the wife will be entitled, even as against his creditors, to such portion of the profits as will compensate her for what she may have contributed to the business either in the shape of capital or credit; at least provided there can be an apportionment of the profits according to the respective contributions of the parties. It may be impossible in some cases to make a complete apportionment. But to the extent to which a just apportionment can, it will be made by a court of equity.

The appellants contend that in this case the wife in fact contributed nothing to the business, and the husband everything in the shape of labor and skill of himself and his minor sons. She certainly contributed no part of the labor and skill with which the business was carried on; and the appellants insist that she had no separate estate which

she could charge with debts on account of the business, and could, therefore, have had no credit to contribute. If she had such estate, she certainly intended to charge, and did charge it, with the payment of the said debts. She did so expressly, by deed duly recorded, at least in regard to the debt to Heath & Co. for the purchase of the goods with which the business was commenced. Had she not such an estate? The property was expressly conveyed to her separate use for life, and the only question is as to her power to dispose of her life
514 *estate or charge it with the payment of her debts. No such power is expressly given or denied to her by the deed. If such a power be not denied, either expressly or by implication, it is given as an incident to the separate estate. It may be denied by implication, and the question is, whether, looking to the whole instrument and the circumstances under which it was made, it was intended by the parties to exclude such a power. The consideration paid by the wife for her separate estate in this case flowed entirely from her. It was her contingent dower right in the real estate conveyed by her husband. She doubtless might have had the subject of the separate estate conveyed absolutely and exclusively to her use instead of for life only. The interest conveyed is as nearly absolute as it well could be. To be sure the use is expressly limited to her for life, but any part of the subject may at any time be sold by the trustee with her consent, and the proceeds of sale invested in other property in trust for her, and after her death the subject is to be conveyed to her descendants, if any, and if none, to her heirs at law:

"provided always, that the said Maria P. shall have the power and authority to convey the said property, or any part thereof, by will, to such person or persons as she shall choose, but not out of her own family or the family of her said husband." There can be no doubt, I suppose, but that the deed conveys the estate to her use exclusively during her life, notwithstanding the terms in which the use is declared; that is, "to the separate use and benefit of the said Maria P. Whitehead for and during her natural life, and shall remain in her possession for the support and maintenance of the said Maria P. and her issue and family, and for no other purpose whatever." These latter words, "for the support and maintenance of the said Maria P. and her issue and family, and for no other purpose
515 whatever," *seem to have been intended only to show the motive and purpose for directing the property to remain in her possession instead of that of the trustee, and more plainly to exclude any claim or control of the husband or liability for his debts, and not to limit or curtail the separate use and benefit for life immediately before, in the same sentence, expressly given to her, nor to give to her "issue and family" any interest in the subject, in law or equity, during her life.

There is a much plainer indication of an

intent to give an exclusive use for life to the wife in this case, than there was in the cases of *Wallace & Wife v. Dold's ex'or*, &c., 3 Leigh 258, and *Stinson, ex'or, v. Day & Wife*, 1 Rob. R. 435; in which it was held that an exclusive use was given. This is not like the case of *Markham v. Guerant*, &c., 4 Leigh 279, in which an improvident husband conveyed an estate to a trustee in trust for the support and maintenance of himself and his wife and their children and family during the joint lives of himself and his wife and the life of the longest liver of them, remainder to their children, with full power to the trustee to manage the estate, and to sell any part of it to pay the debts of the husband then due; in which it was held that neither the husband nor wife could charge the profits of the estate during their lives with their debts, nor even could the trustee himself anticipate the profits by making them liable in advance for present expenses. There, the manifest intent and meaning of the settlement was to guard against the prodigality of the husband, by placing the estate, subject to the payment of his debts, in the hands and under the active control and management of a trustee, in trust to receive and apply the profits as they accrued to the support of the family, for which they were barely adequate. To have permitted the husband or wife, or even the trustee, to

anticipate the profits for the purpose of defraying the current expenses of the family, would, in the opinion of this court, have defeated the plain purpose of the settlement. Here, there was no intent to guard against the mismanagement of the husband, nor against any undue influence which he might have over her, but merely to secure to her, against the claims of his creditors, an equivalent for the contingent right of dower relinquished by her. The separate estate was not directed to remain in the hands and under the active control and management of the trustee, in trust to receive and apply the profits during her life; but it was expressly declared in the deed that the property should remain in her possession for the support and maintenance of herself "and her issue and family, and for no other purpose whatever." The profits of the property were wholly inadequate to the support of the family; but in addition to the use of the few slaves loaned to her by her father, it was all that she had to depend upon for that purpose. Had she not a right to use her separate estate to the best advantage for the promotion of the end in view; and for that purpose, with the advice and concurrence of her husband and her brother and trustee, to engage in a small mercantile business, to be conducted by her husband and his sons on the credit of her separate estate? I think she had. And if so, she had a right to bind, and did bind, her separate estate for the debts of the business in which she engaged. There is great force, too, in the view presented by the counsel for the appellees, that she consented to the terms

of the settlement in consideration of the amount and value of the subject. And that subject being reduced in amount and value by the decree rendered at the suit of Enders, a creditor of her husband, it would seem to be unjust to restrict her in the use and enjoyment of the residue, which is only an equivalent for the dower right relinquished by her.

517 *But she is at all events entitled to have the debts of the business discharged out of its assets in exoneration of her separate life estate, even if she be entitled to nothing more; and such would be her right even though the transaction as to everything beyond an amount sufficient for the payment of the debts might be fraudulent and void as to creditors of the husband. A wife, we have seen, notwithstanding the fraud of her husband and her participation in it, is at least entitled to indemnity against loss out of the subject of the fraud, if sufficient for the purpose; and the wife in this case is, therefore, entitled to have the assets of the concern applied in discharge of its debts and in exoneration of her separate estate therefrom. This right of the wife is unaffected by the value of the separate estate, and as well exists, and to the same extent, where such value is small as where it is large. It is not a right to receive gain, but to avoid loss. It takes nothing from the creditors of the husband, but merely prevents them from realizing anything on account of their claims from a mercantile operation of their insolvent debt- or carried on upon the credit of the separate estate of his wife, until the expenses of the operation have been first discharged and her separate estate thus exonerated therefrom. Their claim, if they have any, is to the profits of the operation, and there can be no profits until the debts incurred in carrying it on are first paid. Nothing can be more just than this. If the wife had received any benefit from the business beyond her support as a member of the family of her husband, it might be just and right to hold her, or rather her separate estate, accountable to that extent. But it does not appear that she did, and the probability is that she did not. The support of the family was a necessary part of the expenses of the operation. It could not otherwise be

carried on, and could, therefore, 518 *realize no profits for anybody. The support of a man's wife and children, constituting a part of his family, is in effect the support of himself, or at least stands on the same footing. Those who credited the wife or her separate estate in this case, did it with a knowledge that she and the rest of the family must derive their needful support chiefly from the proceeds of the business; and, therefore, no injustice was done thereby to them. Certainly no such injustice was done to creditors of the insolvent husband, whose debts were created before the business carried on in the name and on the credit of the separate estate of the wife was commenced.

I have thus far proceeded on the idea that

the wife had a separate estate to some extent, or of some value, which she could, and did, make liable for the debts of her mercantile operations. But suppose I am wrong in this, and that she had no such separate estate or no such power over it. Does it necessarily follow that the creditors of the mercantile concerns in which she was engaged are not entitled to priority of payment out of the assets thereof, over the individual creditors of her husband? I think not. If she had in truth no separate estate which she could make liable for her debts, the question was at least a very doubtful one; and her creditors supposed that she had, and bona fide gave her credit upon the faith of her having such estate. And though they cannot charge the separate estate conveyed by the settlement, they ought certainly to be entitled to charge the property which they sold her or which was bought with the money they loaned her, or the property, choses in action and money acquired by the trade carried on by her with the means afforded by them on the credit of her supposed separate estate, including her stock in trade. That stock in trade at least is separate estate though there be no other,

and is liable as such for the debts of 519 carrying on the business. *Such liability may not rest upon the ground of indemnity, as in the case of her having other separate estate liable for her debts, but it seems to be amply supported by other principles of equity which are equally obvious.

But suppose the wife had not in fact, and had not been supposed to have, any separate estate, but that, being without any adequate means of support for herself and family, and her husband being insolvent, she, with his consent and for the purpose of obtaining a support, engaged in mercantile business for her separate use by the aid of her friends in loaning her money or selling her goods on the credit of the business; would not her stock in trade be liable for the payment of her debts thus contracted; and so liable, preferably to the proper debts of her husband, even though the necessary labor and skill used in conducting the business was furnished by him and his minor sons? I think that it would, and I am aware of no principle of law or equity, nor even of any decision of any court, which is in conflict with a view consisting so much with that what seems to be just to all concerned. Of course I assumed that the creditors of the concern, if it may be so called, are bona fide creditors, and intend only to help the wife and her family, and not to defraud her husband's creditors and cover up his property and place the fruit of his labor out of their reach. And of course I say nothing, for the present at least, in regard to the profits of the operation. I am now speaking only of the right of the wife and her creditors in such a case to have the debts of her mercantile concern paid out of her stock in trade in preference to any other debts for which it may be liable. What injury is done to the creditors of the husband

by giving this right of preference to the creditors of the wife? They (the former) have lost nothing and risked nothing by the operation, but on the contrary may 520 be gainers by it, if the profits *are liable for the satisfaction of their claims. Without some such arrangement, their insolvent debtor could do nothing either for them or for his family, and their claims must remain forever unsatisfied. The husband's agreement that his wife may carry on a trade for her separate use is good against him, as we have seen, even though it be voluntary; and is good also against his creditors, if founded on valuable consideration. Suppose she is engaged in trade with her husband's consent, and third persons bona fide give her credit on the faith of her trade. Is the liability of her stock in trade for the payment of their claims, in preference to the claims of the creditors of her husband, to depend upon whether his agreement to the trade was founded on valuable consideration or voluntary only? Is it incumbent on such persons before they give such credit to ascertain that fact? But why should it be so if they do not interfere with the profits of the trade, to which only the creditors of the husband can have any just claim? It seems to me, therefore, that in every such case the stock in trade is in itself separate estate, liable as such to the payment of the debts of the business, and is a trust fund set apart by the act of the parties and looked to by the creditors for the payment of said debts. To permit the creditors of the husband, after remaining silent for six or seven years while the business was in operation, now to come forward for the first time, and have, not only the profits of the business, but the whole stock in trade applied to the payment of their claims leaving unsatisfied the claims of those from whom the stock was derived and who gave credit on the faith of it, would be like permitting not only gross injustice but the perpetration of a fraud. To say the least, the creditors of the business, if they be not creditors of the wife on account of her separate estate, are creditors of the husband, and cannot stand on 521 lower ground than his other *creditors. But they stand on this higher ground, that the assets of the business were derived from them, and were looked to by them as the means of satisfying their claims, and they seem, therefore, by the understanding of the parties, to have an express or implied lien upon those assets.

It results from what I have said that, in my opinion, the assets of the concern of Floyd L. Whitehead, agent of Maria P. Whitehead, are liable for the debts of that concern, preferably to the individual debts of said Floyd L. Whitehead, and also that the assets of the concern of Floyd L. Whitehead, agent, & Son, are in like manner liable for the debts of that concern. But there is another ground on which the assets of the latter concern are first liable for the debts of that concern; and that is, because it was a partnership, the well settled prin-

ciple in regard to which is, that "no one partner has any right to share in the partnership property except what remains thereof after the full discharge and payment of all debts and liabilities of the partnership; and therefore each partner has a right to have the same applied to the due discharge and payment of all such debts and liabilities, before any one of the parties, or his personal representatives, or his individual creditors, can claim any right or title thereto." And there is, as between the parties and the partnership creditors, a lien on the partnership property, "or at least an equity, which may be worked out through the partners in favor of the creditors, although it may not directly attach in the creditors by virtue of their original claims in all cases." Story on Part. §§ 97, 326.

An infant is capable of being a partner, and his contract of partnership is not void, but voidable only. If he affirm it after he arrives at age he will be bound by it. Story on Part. § 7. Alexander R. Whitehead,

though an infant when he entered the 522 partnership, affirmed it after *he became of age, and is therefore one of the partners. Though his father was entitled to the custody of his person and to his services during his infancy, yet it was competent for the father, notwithstanding he was indebted and insolvent at the time, to release to his son all claim to the services of the latter. Indeed, the insolvency of the father may be a motive and a reason for releasing his claim to the custody and services of his infant child, in order that the child, by his own labor, may provide for himself. His claim to such custody and services results from his duty to maintain and educate the child. The father, says Blackstone, has the benefit of his children's labor while they live with him and are maintained by him, and this is no more than he is entitled to from his apprentices or servants. 1 Bl. Com. 453; 2 Kent's Com. 193-4, 203; 1 Tuck. Com. Book 1, p. 129. That a father may by agreement with his minor child, relinquish to the child the right which he would otherwise have to his services, see the cases cited in the note (a) to 2 Kent's Com. 194; also the cases of Lord v. Poor, 10 Shep. R. (23 Maine) 569; Lyon v. Bolling, &c., 14 Alab. R. 753; and Covington v. Cheek, a MS. decision of the Special Court of Appeals, cited by the counsel for the appellees. In this case the father consented to the son's being a partner, which was a relinquishment of all claim to the services of the son during the existence of the partnership, in the business of which the son was actively engaged. It seems to have been well understood and agreed that the son was to have one-fourth of the profits of the partnership.

It also results from what I have said that, in my opinion, if there be any surplus of the assets of F. L. Whitehead, agent of Maria P. Whitehead, after the payment of the debts of that concern, it will be applicable in the next place to the payment

523 of any balance which *may remain unpaid of the debts of the other concern, after applying to their payment all the assets of that concern, though for one-fourth of the said balance Alexander R. Whitehead will be liable in the first place before any such surplus will be liable therefor; and on the other hand, if there be any surplus of the assets of F. L. Whitehead, agent, & Son, after the payment of the debts of that concern, one-fourth of the said surplus will belong to the said Alexander R. Whitehead as his share of the profits, and the other three-fourths will be applicable in the next place to the payment of any balance which may remain unpaid of the debts of the concern of F. L. Whitehead, agent, after applying to their payment all the assets of that concern.

In regard to the objection taken in the assignment of errors in the petition, "that there was no disclosure on his sign by Whitehead, of his principal, as required by the act in the Code and the act of 1839," and that the goods of both of the concerns of "Whitehead, agent," and "Whitehead, agent, & Son," were liable to the lien of the appellants; the objection was not taken in the bill, nor in any of the proceedings in the original suit of Penn v. Whitehead in the court below, and it was too late to take it for the first time in the petition for an appeal. It was taken in the bill in the other suit, of Hargrove, &c. v. Whitehead, &c.; in which two suits the decree appealed from was rendered. Maria P. Whitehead, in her answer to that bill, denies the charge on that subject contained in the bill, and prays for full proof on the part of the plaintiff of anything which would be calculated to prejudice her rights. There is no proof on the subject in the record. The decree of Hargrove, &c., was not obtained nor the suit brought to enforce the lien of the said decree and of the execution issued thereon against the subject in contro-

524 versy in this case until 1853, *while the first appeal in Penn v. Whitehead was pending in this court. As to the concern of "Whitehead, agent," its operations commenced in March or April, 1846, and ended in September or October, 1850, and are governed almost entirely by the act of 1839 (Sess. Acts, p. 45, ch. 72), which was in force until the first of July, 1850, when the Code took effect. The act of 1839 merely required that the name of the principal of a person trading in his own name as "agent" should be disclosed, without prescribing the manner of such disclosure; while the Code, ch. 145, § 13, requires the disclosure to be "by a sign," &c. It appears that there was in fact a disclosure of the name of the principal of "Whitehead, agent," according to the requisition of the act of 1839. As to the concern of "Whitehead, agent, & Son," it commenced its operations after the Code took effect; but as Alexander R. Whitehead was a partner in that concern, and has a right, as such, to have its debts discharged out of its assets before any part thereof can be applied

to the payment of the debts of F. L. Whitehead, even though the latter may not have complied with the requisition in the Code in regard to the disclosure of the name of his principal, it is immaterial whether there was such compliance or not, at least so far as the question of priority between the creditors of that concern and the individual creditors of F. L. Whitehead can be affected thereby. It may be material in regard to the profits, unless they are otherwise liable to the claims of the latter creditors; as to which I will presently inquire. But in regard to both concerns, there is a ground on which I think their creditors respectively are entitled to priority over the individual creditors aforesaid, notwithstanding any non-compliance with the requisitions of the act of 1839, or of the Code as aforesaid; and that ground is, that a wife cannot be affected by the fraud of her husband.

525 She has a right, as *I think I have shown, to have the assets of the concerns in which she was engaged applied to the payment of the debts of those concerns in exoneration of her separate estate, and will not be deprived of that right by any fraud of her husband in trading in his name as agent without disclosing the name of his principal. Other reasons might be assigned in answer to this objection, but I think it has already been sufficiently answered.

In regard to the claim of the appellants, that if their debtor F. L. Whitehead be not as to them the owner of all the property in controversy, he was at least entitled to compensation for his services and those of his minor sons, in attending to the business of the said concerns, and the amount to which he was so entitled should be applied to the payment of the debts due to them. There appears to be due by F. L. Whitehead to the concern of "F. L. Whitehead, agent," a balance of \$3,102.84, and to the concern of "F. L. Whitehead, agent, & Son" a balance of \$1,082.48, which, I think, would be ample compensation for his services. The services of his minor sons seem to have been fully compensated by what they received from the concerns to which those services were respectively rendered. While A. R. Whitehead was a partner, he has of course no claim to compensation for services other than his interest in the profits as a partner. But even if F. L. Whitehead had any claim to compensation for his services, it would be in subordination to the claims of the creditors of the concerns to priority of payment out of the assets of said concerns respectively. He could stand on no higher ground than a partner whose individual claim against the partnership is always postponed to the payment of its debts to others. Story on Part. §§ 390-405. In fact, it seems that a husband who permits his wife to engage in trade on her separate account is personally liable at law for the debts contracted

526 *by her in carrying on the business, unless there be an understanding with the creditors to the contrary, or the property is legally vested in other trustees than

himself to enable her to carry on the trade; but a court of equity, it is conceived, will protect the husband from his legal responsibility and confine the creditors to the assets in the trade. Such is the conclusion drawn from the authorities on this subject in 2 Roper 173-178. See also, 2 Story's Eq. § 1387, note (3). At all events I think it may be safely stated that a husband can set up no claim to compensation for services rendered in carrying on the separate trade of his wife, which would prevent the full payment of what may be due by her to others on that account.

In regard to the several exceptions to the commissioner's report, I deem it sufficient to say that I see no error in the disposition made of them by the Circuit court.

It now only remains for me to say what, in my opinion, is to be done with any surplus which may remain of the assets of the two concerns aforesaid after paying their debts and deducting anything that may be due to A. R. Whitehead on account of his fourth of any profits which may possibly have been realized by the concern of "F. L. Whitehead, agent, & Son." I think it is a part of the estate of F. L. Whitehead, quoad his creditors, and ought to be paid to the appellants in the order of priority in which they obtained their liens by decree and execution. I think that Mrs. Maria P. Whitehead has been fully compensated for the credit of her separate estate, which is all that she contributed to the business, by the support of herself and family derived from it, and by the indemnity secured to her separate estate in the application of the assets to the payment of the debts of the said concern as aforesaid; and that

527 the said surplus, at least, *is justly due to her husband, quoad his creditors, for the labor and skill of himself and his minor sons, contributed by him to the business. I say quoad his creditors, because his agreement that his wife should carry on the trade, though voluntary, would be valid against him, but not against his creditors beyond the extent aforesaid. Nothing seems to be better settled than that the husband's voluntary agreement that his wife may carry on a trade for her separate use, though good against him, is fraudulent and void as to his creditors, at least to the extent of subjecting the profits of the trade to liability for their claims; and that, too, though the trade be carried on by the skill and labor of the wife, as for instance, the trade and business of a milliner. A fortiori is this the case where, as here, the wife has no agency in conducting the trade, but it is carried on exclusively by the skill and labor of the husband and his minor sons; the whole time and services of whom, at least of the husband, seem to have been devoted to the business while it was in active operation—a period of seven or eight years. Now I take it to be a sound principle of law, that by no agreement or arrangement between husband and wife alone founded on no valuable consideration, can the profits of the future labor of either

of them, much less of the husband alone, be secured to the use of them, or either of them or their family, in exclusion of the claims of their creditors, existing at the time such agreement or arrangement is made; and any such agreement or arrangement, entered into for the purpose of having that effect, would be a mere contrivance to hinder, delay and defraud creditors, and would be null and void as to such creditors, according to the true intent and meaning, if not the literal terms, of the statute. Code, ch. 118, §§ 1 and 2. No one will contend that such profits can thus be secured

528 to the husband alone in exclusion of the claims of his creditors. *Nor can they any more be thus secured to the use of his wife or family, at least in exclusion of the claims of his existing creditors; for a husband who is not indebted, or who provides amply for the payment of his present debts, may make a voluntary deed for the benefit of his wife and family in exclusion of the claims of his future creditors, because the deed being recorded as required by the registry laws, is notice to the world; and persons afterwards crediting the husband, do it in subordination to the rights created by the deed. A man who is without the means of paying his debts, is morally bound to do all he honestly can to acquire such means, and honestly to devote all the profits of his future labor to the payment of his debts. To be sure the law cannot, or does not, compel a man, in advance, to labor for his creditors. And if he chooses to be so dishonest as to idle or give away his time, rather than labor for the means of paying his debts, the law cannot, or does not, attempt to prevent it. But if he does labor and make any profit for himself, or his wife and family, which is the same thing, his creditors may subject it to liability for the payment of their claims. Husband and wife are one in law, and he is bound, morally if not legally, to support her and the rest of his family. In laboring for them he labors, in effect, for himself. Every benefit secured to them is a benefit, incidentally, secured to himself. And as the law will not allow him directly to secure the profits of his future labor to himself, in exclusion of the claims of his creditor, it will not allow him, indirectly, to do the same thing, by securing such profits to his wife or family; at least quoad his existing creditors. A man is not apt to give away his labor, or even idle away his time. If he is not honest enough to wish to pay his debts, self-interest prompts him to do something, and to try to secure to himself and his family the profits

529 of his skill and labor. *This motive of self-interest is generally sufficient, without being assisted by legal means, to stimulate a man into action and prevent him from throwing or giving away his time, instead of trying to make a profitable use of it. And the law, instead of attempting to apply such a stimulus, contents itself with subjecting any profit he may make for himself or family to liability to the payment of his debts as aforesaid.

I have, in my observation on this subject, used the word profits, because I wish to be understood as confining my meaning in this connection to them, and not as extending it to the whole proceeds of a man's future labor. The idea of "profits" presupposes the payment of all necessary expenses of the business by which such profits are made. A man without means cannot carry on a business which occupies his whole time, unless he is supported while he is doing so. The expenses of his support are a part of the necessary expenses of the business, without which there can be no profits; and the same may be said of the support of his wife and family. I do not therefore mean to say that a man, who is without the means of paying his debts, cannot make a valid arrangement to secure the proceeds of his future labor as they accrue, first to the payment of the necessary current expenses of himself and family, and then to the payment of his debts. Such an arrangement, if fairly made and carried into execution, would, by all men, be considered honest, and would no doubt be lawful. In the absence of a bankrupt law, I do not see how an insolvent debtor could otherwise do anything for the benefit either of his creditors or himself. It is the policy of a bankrupt law not only to exempt an honest insolvent debtor from personal liability for the payment of his existing debts on his making a full surrender of his estate for that purpose,

530 but even to secure to him a portion of his estate *for the present support of himself and family. But this cannot be done on general principles and in the absence of a bankrupt law.

I have also confined my observations on this subject to an arrangement between husband and wife, so far as it may be voluntary, and not founded on any valuable consideration flowing from the wife herself or any other person acting in her behalf or for her benefit. When the consideration flows only from the wife, it may make the arrangement valid as to creditors, to the extent of affording her a reasonable compensation or indemnity, as I have before endeavored to show; but beyond that extent, the arrangement is voluntary. Where the consideration flows from a third person, the effect may be otherwise; but upon that question I express no opinion, because it does not arise in this case. Here, no consideration flowed from a third person. Those who credited the wife or her separate estate, did it on their own account, and because they thought they could safely do so; or at all events, without any stipulation with the husband that she should have the profits of the business for her separate use, even if such a stipulation would have been of any avail against his creditors. This is a sufficient answer, I think, to the case of *Hodges v. Cobb*, 8 Rich. S. C. Law. R. 50, cited and much commented and relied upon by the counsel for the appellees. There, the arrangement was made between the husband and brother-in-law of his wife, whereby the brother-in-law, a wealthy man, advanced to the husband, an insolvent

debtor, \$4,000, to be used by the latter in buying and selling negroes; one-half of the net profits of which trade were to enure to the separate use of the wife; and the arrangement was held to be valid against the execution and other creditors of the husband. In the reporter's marginal abstract of the case, he states it as having decided that "an insolvent husband
531 *may stipulate beforehand that the proceeds of his labor shall be appropriated to the sole and separate use of his wife, and such stipulation is no fraud upon his creditors." While I have great respect for the court which decided that case, and do not mean to say whether or not I would have decided it otherwise, as it is not necessary or proper for me to do so, the case being materially different from this, I must yet say that I do not concur in any of the views of the court in that case which are in conflict with what I have said.

On reviewing my notes of the argument of this case, I perceive that I have overlooked an objection taken by the appellees, which I ought to have noticed earlier in this opinion. It is, that there is no evidence in the one case, nor sufficient evidence in the other, that executions were sued out on the decrees in favor of the appellants, so as to give them liens on the personal estate in controversy. If this fact be material, the objection is not fatal on an appeal from an interlocutory decree, which was merely intended to settle the principles of the cause. The cases proceeded in the court below upon the apparent concession of the fact as averred, and no doubt truly averred, in the bills respectively; and when they go back to that court the necessary evidence may be supplied, or an inquiry may be made by a commissioner to ascertain the fact. Indeed, the decree appealed from seems to contemplate such an inquiry, in declaring the appellants entitled to the residue, &c., if any there shall be, "in the order in which they obtained their liens."

Upon the whole I think the decree ought to be amended, so as to make it conform to the foregoing opinion, and, as amended, affirmed.

The decree is as follows:

The court is of opinion, for reasons
532 stated in writing *and filed with the record, that the assets of the mercantile concerns of Floyd L. Whitehead, agent for Maria P. Whitehead, and of Floyd L. Whitehead, agent, & Son, are liable, in the first place, to the payment of the debts of the said concerns respectively; that Alexander R. Whitehead, as a partner in the concern of Floyd L. Whitehead, agent, & Son, is entitled to one-fourth of any surplus which may remain of its assets after the payment of its debts, and bound for one-fourth of the amount which may remain unpaid of its debts after applying to their payment the assets of said concern; that if there be any surplus of the assets of Floyd L. Whitehead, agent as aforesaid, after the payment of the debts of that concern, it

will be applicable, in the next place, to the payment of any balance which may remain unpaid of the debts of the other concern, after applying to their payment all the assets of that concern, though for one-fourth of the said balance Alexander R. Whitehead is primarily liable as aforesaid, and the said surplus is not to be liable unless he should be unable to pay the same; that, on the other hand, if there be any surplus of the assets of Floyd L. Whitehead, agent, & Son, after the payment of the debts of that concern, three-fourths of the said surplus will be applicable in the next place to the payment of any balance which may remain unpaid of the debts of the concern of Floyd L. Whitehead, agent, after applying to their payment all the assets of that concern; and that any ultimate surplus which may remain of the assets of the two concerns aforesaid, or either of them, after paying their debts and deducting anything that may be due to Alexander R. Whitehead as aforesaid on account of his fourth of any profits which may possibly have been realized by the concern of Floyd L. Whitehead, agent, & Son, is a part of the estate of said Floyd L. Whitehead as to the claims of the appellants against him, and ought
533 *to be paid to them on account of the said claims, in the order of priority of their liens upon the subject by decree or execution. And the court is further of opinion (and it is accordingly so ordered), that the said decree be amended so as to make it conform to the foregoing opinion, and that in the said decree so amended there is no error. Therefore it is decreed and ordered, that the said decree as amended be affirmed, and that the appellants James S. Penn and Thomas P. Fitzpatrick, administrator de bonis non with the will annexed of William Fitzpatrick deceased, the former out of his own estate and the latter out of the estate of his said testator in his hands to be administered, do pay unto the appellees thirty dollars damages, and also their costs by them about their defence in this behalf expended; which is ordered to be certified to the said Circuit court.

534 *Robertson & als. v. Wright & als.

June Term, 1867, Richmond.

1. Administration Accounts—Settlement of—Heirs Not Parties—Effect.—An administration account settled in a cause in which the heirs are not parties, is not *prima facie* evidence as against the heirs.
2. Account Stated—What Necessary.—The mere rendering of an account by one party to another, is

*Accounts Stated—Confirmed by Court—Effect on Persons Not Parties to Suit.—In 4 Min. Inst. (3d Ed.) 1485, 1486, it is said: "An account formerly stated in pursuance of a decree of court, in a suit *inter partes*, although confirmed by the court, is not even *prima facie* evidence against persons who were not parties to the first suit, nor in privity with any party thereto. (Mason v. Peters, 1 Munf. 437; Street v. Street, 11 Leigh 498; *Robertson v. Wright*, 17 Gratt. 540; Deneale v. Stump, 8 Pet. 528.) On the other

not sufficient to make it an account stated. For that purpose there must either be an actual statement or adjustment of the account by the parties by going over the items together and striking the balance; or an admission by one party of the correctness of the balance struck by the other, or some other evidence to show that the party who is sought to be charged has, by his language or conduct, admitted the correctness of the account.

3. Account Rendered—Correctness of—Presumption.—

If an account has been rendered by one party to another, the court cannot presume, in the absence of all evidence on the subject, that the party who received it has acknowledged its receipt and the correctness of the account.

Mary Brown brought a suit in equity against Maurice H. Garland, administrator of Archibald Robertson deceased (he being the only defendant), to recover a debt due her from said Robertson as executor of William Brown deceased. Under an order in that cause said Garland settled before a commissioner an account of his transactions as administrator of Robertson, which was reported to the court and confirmed by its decree at April term, 1839. One of the items in the account thus settled and confirmed was a credit in the words and figures following:

535 "1835.

November 17, By S. & M. H. Garland,
balance due from them, \$1,058.90"

The said S. & M. H. Garland were attorneys at law in Lynchburg, the members of the firm being Samuel Garland and Maurice H. Garland.

In September, 1839, Wright and others filed

hand, an *ex parte* settlement, officially made, is *prima facie* evidence of the several charges and credits contained therein (2 Rob. Pr. (1st Ed.) 118; Boyd v. Oglesby, 23 Gratt. 689; Leake v. Leake, 75 Va. 803); an effect which has been referred to the long-established practice of the country (Newton v. Poole, 12 Leigh 142; Leake v. Leake, 75 Va. 808); although it would seem rather to proceed from the principle that such *ex parte* proceedings are *in rem*, and, therefore, obligatory alike upon everybody. (1 Greenl. Ev. §§ 541, 544 et seq.; 7 Rob. Pr. 306, 324, 345, 350, etc.; ante, p. 888.) But to whatever principle referrible, the doctrine in Virginia is confirmed expressly by statute, when the court has approved the report of the commissioner. (V. C. 1873, ch. 128 § 29, V. C. 1887, ch. 121, § 2699.)"

But the *ex parte* settlement of the fiduciary is only *prima facie* correct, and parties interested may file a bill to surcharge and falsify the account so settled. Corbin v. Mills, 19 Gratt. 438, and *foot-note*, where there is a collection of cases in point.

See generally, monographic *note* on "Commissioners in Chancery" appended to Whitehead v. Whitehead, 23 Gratt. 376.

Judgments against Personal Representatives—Heirs Not Parties—Effect.—In Brewis v. Lawson, 76 Va. 40, the court said: "A judgment (by default at least) against a personal representative in a suit to which the heirs or devisees of the decedent are not parties, is not evidence against such heirs or devisees in a suit or proceeding by the creditor to

a creditor's bill on behalf of themselves and all other creditors of said Archibald Robertson deceased, against M. H. Garland, administrator of said Robertson, and the widow and heirs of said Robertson, praying an account and a marshaling of the real and personal estate. M. H. Garland was ordered to settle an account of his administration; but before the account was settled he died; and in 1841 the suit was revived against Samuel Garland, administrator *de bonis non* of Archibald Robertson deceased, and executor of Maurice H. Garland deceased. In 1842 the cause came on to be heard in the Circuit superior court of Amherst county, along with the case of Brown v. Robertson's administrator, which had been likewise revived against Samuel Garland, administrator *de bonis non* of Robertson, and an order was made directing said Garland to settle an account of M. H. Garland's administration of Robertson's estate to the time of his death, which took place in 1840, and also an account of his own administration of the same estate.

Commissioner Brown, in stating the account of M. H. Garland's administration under this order, adopted the account settled in Brown v. Robertson's administrator, as above mentioned, as far as it went. The widow and heirs of Robertson, who appear not to have been represented before the commissioner, filed exceptions to this report, and particularly in reference to the credit of \$1,058.90, adopted from the account settled and confirmed in Brown

536 "v. Robertson's administrator, and to various items in the account of S. & M. H. Garland with Archibald Robertson,

subject the real estate, descended or devised, to the payment of the debt; and the reason assigned is, that there is no privity between the representative and such heirs or devisees. It was so held by this court at an early day (1810) in Mason's Devisees v. Peter's Adm'r, 1 Munf. 487, and the decision has been since repeatedly recognized as authority. See Foster, etc., v. Crenshaw's Ex'ors, 8 Munf. 530; Chamberlayne, etc., v. Temple, 3 Rand. 384, 396; Shields, Adm'r, v. Anderson, Adm'r, 8 Leigh 729, 736; Street's Heirs v. Street, 11 Leigh, 498, 506; Robertson and others v. Wright and others, 17 Gratt. 334, 340. CHIEF JUSTICE MARSHALL, in delivering the opinion of the supreme court in Deneale v. Stump's Ex'ors, 8 Peters 531, said: 'It is understood to be settled in Virginia, that no judgment against the executors can bind the heirs, or in any manner affect them. It could not be given in evidence against them.'"

In Laidley v. Kilne, 8 W. Va. 229, the court, citing among others the principal case said: "On a bill by a simple contract creditor against heirs or devisees to marshal assets, there must be proof of the justice of the plaintiff's claim. It will not be sufficient to produce a judgment at law against the executor. There being no privity between the personal representative and the party to whom the real estate has descended or been devised, the judgment against such personal representative is no proof as against the heir or devisee." See also, the principal case cited as to this point in Carey v. Roosevelt, 81 Fed. Rep. 606.

out of which the said balance of \$1,058.90 arose. This report was re-committed by consent of parties, without any decision upon the exceptions. In the course of the proceedings, Samuel Garland insisted by his exceptions and by his answer, that the account settled and confirmed in *Brown v. Robertson's* administrator was conclusive upon the parties in that cause and their privies; that all the creditors of Robertson were such privies; and also that as no specific errors were alleged in the bill, the said account could not be disturbed. Commissioner Brown, in his second report, held these positions of Samuel Garland to be untenable, and proceeded to investigate the account between S. & M. H. Garland and Robertson; Samuel Garland expressing his willingness to correct any errors that might appear in said account. The commissioner reported numerous errors in said account, some being erroneous charges and others being omissions of credits and short credits. This report was also re-committed without a decision upon the exceptions, and the case was referred to Commissioner Tinsley, with instructions to report upon the exceptions and the case generally.

Commissioner Tinsley made a report in 1849, in which he treated the account in *Brown v. Robertson's* administrator as entitled to the weight of a settled account; that is to say, as *prima facie* correct, but liable to be impeached by evidence. And he held that this principle applied to the account of S. & M. H. Garland and Archibald Robertson, out of which the balance of \$1,058.90 arose. He sustained some of the objections to that account, as to which he thought the evidence sufficient to impeach it, and overruled others as to which he thought the evidence insufficient for that purpose. Among the subjects of

537 exception in the account between S. & M. H. Garland and Robertson, were two charges of \$117.95 and \$950, the former for the amount of John Major's execution against Robert Tinsley, the latter for cash lent. As to the former the question was whether the Garlands had authority to charge Robertson with the amount of Tinsley's debt to Major; and as to the latter the question was whether the loan had been repaid. The commissioner was of opinion that the former item could not have been allowed without further proof, if it had been objected to in *Brown v. Robertson's* administrator. As to the latter, he seems to have thought the case doubtful upon the evidence. But he allowed both items, upon the ground that they had been allowed in the account settled in *Brown v. Robertson's* administrator. These were the only items in the account between S. & M. H. Garland and Robertson which were the subject of controversy in this court.

Samuel Garland excepted to this report as far as it varied the account in *Brown v. Robertson's* administrator, except where said account might be found erroneous on its face, there being no allegations of sur-

charge or falsification. He further objected to any change in the account between S. & M. H. Garland and Robertson, upon the further ground that said account had been rendered to said Robertson several years before his death, and had been held by him until his death without objection.

It appeared from the evidence that Samuel Garland addressed a letter to Archibald Robertson, without date, covering a copy of the account between S. & M. H. Garland and said Robertson from February, 1827, to April 1, 1831, which showed a balance due to Robertson on that day of \$2,014.07. The charges in this account consisted of lawyers' fees, costs and other expenses, payments to Robertson, and payments of 538 debts of Robertson, and the credits of moneys collected for Robertson.

There was a further account between S. & M. H. Garland and Robertson, after April, 1831, extending down to the death of the latter in June, 1835, which showed, besides fees and expenses, charges for large sums paid upon debts of Robertson. After April 1, 1831, there were charges for sums lent to Robertson, but no charges for sums paid to him. From these and other facts in the cause, it seemed that the funds of Robertson in the hands of S. & M. H. Garland were left in their hands by him to be applied by them to the payment of his debts.

The account rendered by S. & M. H. Garland was found among Robertson's papers after his death. It did not appear when it was rendered, but this court treated it as having been rendered in 1831. There were also found among Robertson's papers memoranda made by him of various objections to the said account, and among the items objected to were those of \$117.95 and \$950, above mentioned. It did not appear whether Robertson did or did not communicate to S. & M. H. Garland any objection to said account, or whether he did or did not have any communication with them, or either of them, on the subject of the said account, or of the money due upon it, after it was rendered. There was a total absence of evidence on these points. Robertson resided in Amherst county, a short distance from Lynchburg.

The widow and heirs of Robertson excepted to the report of Commissioner Tinsley, upon the ground, among others which need not be stated, that the said sums of \$117.95 and \$950 had been charged to Robertson. The Circuit court overruled these exceptions, and the widow and heirs appealed.

The case was argued in this court, in print, by Mosby, for the appellants, and by Garland and Slaughter, for 539 the appellees; and orally by Jones, for the appellants, and by Garland and Tucker, for the appellees.

It was contended by the counsel for the appellees, that the account rendered by S. & M. H. Garland to Robertson ought to be treated as an account stated, and, therefore, *prima facie* correct: for which they cited *Willis v. Jernegan*, 2 Atk. R. 252; *Langdon*

v. Roane's adm'r, 6 Alab. R. 518; Murray v. Toland, 3 John. Ch. R. 569; Chappedelaine v. Dechenaux, 4 Cranch R. 306; Townes v. Birchett, 12 Leigh 173.

On this point the counsel for the appellants contended, that except between merchants dealing with each other as such, the rendition of an account and its retention without objection, did not give it the effect of an account stated; for which they cited the opinion of Allen, J., in Townes v. Birchett, 12 Leigh 173, 199, 200, and the case cited there. They said that this doctrine was not inconsistent with the decision of the court in that case, because the majority of the court treated the parties as merchants, and also relied upon other circumstances besides the retention of the account without objection to show that it had been approved. They also cited the remarks of Moncre, J., in Tazewell's adm'r v. Whittle's adm'r, 13 Gratt. 349.

The counsel for the appellees contended that the account settled in Brown v. Robertson's administrator having been settled under the authority of a court of chancery and approved and confirmed by it, was entitled at least to the same prima facie presumption in favor of its correctness as an account settled ex parte before commissioners of the court of probate; as to which it is well settled in Virginia and elsewhere, that such a presumption exists. They referred especially to Newton v. Poole, 12 Leigh 112, to show the grounds of that presumption.

540 *The counsel for the appellants replied that the effect given to ex parte settlements was founded more on long usage than upon principle (Anderson v. Fox, 2 Hen. & Mun. 245), and that besides in such a case any party interested may intervene and controvert the settlement either before the commissioners or before the court; whereas nobody but the parties had a right to interfere in the settlement before the commissioner in Brown v. Robertson's administrator, or to except to the account when reported.

The counsel for the appellees further contended that the correctness of the said account could not be inquired into in this case, because no specific errors were alleged in the pleadings. The counsel for the appellants upon this point cited Shugart's adm'r v. Thompson's adm'r, 10 Leigh 434. This point was not noticed by this court, probably because it held that the account was not to be regarded as either a settled account or a stated account.

JOYNES, J., delivered the opinion of the court:

The court is of opinion that the account of Maurice H. Garland, administrator of Archibald Robertson deceased, settled under the decree of the court in the suit of Mary Brown against Archibald Robertson's administrator, is not, by reason of its having been settled in that suit and confirmed by the court, even prima facie evidence as against the heirs at law of said Archibald

Robertson, of the balance credited in said account as due from S. & M. H. Garland to said Archibald Robertson, or of the items of account out of which the said balance arose, because the said heirs were not parties to said suit, and were not in privity with any party thereto, so as to be bound or affected by any proceeding therein. Mason's devisees v. Peter's adm'r, 1 Munf. 437; Street's heirs v. Street, 11 Leigh 498; Deneale v. Strump's ex'ors, 8 Pet. R. 528.

541 *And although it appears that a partial account between the said S. & M. H. Garland and said Archibald Robertson, embracing the items now in controversy, was rendered by the said S. & M. H. Garland to the said Archibald Robertson in the year 1831, the court is of opinion, for reasons hereafter stated, that the same ought not to be regarded as an account stated between the said parties, so as to be prima facie evidence of the correctness of the charges therein, which are now in controversy, namely, the charge of \$117.95 and the charge of \$950, and to throw upon the said Robertson's representatives the burden of disproving the same.

The court is of opinion that the mere rendering of an account by one party to another, is not sufficient to make it an account stated. For that purpose there must either be an actual statement and adjustment of the account by the parties by going over the items together and striking the balance, or an admission by one party of the correctness of the balance struck by the other, or some other evidence to show that the party who is sought to be charged has, by his language or conduct, admitted the correctness of the account.

It does not appear that the said Archibald Robertson admitted, by words, the correctness of the said account rendered, nor does it appear whether he did or did not communicate to the said S. & M. H. Garland any objection to it. On this latter subject there is a total absence of all evidence, though it does appear that he made and preserved memoranda of various objections to said account; the two items above mentioned being among those to which he thus made objection. It cannot be presumed that no such communication was made from the fact that none is proved, because it might well have been made without its being possible for the appellants to prove the fact, and the said S. & M. H.

542 Garland have produced no *evidence whatever on the subject. And even if such a presumption could be made, it would not be competent to found upon it a further presumption, that the said Robertson admitted the correctness of the account rendered, for that would be to base a presumption upon a presumption, contrary to the rules of evidence, and would moreover be in conflict with the express proof afforded by the memoranda aforesaid, that he did not admit it. Whether the failure of said Archibald Robertson to communicate to said S. & M. H. Garland his objection to

said account rendered, if it had been established by proper evidence, would have been sufficient, without the help of other circumstances, to give to the said rendered account the effect of an account stated, the court does not think it necessary to decide. Vide *Irvine v. Robertson*, 3 Rand. 549; *Irvine v. Young*, 1 Sim. & Stu. R. 333; *Lord Clancarty v. Latouche*, 1 Bal. & Beat. R. 420; *Townes v. Birchett*, 12 Leigh 173; *Toland v. Sprague*, 12 Pet. R. 300; *Murray v. Toland*, 3 John. Ch. R. 569; *Phillips v. Belden*, 2 Edw. Ch. R. 1; *Killam v. Preston*, 4 Watts & Serg. R. 14; *Spangler v. Springer*, 22 Penn. R. 454.

And the court is further of opinion, that this case does not come within the principle laid down by this court in the case of *Mertens v. Nottebohm*, 4 Gratt. 163, namely, that an account rendered by a consignee, factor, agent, attorney, trustee, or the like, of his acts and transactions in the execution of his agency or trust, is to be taken to be *prima facie* correct. For as to the item of \$117.95, the question in controversy is, not whether the said S. & M. H. Garland paid it under an admitted authority, but whether they had the authority to pay it; and as to the item of \$950, the question is, whether a sum of money advanced by said S. & M. H. Garland to Archibald Robertson as a loan has been repaid to them.

543 *The court is further of opinion that there is no sufficient evidence that the said sum of \$117.95 charged by said S. & M. H. Garland against said Archibald Robertson, for the amount of John Major's execution against Robert Tinsley was properly so charged.

* * * * *

Decree reversed with costs so far as declared to be erroneous, and affirmed as to all other things, and cause remanded.

Decree reversed.

544 *Robertson & als. v. Read's Adm'r & als.

June Term, 1867, Richmond.

1. *Laches—Lapse of Time—Claim Rejected on Account of.*—A claim probably just originally, disallowed and rejected in consequence of its staleness, and of the probable impossibility from lapse of time and the death of parties, of ascertaining the facts of the case and doing justice; and also because it may reasonably be presumed that the said claim if originally just, had been abandoned or satisfied.
2. *Partnership—Dissolution of—Case at Bar.*—M. A. and R. partners dissolved their partnership; M. being a large creditor, to whom debts due to the concern were transferred in payment, with the agreement that if any of these debts could not be collected

**Laches—Lapse of Time.*—The principal case was cited on this point in *Bargamin v. Clarke*, 20 Gratt. 553; *Bell v. Moon*, 79 Va. 343; *Etting v. Marx*, 4 Fed. Rep. 663. See also, *foot-note* to *Bargamin v. Clarke*, 20 Gratt. 553; *Doggett v. Helm*, 17 Gratt. 96, and *foot-note*; *Foster v. Rison*, 17 Gratt. 321, and *foot-note*.

other debts were to be transferred in lieu of such. A was the acting party and transferred debts to M in lieu of such as could not be collected. In settling the account between M and the partnership and A and the partnership, M is to be credited as of the date of the agreement, with a debt returned; and he is to be charged with the amount of the debt, principal and interest transferred, in lieu of the first, as of the date of the transfer; and A is to be credited in his account with the same amount as of the same date, as if it had been paid in money.

3. *Same—Same—Same.*—In such case on the dissolution of the partnership they place a large amount of bad and doubtful debts in the hands of G, an attorney, for collection, and G is also the agent of M, to whom A and R are indebted. G makes considerable collections from the debts in his hands, and is directed by A and R to apply their portion to satisfy the debts they owe M. HELD: G's account is to be settled with annual rests, bearing interest from the end of the year, and applying his disbursements to the principal, on the principles applicable to the accounts of fiduciaries. And the funds in his hands, principal and interest, to which A and R are entitled, are to be applied at proper periods to the payment of the debts due by A and R to M.

545 *This was a suit in equity, brought in 1834 by Samuel Read's administrator against Boyd Miller and Archibald Robertson, the former partners for Read, for the settlement of the partnership accounts.

Boyd Miller, Archibald Robertson and Samuel Read were partners as merchants, doing business at Lynchburg, under the style of A. Robertson & Co., and at Otter Bridge in Bedford county, under the style of S. Read & Co. The Lynchburg store was managed by Archibald Robertson, and the Bedford store by S. Read. Boyd Miller resided in London, England. The last term of each of these partnerships expired by limitation on the 31st day of August, 1819. At that time Miller was creditor of each of said firms to a large amount, but the accounts were so kept that the entire debt to him appeared on the books of the Lynchburg store; the Bedford store accounting to the Lynchburg store.

At the expiration of these partnerships in 1819, an inventory and balance sheet of said concern were made out, showing its assets and liabilities. The debts due to each firm were distributed into two classes: one called "good," and embracing all debts supposed to be good; the other called "bad and doubtful," and embracing all debts considered bad or doubtful. Besides the debt to Miller there were debts due by each firm to other parties, which were to be provided for.

Boyd Miller being in this country and being desirous of closing up his business here, the parties got together in the fall of 1819, and entered into certain arrangements hereafter mentioned. One of the questions in this case was, whether these arrangements were designed by the parties to be a settlement of their affairs, as far as they went. This court held that such was their

design and effect, and it is unnecessary to give a detail of the facts bearing on that question.

546 *The firms not having money to pay the debt to Miller, amounting to £29,171, 9s, 1d, Virginia currency, it was agreed that he should take debts due to the said firm, and supposed to be good, in payment of his debt, but with a stipulation that if after the use of due diligence any of such debts could not be collected, they might be returned and others substituted for them, until his debt should be fully paid. At the same time the goods at the Lynchburg store were divided. Miller sold to Read his share of the goods at the Bedford store, and sold to Robertson his share of the good debts at both stores and his share of the real estate in Lynchburg. He took bonds from Read and Robertson, respectively, for what he sold them; the bonds of Robertson being payable in one, two and three years. The bad and doubtful debts were placed in the hands of Samuel Garland for collection, on the joint account of the parties.

In pursuance of this agreement, Boyd Miller, on the 22d December, 1820, drew an order on Robertson, directing him to deliver to Samuel Garland good debts to the amount of £17,256, 0s, 8d, in discharge of the balance due to him on the books of A. Robertson & Co. due 31st August preceding. On the same day he drew an order on Read directing him to deliver to Thos. L. Leftwich debts to the amount £11,915, 8s, 5d, "being the balance due from the Bedford to the Lynchburg store and transferred to me by A. Robertson & Co." Robertson filled the order on him by delivering debts to Garland to the full amount, the debts being reduced to cash on the 31st of August, 1819. Read objected that the order on him was drawn for more than the Bedford store owed to the Lynchburg store, and claimed a deduction from the order on him on that account. The amount of the deduction claimed was £517, 18s, 2d, and by a letter dated October 26, 1820, William Barrett of Richmond, agent for Boyd *Miller, who had returned to England, instructed Leftwich that the exact sum for which debts were to be handed over to him by Read was £11,397, 10s, 3d, which was less than the amount of the order on him by £517, 18s, 2d, and Read settled with Leftwich accordingly. This error seems to have arisen mainly from putting down the debts of Lynch and Shepherd in the "good" list instead of the "bad and doubtful" list of the Bedford store. This, however, did not account for the whole amount of the deduction. It did not fully appear how the residue was made up.

There were figures in the handwriting of Robertson on the margin of each of the balance sheets, in which the £517, 18s, 2d, was deducted from the amount of the order on Read and the same sum added to the amount to the order on Robertson. From this it was contended by the appellees, that Robertson was apprised of the deduction

from the order on Read, and that he also recognized his own liability to pay to Miller the amount of that deduction. It was further contended that the practical effect of the arrangement was, that the Lynchburg store owing the whole debt to Miller, transferred to Miller the amount due to it from the Bedford store, as indicated by the language of Miller's order on Read, and that consequently Robertson, representing the Lynchburg store, was liable to Miller for so much of that amount as Read, representing the Bedford store, failed to pay. This was controverted by the appellants, who insisted that Miller made separate arrangements with the two houses, looking to each for the amount of the order drawn upon it. The terms of the arrangement made by Miller, Robertson and Read, were not reduced to writing, or proved by a witness, but on this point as well as others,

had to be collected as well as they 548 could be from the papers. *It is unnecessary, however, to state in detail the evidence bearing on this point, this court being of opinion that Robertson was probably liable to Miller for the amount deducted from the order on Read.

By a letter dated January 21, 1820, Read informed Miller that there had been a "change in the list of balances," which he said would be recognized by Robertson if approved by Miller. In this letter Read made some explanation in reference to Lynch's and Shepherd's debts. Miller in a letter to Robertson, dated January 3, 1820, stated that Samuel Garland would account for his [Miller's] proportion of Lynch's and Shepherd's debts "not extended in Read's list," so that that need not interfere with the payment of Robertson's bonds to him.

On the 20th day of November, 1822, William Barrett, as agent for Miller, executed to Robertson a receipt for the amount of his two first bonds to Miller given for the purchase of Miller's share of the good debts and lots sold to Robertson in 1819, and an agreement in the same paper, that the third and last bond should remain unpaid and undemanded from Robertson, until it should be fully ascertained what deduction was to be made for bad and doubtful debts assigned to Miller, and in this paper Barrett further agreed that if said last bond should not be sufficient to pay Miller's proportion of such debts, he would pay the deficiency.

In a letter to Robertson, dated April 22, 1825, Miller says he is sorry to hear that some of the debts which were considered good will prove bad, but that at all events that need not prevent the payment of Robertson's bond for debts bought by him, of which he took the whole risk, and that he hoped soon to hear from Mr. Barrett that it was settled.

In October, 1830, Miller brought a suit against Robertson in the Federal 549 court upon the said third and *last bond. On the 8th day of June, 1831, Robertson made an affidavit in said suit, stating that he had offsets to nearly if not

the whole amount of the said bond by reason of having furnished good debts in place of debts transferred to Miller, which had been returned as bad, for one-third part of which Miller was responsible, and which, by agreement, was to be applied in discharge of said bond. On the 12th of August, 1831, Robertson addressed to Miller a letter, in which he complained of Barrett for suing him on his last bond to Miller, referred to the fact that many of the debts placed in the hands of Samuel Garland for Miller had been replaced by others, which, he added, "will necessarily reduce the amount of your share transferred to me fully as much if not more than the amount of my bond to you now in suit." He again expresses the belief that he will owe Miller nothing on a settlement, says he has drawn nothing from Garland on account of his share of the bad and doubtful debts, and states that debts had been handed to Garland to the amount of more than \$10,000 over and above his (Robertson's) proportion of Miller's claims against A. Robertson & Co. and S. Read & Co.

Miller replied to this letter under date of September 28th, 1831. He said he did not know what connection the bond in suit had with the debts placed in Garland's hands for his benefit; that he did not know what Robertson meant by saying that debts to the amount of more than \$10,000 over and above his share of Miller's claim, had been put into the hands of Samuel Garland; but he expressed his willingness to submit the whole matter to said Garland, who, upon being satisfied that Miller's claim would be adjusted in a reasonable time, would have the suit dismissed.

Archibald Robertson was one of the executors of William Brown deceased, who was partner of Miller in a firm 550 *styled William Brown & Co., which preceded the partnership between Miller, Read and Robertson. Between the 1st day of January, 1820, and the 26th day of November, 1822, Boyd Miller, as surviving partner of William Brown & Co., made numerous payments to Archibald Robertson, executor of William Brown deceased, amounting, in the whole, to over \$100,000, as appeared by the report of a commissioner in the suit of Boyd Miller v. William Brown's executors in the Federal court.

In March, 1834, the administrator of Samuel Read deceased, filed the bill in this cause against Boyd Miller and Archibald Robertson, setting forth the partnership, that a partial settlement was made in 1819, the transfer of debts to Miller, that many of those debts had proved insolvent, and praying that the defendants might set out and show the settlement theretofore had, and that a final settlement of the said partnership might be had. Miller filed his answer in February, 1835, admitting the partial settlement in 1819, setting forth its terms, stating that many of the debts which had been transferred to him by the Lynchburg store had proved insolvent, setting forth the settlement with and the order on

each store; that Read, as Miller had been informed by Leftwich, never did deliver the full amount due from him; that the bad and doubtful debts had not been embraced in the settlement of 1819, expressing his anxiety that the whole matter should be adjusted in the most speedy and amicable way, and consenting to an immediate reference of the accounts for that purpose. At February term 1835, the same at which Miller filed his answer, the case, by consent of parties, was referred to Charles W. Christian, special commissioner, to take an account of the transactions between the parties. Robertson having died in June,

1835, the cause was revived in January, 1836, *against Maurice H. Garland, his administrator, by consent of parties. In May, 1837, Thomas McKinney was substituted as special commissioner in place of Christian. In May, 1840, the cause, which had been commenced in the Circuit superior court of law and chancery for the town of Lynchburg, was removed to the Circuit superior court of law and chancery for the county of Amherst, where it was docketed at the August term 1840. At the same term, the powers of the plaintiff having been revoked, the case was revived in the name of the administratrix de bonis non of Samuel Read. At March term 1841, Maurice H. Garland having died, the cause was revived by consent against Samuel Garland, executor of Maurice H. Garland deceased, and administrator de bonis non of Archibald Robertson deceased. Nothing further was done in the cause until April, 1849, when it was referred to Commissioner Tinsley with instructions to settle the accounts.

In the bill in this cause no allusion was made to the deduction of £517, 18s, 2d, from the order on Read, or to any liability on Robertson on account of any error in the settlement of 1819, and in the answer of Miller, though allusion was made to the fact that Read had not delivered to Leftwich debts to the full amount of the order on him, no suggestion was made of any liability on Robertson on that account. And in all the correspondence and transactions between the parties, from the time of the settlement in 1819 down to 1849, when the cause was referred to Commissioner Tinsley, it does not appear that any claim was made by Miller, or by Barrett, his agent, against Robertson on that account. And from October, 1820, when Barrett, in his letter to Leftwich authorized the deduction from the order on Read, there does not appear any allusion to that deduction, or to the failure of Read to fill the order upon him, until that which was made in Miller's answer.

552 *While Commissioner Tinsley was engaged in settling the accounts under the order of April, 1849, he discovered the deduction from Read's order, and for the purpose of getting information in respect to it, he addressed a letter on the 16th of February, 1850, to Boyd Miller. In this letter he suggests that the amount deducted

from Read's order ought to have been added to the amount paid by Robertson, and asks explanations from Miller on the subject. Miller replied, but was unable to give any satisfactory explanation on the subject. In a subsequent letter, dated March 7th, 1850, Tinsley gives further explanations to Miller as to the deduction from Read's order, founded upon what he conjectured to be the true state of the facts. It is not necessary for the purposes of this report to give the particulars of these letters. In 1849 and 1850 letters passed upon this subject between Samuel Garland and Boyd Miller, but it is unnecessary to state the particulars. Miller seemed to have but little recollection of the facts and could give no definite explanation.

In the investigation before Commissioner Tinsley, the facts appeared as they are set out in the preceding narrative. The commissioner held that Robertson was liable to Miller for the £517, 18s, 2d, deducted from the order on Read, and settled the account accordingly. The widow and heirs of Robertson excepted to the report, on the ground that this sum ought not to be charged to Robertson; but the court overruled the exception, and confirmed the reports in this respect.

In the foregoing narrative of facts many details have been omitted, but the narrative contains an outline of the principal facts, and is believed to be sufficient for a correct understanding of the decision of the court in relation to the item of £517, 18s, 2d.

The commissioner stated an account 553 between Boyd *Miller and A. Robertson & Co., and another account between Archibald Robertson and A. Robertson & Co. The account between Boyd Miller and A. Robertson & Co. was balanced on the 31st of August, 1819, by the debts transferred in payment of it, according to the arrangement between the partners heretofore explained. When a debt was returned by Miller as not collectible, and another debt substituted in place of it, the amount due on such substituted debt was applied first to pay the interest due on the returned debt and the balance was applied to the principal. But in the account between Archibald Robertson and A. Robertson & Co., the returned debts were estimated with running interest on the principal from the time of the return to the close of the account. The result was that A. Robertson & Co. got credit with Boyd Miller for more than Archibald Robertson got credit for with A. Robertson & Co. The widow and heirs of Robertson excepted to the report on this ground, and contended that the account between Archibald Robertson and A. Robertson & Co. should at least be balanced annually, according to the usage of the firm, and interest charged upon the balances from year to year.

This exception was referred back to the commissioner for further consideration. The commissioner in his report under this order, thought that there could be no objection to the mode of calculating interest in

the account between Boyd Miller and A. Robertson & Co.; that being an account between debtor and creditor, to which the rule established in *Lightfoot v. Price*, 4 Hen. and Mun. 431, applied. His remarks upon the mode of calculating interest in the account between Archibald Robertson and A. Robertson & Co. were as follows: "As to the account of A. Robertson & Co. with Archibald Robertson partner, and of S. Read & Co. with Samuel Read partner,

I am fully sensible of the hardship of 554 this rule, and will *adopt a fairer, if

I can be satisfied there is any rule of court or of law to justify it. The hardship consists only in this, that there are no credits to be applied from time to time in extinguishment of interest, and is the same hardship borne by every creditor whose debt remains a long time at interest without payments. To charge interest upon interest, as indicated by the exception, is not deemed allowable; neither does it appear to me to be right to continue, after dissolution, the rule of the concerns to make annual balances on the 31st of August in each year. So long as the partnership continued, this was done according to the articles of co-partnership, and so far as done, these settlements will be respected; but when the co-partnership was dissolved, and the parties ceased to keep books and make annual settlements, and it becomes the duty of the court to settle for them, that rule no longer applies, but the rule of law must be adopted. See *Cary on Partnership* 289." The commissioner stated the account in conformity with these views. The widow and heirs excepted, but the court overruled the exception, and confirmed that part of the report.

Commissioner Tinsley stated the account of Samuel Garland for the collection of bad and doubtful debts upon the principles applicable to the accounts of fiduciaries, charging the disbursements against the principal, and charging interest on the annual balances from the end of each year. The widow and heirs of Robertson insisted by an exception, that, as Garland was Miller's agent, and as the proceeds of the bad and doubtful debts were pledged by Robertson and Read to the payment of Miller's debt, Robertson's share of the proceeds of Garland's collections should be applied, at the end of each year, to the reduction of Miller's debt.

Commissioner Tinsley, to whom this exception was referred, balanced Gar- 555 land's account at the end of 1824, *and again at the end of 1835, and again at the close of the report, and applied the balance, at each of these periods, to the reduction of Miller's claim against Robertson, giving his reasons for adopting these several periods.

The widow and heirs excepted to the report made upon this basis, but the court overruled the exception, and confirmed that part of the report.

The court having rendered a decree based

upon the principles hereinbefore stated, the widow and heirs of Robertson appealed.

The case in this court was argued, in print, by Mosby, for the appellants; and by Garland and Slaughter, for the appellees; and orally by Jones, for the appellants, and by Garland and Tucker, for the appellees.

JOYNES, J., delivered the opinion of the court:

The court is of opinion that the transactions between Boyd Miller, Archibald Robertson and Samuel Read, as of August 31, 1819, in reference to the affairs of the mercantile firms of A. Robertson & Co. and S. Read & Co. of which they were the members, was a settlement between the said parties of the affairs of said firms as far as it was practicable at that time to settle the same, and embraced everything relating to said affairs, except the bad and doubtful debts, and the liabilities that might arise out of the return to the said firms, or either of them, of any of the debts transferred to the said Boyd Miller, according to the agreement then made between the said parties. The court is further of opinion, that if, as alleged by said Samuel Read, there was an error in the said settlement, in charging the Bedford store with too much by the sum of £517, 18s, 2d, the said sum was properly allowed to said Samuel Read as a deduction from the order of said Boyd

Miller on him. And it further
556 *seems probable, as far as the agreement between the parties to these transactions can now be ascertained, that in consequence of the said deduction from the order on said Samuel Read, the said Boyd Miller became entitled to receive from the said Archibald Robertson the said sum of £517, 18s, 2d, in addition to the amount of said Miller's order on said Robertson, and that said Robertson became entitled to a deduction from his bonds to said Miller of one-third part of said sum, or of one-third part of so much of said sum as was made up of bad debts set down as good in the balance sheet of the Bedford store.

But the court is of opinion, that while it would have been proper to make a full correction of the said error, if a proceeding for that purpose had been instituted in due time, yet after so great a lapse of time from the discovery of said error, after so many transactions have taken place between the said Archibald Robertson and the said Boyd Miller and his agents, and as the said Boyd Miller and his agent Wm. Barrett, failed to make or suggest any claims against the said Archibald Robertson or his representatives, on account of the said error, until thirty years after it was discovered, when said Archibald Robertson and Samuel Read were both dead, and after the claim had been suggested to said Miller by Commissioner Tinsley, although, during the interval, the said Robertson had claimed large credits on his bonds to said Miller, on account of returned debts, the claim set up in this cause by the said Miller to charge the said

Robertson's representative with £517, 18s, 2d, on account of said error, ought to be disallowed and rejected, in consequence of its staleness and of the probable impossibility, from lapse of time and death of parties, of ascertaining the facts of the case and of doing justice, and also because it may reasonably be presumed that the
557 said *claim, if originally just, had been abandoned by said Miller, or satisfied by said Robertson.

The court is, therefore, of opinion that the Circuit court erred in overruling the 1st, 2d, 3d and 4th, exceptions of the appellants to the first report of Commissioner Tinsley in respect to the said sum of £517, 18s, 2d.

The court is further of opinion, that the debt of \$1,000, due by Nicholas Harrison, which was not returned to Archibald Robertson in his lifetime and accepted by him as a returned debt, ought not to have been charged as a returned debt, because it had not been ascertained that any part of it would be lost, and it was just, under the circumstances of the case, that Boyd Miller should await the result of the legal proceedings in which the said debt was involved.

The court is, therefore, of opinion that the Circuit court erred in overruling the eleventh exception of the appellants to the first report of Commissioner Tinsley, so far as the same relates to the said debt of \$1,000.

The court is further of opinion, that the interest account between Boyd Miller and A. Robertson & Co., and between Archibald Robertson and A. Robertson & Co., in relation to the returned and substituted debts, should be stated in accordance with the following general principles.

Upon the return of a debt by Boyd Miller (supposing it to be one of those transferred to him as of the 31st August, 1819), the amount of said debts, on said 31st August, 1819, should be put to the credit of said Boyd Miller in account with A. Robertson & Co., by a cross-entry of that date, so as to leave unpaid so much of said Miller's debt as had been originally paid by the debt returned; the effect of returning the debt being to cancel the payment to Miller, pro tanto. When another debt of the firm is substituted by Robertson in place of
558 the debt returned, *the amount due upon it, at the time of the substitution, principal and interest, is the amount paid by it on account of the debt of A. Robertson & Co. to Miller, and Archibald Robertson must have credit with A. Robertson & Co., for that amount, and interest must be allowed upon it, just as if the amount had been paid in money. Thus, Archibald Robertson will receive credit with A. Robertson & Co. for as much as A. Robertson & Co. get credit for with Boyd Miller, the interest on one side will exactly balance the interest on the other, and the injustice will be avoided of subjecting Robertson to a loss in consequence merely of his standing as a middle man between Boyd Miller and A. Robertson & Co.

When the amount due on the substituted debt is less than the amount due to Miller on account of the debt returned, it must be applied first to pay the interest due him, in like manner as if the amount had been paid in money.

Or, instead of stating an account as aforesaid between Archibald Robertson and A. Robertson & Co., the whole of the transactions in question may be stated in an account between Boyd Miller and A. Robertson & Co., in which account said Boyd Miller, will be credited and said firm will be charged with the amount, principal and interest, of all debts returned by said Miller; and said Miller will be charged and said firm will be credited with the amount, principal and interest, of all debts of the firm substituted for those returned. In this mode of stating the account, the firm will, of course, lose what Boyd Miller receives, and neither more nor less, and the practical result will be the same as on the other mode of statement above mentioned.

The court is further of opinion, that in the account of Samuel Garland for the collection of bad and doubtful debts, he should be charged with interest on the annual balances from the end of each year, and 559 that his disbursements ^{*}should be charged against the principal, according to the principles applicable to the accounts of fiduciaries. And as the interests of Archibald Robertson and Samuel Read in the said bad and doubtful debts, were pledged to make good the claims of Boyd Miller against A. Robertson & Co., for the collection of which claim said Samuel Garland was agent of said Miller, the funds in the hands of said Samuel Garland arising from the collection of bad and doubtful debts, should, in the opinion of the court, be applied, at proper periods, to the payment of said claims of said Boyd Miller. And the court is further of opinion that as the collections of said Samuel Garland from bad and doubtful debts were of small amount prior to January, 1824, it would not be proper to make a rest in said account for the purpose of applying the balance due from said Samuel Garland as a credit upon the claims of said Boyd Miller, until the end of the year 1824, at which time the amount due by said Samuel Garland on said account, principal and interest, except so much as might properly have been retained by him to meet expenses, should be applied to the credit of A. Robertson & Co. in account with Boyd Miller, and that after that time, the balance should be struck in said Garland's account aforesaid at the end of each year, and the amount thereof, except so much as might properly have been retained to meet expenses, applied, at the date of such balance, to the credit of A. Robertson & Co. in account with Boyd Miller.

The court is therefore of opinion that the Circuit court erred in overruling the 28th, 30th and 31st exceptions to the first report of Commissioner Tinsley, so far as the accounts and statements to which the said

exceptions apply are inconsistent with the foregoing principles.

Decree reversed, with costs, so far 560 as declared to be ^{*}erroneous, and affirmed in all other things, and cause remanded.

RIVES, J. I concur in the opinion of the court with one exception. That relates to the disallowance of the item of £517, 8s, 2d, to Miller, because of the deduction of that sum from the Bedford list of balances at the instance of Read. This deduction was assented to by Miller's agent (Barrett), on the assurance of Read that its propriety was recognized by Robertson; and the calculations of Robertson in his own hand, seem to me sufficient proof that this correction was made with his consent; and that thereby this amount was assumed by him, as it was undoubtedly due to Miller. I therefore consider it as a contemporaneous correction of the settlement by the parties thereto; and, therefore, unexceptionable on the score of lapse of time.

561

***Kates v. The Commonwealth.**

April Term, 1867, Richmond.

1. Criminal Law—Appellate Practice—Verdict Contrary to Weight of Evidence.—In a prosecution for a felony, after verdict and judgment, the appellate court will not reverse the judgment and order a new trial, on the ground that the verdict is contrary to evidence, unless it is plainly insufficient for a conviction.

This was an indictment in the Circuit court of Bedford county against Lucinda Kates, a colored woman, for the murder of her child. On the trial the jury found her guilty of voluntary manslaughter, and fixed the term of her imprisonment in the penitentiary at eighteen months. The prisoner asked for a new trial, on the ground that the verdict was contrary to the evidence; but the court overruled the motion, and sentenced her in accordance with the verdict. And thereupon the prisoner excepted to the opinion of the court overruling her motion, and the court stated the facts proved upon the record; and a writ of error to the judgment was awarded.

***Appellate Practice—Verdict Contrary to Weight of Evidence.**—It is an established rule that an appellate court will not reverse a judgment, refusing a new trial, on the ground that the verdict is contrary to the weight of evidence, unless the evidence is plainly insufficient to warrant the verdict. The principal case was cited as authority for this proposition in *Oneale's Case*, 17 Gratt. 591; *Kemp's Case*, 18 Gratt. 977; *Read's Case*, 22 Gratt. 945; *Kimball v. Friend*, 95 Va. 144, 27 S. E. Rep. 901.

See also *Vaiden's Case*, 12 Gratt. 717; *Blair v. Wilson*, 28 Gratt. 166, and *foot-note*; *Hilb v. Peyton*, 23 Gratt. 550, and *foot-note*; *Richmond, etc., R. Co. v. Snead*, 19 Gratt. 355, and *foot-note*.

As to when the original court should grant a new trial on the ground that the verdict is contrary to the weight of evidence, see *foot-note* to *Read's Case*, 22 Gratt. 924; *Blosser v. Harshbarger*, 21 Gratt. 214, and *foot-note*.

There was no doubt that the prisoner was the mother of the child, and that she deposited it in a shed in a back lot near to that on which she lived as cook in a white family, where it was almost immediately found. The only questions of doubt were, whether the child was born alive, or came to its death by the act of its mother afterwards. On these questions there might be a possible doubt.

562 *Jordan, for the prisoner.

The Attorney General, for the commonwealth.

MONCURE, P., delivered the opinion of the court:

The court, although of opinion that the evidence in this case does not clearly show either that the child was born alive or that it came to its death by the act or neglect of the mother, is yet of opinion that, according to the principles laid down by this court in the case of *Vaiden v. The Commonwealth*, 12 Gratt. 717, the said evidence is not so plainly insufficient to warrant the verdict as to authorize this court to reverse the judgment. Therefore it is considered by the court that there is no error in the said judgment, and that it be affirmed.

Judgment affirmed.

563 *Jones v. The Commonwealth.*

October Term, 1866, Richmond.

1. *Criminal Law—Larceny—Indictment—Owner.**—In a trial for larceny to convict the prisoner, there must be satisfactory proof that the property stolen was the property of the person stated in the indictment.

This was an indictment in the Circuit court of the county of Powhatan against Randolph Jones, a freedman, for stealing six hogs, the property of Blair Burwell. On the trial the prisoner was found guilty, and the term of his imprisonment in the penitentiary was fixed at three years. He thereupon moved the court for a new trial, on the ground that the verdict was contrary to the evidence; but the court overruled the motion, and rendered a judgment upon the verdict. The prisoner excepted to the opinion of the court overruling the motion, and the court having certified the facts proved, he applied to this court for a writ of error to the judgment; which was awarded.

There was evidence from which the jury might reasonably infer that parts of a hog or hogs found in the prisoner's house, had been stolen, and there was proof that Burwell had lost six hogs; but there was no proof that the meat found was a part of Burwell's hogs.

*The principal case was cited in *Prather v. Com.*, 85 Va. 137, 7 S. E. Rep. 178. See generally, monographic note on "Larceny" appended to *Johnson v. Com.*, 24 Gratt. 556; monographic note on "Indictments."

John Howard, for the prisoner.

The Attorney General, for the commonwealth.

564 *MONCURE, P., delivered the opinion of the court:

The court is of opinion that while the facts certified may be sufficient to raise a strong suspicion that a part of the meat found in the possession of the prisoner or his wife was stolen property, they do not identify it as part of the hogs supposed to have been stolen from Blair Burwell; but on the contrary tend to show that it was not a part of the said hogs; and that the Circuit court therefore erred in overruling the prisoner's motion for a new trial: Therefore it is considered that the said judgment be reversed and annulled. And this court proceeding to give such judgment as the said Circuit court ought to have given, it is further considered that the verdict of the jury be set aside. And the cause is remanded to the said Circuit court for a new trial to be had therein: which is ordered to be certified to the said Circuit court of Powhatan county.

Judgment reversed.

565 **Hughes v. The Commonwealth.*

January Term, 1867, Richmond.

[94 Am. Dec. 498.]

1. *Criminal Law—Larceny—Indictment—Name of Owner to Be Stated.*—In an indictment for larceny, the name of the owner of the property charged to have been stolen, must be stated; and if it appears that the person so stated to be the owner was a married woman at the time of the larceny, it is error and the prisoner should be acquitted.

2. *Same—Same—Reversal of Judgment—Nolle Prosequi.*—In such a case if there is a verdict and judgment against the prisoner, which on appeal is reversed, when the case goes back a *nolle prosequi* may be entered, and a new indictment may be found.

This was an indictment in the Circuit court of Middlesex county, against Martha E. Hughes, a freedwoman, for grand larceny, in stealing a number of articles of female wearing apparel, stated in the indictment to be the property of Mrs. Robert H. Montague.

On the trial, which took place at the October term of the court for 1866, it appeared in evidence that Mrs. Montague was a married woman; and thereupon the prisoner, by counsel, moved the court to instruct the jury "that if they believe from the evidence in the case, that Mrs. Robert H. Montague, the person to whom the goods charged to have been stolen, as alleged in the indictment, to have belonged, is a married woman, then it is error, and they shall find the prisoner not guilty." The court refused to give the instruction; and the prisoner excepted.

The jury found the prisoner guilty, 566 and fixed the term *of her imprison-

ment in the penitentiary at three years. The prisoner thereupon moved the court for a new trial, on the ground of the refusal of the court to give the instruction asked; and because the verdict was contrary to the evidence. On the last point the only ground was that there was no evidence of the value of the articles, except as it might be inferred from their number and character. The court overruled the objection, and entered a judgment upon the verdict; and the prisoner again excepted, and applied to this court for a writ of error; which was awarded.

Montague, for the prisoner.

The Attorney General, for the commonwealth.

MONCURE, P., delivered the opinion of the court:

This case presents the question whether, in an indictment for larceny, the property alleged to have been stolen can be stated to have been the property of a married woman. It is well settled at common law that in an indictment for larceny the name of the owner of the property stolen must be stated, and a married woman cannot be stated to be the owner. The law on this subject is thus laid down by Russell: "It is necessary that there should be in some person a sufficient ownership of the things stolen; and that they should be stated in the indictment as the goods and chattels or property of such person." 2 Russ. 86.

"Where goods are in the possession of the wife, they must be laid as the goods of her husband; thus if A is indicted for stealing the goods of B, and it appears that B was a feme covert at the time, A must be acquitted." *Id.* 89. Husband and wife are in law one person. Her legal entity is merged in his; and in all legal proceedings, criminal or civil, he is regarded as the owner of property in her possession 567 (if it belong *not to a third person), even though it be her wearing apparel. At common law, therefore, there could be no difficulty in this case. Has the common law rule been changed by statute, or so far changed as to affect the question?

The only material change which seems to have been made by statute on the subject is contained in the Code, page 832, chapter 207, section 8, which is in these words: "In a prosecution for an offence, committed upon or relating to or affecting real estate, or for stealing, embezzling, destroying, injuring or fraudulently receiving or concealing any personal estate, it shall be sufficient to prove that when the offence was committed, the actual or constructive possession, or a general or special property in the whole or any part of such estate, was in the person or community alleged in the indictment or other accusation to be the owner thereof."

This statute was not intended to dispense, and does not dispense, with the necessity of stating in an indictment for larceny the name of the owner of the property stolen, nor to enable any person to be such owner

who was not capable of being so at common law. Its only object was to get rid of the difficulties which often existed at common law in regard to the proper person to be stated as the owner of the property in an indictment for larceny or other offences against property. It therefore declares that in all such case, "it shall be sufficient to prove that when the offence was committed, the actual or constructive possession, or a general or special property in the whole or any part of such estate, was in the person or community alleged in the indictment or other accusation to be the owner thereof." But the person named in the indictment as owner of the property must still, under the statute, as under the common law, be a person competent in law to be such owner.

568 *The court is therefore of opinion that the Circuit court erred in refusing to give the instruction asked for, and that for that cause the judgment must be reversed, the verdict set aside, and the cause remanded for a new trial to be had therein (unless a nolle prosequi should be entered, in which case a new indictment may be found); on which new trial, if there should be any evidence before the jury to prove that Mrs. Robert H. Montague named in the indictment was a married woman when the alleged larceny was committed, the Circuit court, if asked to do so by the prisoner or her counsel, shall instruct the jury that if they believe such evidence they ought to find a verdict of not guilty.

There was no direct proof before the former jury as to the value of the property; but it is unnecessary to decide whether that defect would have been fatal to the verdict, or whether the jury might not properly have inferred from the number and nature of the articles stolen that they were of the value of twenty dollars or more, as the defect can and no doubt will be supplied on the new trial.

The judgment is in these words:

It seems to the court here, for reasons stated in writing and filed with the record, that the Circuit court erred in refusing to give to the jury the instruction asked for by the counsel for the prisoner: Therefore (without deciding whether the defect in the evidence in not expressly showing that the value of the property alleged to have been stolen was twenty dollars or more is material, as that defect can be supplied on the future trial) it is considered that the judgment aforesaid be reversed and annulled. And it is ordered that the verdict of the jury be set aside and the cause remanded to the said Circuit court for a new trial to be had therein (unless a nolle prosequi

569 *should be entered; in which case a new indictment may be found); on which new trial, if there should be any evidence before the jury to prove that Mrs. Robert H. Montague named in the indictment, was a married woman when the alleged larceny was committed, the Circuit court, if asked to do so by the prisoner or her counsel, shall instruct the jury that if

they believe such evidence they ought to find a verdict of not guilty: which is ordered to be certified to the said Circuit court.

570 *Speers v. The Commonwealth.

January Term, 1867, Richmond.

1. **Criminal Law—House-Breaking—Indictment.**—An indictment which charges a breaking into a house with intent to steal, and the stealing therefrom, is an indictment for house-breaking, and not for larceny; and is good.

2. **Same—Same—Larceny.**—To such a count may be added a count for simple larceny of the same goods. And the jury may find the prisoner guilty on each count, and fix a several punishment for each offence.

***Criminal Law—House-Breaking—Larceny—Indictment.**—In *State v. McClung*, 35 W. Va. 283, 13 S. E. Rep. 655, the rule laid down in the principal case is approved, the court saying: "It might be supposed that, as on a count charging both burglary and larceny there may be a conviction of either, there could also, if both offences were proven, be a conviction of both, followed by the separate penalty for each; but this is not so, for, if there be a general verdict of guilty on such a count, it is deemed a conviction of burglary only, and the sentence is for burglary, not for both, or for larceny. *Speers' Case*, 17 Gratt. 570; 1 Hale, P. C. 559. * * * On separate counts there can be convictions of both burglary and larceny. 1 Blish. Crim. Law, § 893; *Speers' Case*, 17 Gratt. 570." And in *Benton v. Com.*, 91 Va. 728, 21 S. E. Rep. 495, it is said: "House-breaking with the intent to commit larceny, and grand larceny are distinct offences under the law, and to each is affixed its own penalty, but they may be and often are one continued act, and may be charged in the same count of an indictment. Upon such count the accused may be found guilty of either of the offences, but there can be only one penalty imposed. *Com. v. Hope*, 22 Pick. 1; *Josslyn v. Com.*, 6 Metcalf 226; and Blish. on Cr. Pr. vol. 2, sec. 144. If it is desired to punish for both offences in a case of this kind, there must be inserted in the indictment a separate count for the larceny, as was done in *Speers' Case*, 17 Gratt. 570."

The principal case is cited and followed in *Vaughan v. Com.*, 17 Gratt. 578. It is also cited in *Butler v. Com.*, 81 Va. 162, and *Webster v. Com.*, 80 Va. 599.

But in *State v. Hupp*, 81 W. Va. 357, 6 S. E. Rep. 920, in reference to the two last named cases it is said: "In order to charge 'house-breaking,' all the authorities agree that the indictment shall allege the ownership of the house which has been broken into. 1 Whart. Crim. Law, § 816; *Webster's Case*, 80 Va. 598; *Butler's Case*, 81 Va. 162. In the last two cases it is held that an indictment charging that 'the prisoner,' etc., 'a certain mill-house not adjoining to or occupied with the dwelling-house of A.,' etc., sufficiently alleges the ownership of the mill-house to be in A., and is sufficient in law. The indictment in *Speers' Case*, 17 Gratt. 570, is referred to in both the late Virginia cases. But *Speers' Case* is no authority, because the point was not in that case raised or considered."

See generally, monographic note on "Indictment."

See foot-note appended to *Vaughan's Case*, 17 Gratt. 576.

This was an indictment in the Circuit court of Albemarle county, found against Harrison Speers, a freedman. The indictment contains two counts: The first charged that the prisoner on, &c., a certain meat-house, not adjoining to or occupied with the dwelling-house, of one Mrs. Nannie Garrett, there situate, in the night time, feloniously did break and enter, with intent, &c., feloniously to steal, &c., and thirteen pieces of bacon of the value of thirty-one dollars and fifty cents, of the property of said Nannie Garrett, then and there found, then and there did feloniously steal, take and carry away. The second count charged a simple larceny of the same bacon.

On the trial the jury found the prisoner guilty on the first count, and fixed the term of his imprisonment in the county jail at one month; and they found him guilty on the second count, and fixed the term of his imprisonment in the penitentiary at three years. The prisoner then moved the court to arrest the judgment; but the court overruled the motion, and rendered a judgment upon the verdict. And thereupon the prisoner applied to this court for a writ of error to the judgment; which was awarded.

Crump, for the prisoner.

The Attorney General, for the commonwealth.

RIVES, J. The indictment in this case contains two counts: The first charges the statutory offence of house-breaking, under the 12th and 13th sections of chap. 192 of the Code, alleging not only the intent to steal, but also the actual theft; the second is for the larceny alone. As to the goods, their value and ownership, the larceny is laid precisely alike in both counts. Moreover, the court certifies it as a part of the record of this case, "that the larceny of which the prisoner was convicted under the second count of the indictment against him, was the same larceny charged in the first count of the indictment." Under this state of the pleadings, the prisoner was tried and found "guilty in manner and form as charged in the first count of the indictment aforesaid, and the term of his imprisonment in the county jail ascertained to be one month; and also guilty as charged in the second count of the indictment, and the term of his imprisonment for that offence fixed at three years in the penitentiary." Thereupon a motion was made in arrest of judgment, on the ground that the record disclosed two convictions for one and the same offence; that a conviction on the first count should discharge the prisoner on the second, or otherwise he might be convicted and punished twice for the same offence. The overruling of this motion constitutes the only assignment of error in this case.

We are, therefore, called to examine and ascertain the legal effect, character and consequences of the first count of this indictment. As to the second, there is no question; that is clearly and confessedly a count for larceny only. The first

count, however, charges the statutory offence of house-breaking, with a two-fold averment of an intent to steal, and of the actual theft. The averment of the intent to steal is sufficient under the statute; so also, where the felony has actually been committed, it seems sufficient to allege the commission; as that is the strongest evidence of the intention. But the intent to commit a felony, and the actual commission of it, may both be alleged; and, in general, this is the better mode of statement. 1 Hale 560; 2 East P. C. c. 15, § 25, p. 514; Rex v. Furnival, Russ. & Ry. 445. Had this count contained only the averment of the intent, I presume there would be no ground for the present complaint. If it had omitted this averment and substituted it by an allegation of actual theft alone, the case would be different from the present; and upon that I am not called upon to give an opinion. But here we have this complex crime set forth by a three-fold specification of the house-breaking, the intent to steal, and the actual theft. How shall such a count be construed? Shall it be taken as a count for felonious house-breaking, or as a joint count for house-breaking and larceny? And in case of a general finding under such a count, shall the conviction be of house-breaking or of larceny, or of both? These questions, I think, are easily solved upon authority and the well-established principles of criminal pleading.

A leading case upon this subject is that of Commonwealth v. Hope, 22 Pick. R. 1, where the doctrine is expressed with great clearness by Chief Justice Shaw. In that case the defendant was indicted upon four distinct charges of house-breaking in the daytime; the indictment setting forth the entering and breaking with intent to steal, and also the actual theft. The prisoner was found guilty in all the four cases. By the law of that state, Rev'd Stat. ch. 126, § 19, a person convicted *at the same term of the court of three distinct larcenies shall be deemed a common and notorious thief, and shall be punished by imprisonment in the state prison not more than twenty years. Now, the municipal court, before which these trials were had, held these convictions to be of larceny, and sentenced the prisoner accordingly as a common and notorious thief. But this judgment was reversed, on the ground that the conviction was for house-breaking, and not larceny. It was admitted that the usual form of an indictment for burglary, East's P. C. 512, contained an averment of the larceny, because the fact of stealing is the strongest evidence of the intent to steal; the intent being vouched by the act, and the averment of the latter tantamount to the averment of the former. The averment of the larceny in such forms is regarded as a mere substitute for the averment of the intent; and in another case, Larned et al. v. Commonwealth, 12 Metc. R. 204, the court treated the averment of actual theft as surplusage, and held that where such averment

was informal and wholly defective, the allegation of breaking and entering with intent to steal would be sufficient to sustain the conviction and judgment thereon. To the same effect are the cases of Crowley v. Commonwealth, 11 Metc. R. 575; Kite v. Commonwealth, 11 Metc. R. 581; Wilson & others v. The State, 24 Conn. R. 57.

If, therefore, this count had stood alone, we would be bound by these authorities to treat it as a count for the statutory offence of house-breaking, and to accept a general verdict of guilty under it, as a conviction of that offence, and not of larceny. But it seems to me this is more especially proper when it is associated with another count in the same indictment for larceny; the offence generally attending house-breaking, and the object contemplated by the burglar. It is the office of the prosecuting attorney so to frame and vary his charges as to suit and meet such different proofs as he may contemplate; provided he be not guilty of duplicity in pleading. The evidence may fail to establish a burglarious entry, but be all-sufficient to establish a larceny. It is, therefore, eminently proper and convenient in such a case, to proceed by the two charges, first of burglary and then of larceny. The accused cannot object; on the contrary, such an arraignment more explicitly apprises him of the shifting accusations that he has to meet. When we contemplate the proper co-existence of the two counts, and the necessity of ascribing a different office to each we have no recourse but to construe the first as a count for felonious house-breaking, from which we must discard the averment of larceny as superfluous, because tantamount, in such connection, with the precedent averment of the intent to steal; and the second as a count for the larceny attending the house-breaking. In case of a similar count in burglary, it has been held, the burglary may be negated and the larceny found; so that if there be a general verdict of acquittal, no future trial could be had for the larceny comprised in the charge; but a general finding of guilty would lead to a sentence of house-breaking, and not larceny.

While for these reasons I hold it to be well settled upon authority and principle, that this count, if it stood alone, is to be accepted as a count for the statutory offence of house-breaking, it seems to me, when we construe it in connection with the other count of the same indictment, all doubt vanishes. That it was designed as a count for house-breaking and not larceny, is conclusively proven by the separate and distinct count for the latter offence. That no confusion arose upon the trial, appears from the responsive character of the verdict. The jury well understood and distinctly replied to the *two counts. They evidently construed the first according to its legal intendment as for house-breaking, and affixed the shortest term of imprisonment for such offence; and found the larceny under the second, and punished it by a more exemplary sentence. There is

no pretext, therefore, to be found, as it seems to me, in the pleadings, the verdict of the jury or the certificate of the court, to justify the allegation that the prisoner in this case has been twice sentenced for the same offence. The judgment, therefore, must stand; and as the prisoner has already undergone the confinement in the county jail, to which he was sentenced, the term of his imprisonment in the penitentiary should now commence.

The other judges concurred in the opinion of Rives, J.

Judgment affirmed.

576 *Vaughan v. The Commonwealth.

January Term, 1867, Richmond.

1. **Criminal Law—House-Breaking—Indictment.***—An indictment which charges a breaking into the house of L. with intent to steal, and stealing therefrom, is an indictment for house-breaking; and is good.

2. **Same—Indictment for House-Breaking—Conviction of Larceny.**†—In such indictment, if the actual larceny is properly stated, the prisoner may be found guilty of the larceny, though acquitted of the house-breaking.

3. **Same—Larceny—Indictment—Description of Goods.**‡

***Criminal Law—House-Breaking—Indictment.**—It seems well settled that an indictment which charges a breaking into a house with intent to steal, and stealing therefrom, is an indictment for house-breaking, and is good. Speers' Case, 17 Gratt. 570; Wright's Case, 82 Va. 188; State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654.

†**Same—Indictment for Burglary—Conviction of Larceny.**—Where the indictment charges not only breaking and entering, but the stealing of a trunk and its contents, of a stated value, the prisoner, though acquitted of burglary may be found guilty of larceny. Clarke v. Com., 36 Gratt. 908. See also, Speers' Case, 17 Gratt. 570.

Same—Count Alleging Burglary and Larceny.—Under a count which properly alleges both burglary and larceny, there may be a conviction of either, but not of both. State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654.

In State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654, it was said: "In *Vaughan's Case*, 17 Gratt. 576, where there was a count charging both burglary and larceny, JUDGE JOYNER said: 'The allegation of actual larceny is only in aid of the intent. If that allegation were struck out altogether, enough would remain to describe the offense of which the prisoner has been convicted. Such being the object for which the charge of an actual larceny is introduced, it need not be laid with the same formality as in an indictment for the larceny itself. Larned v. Com., 12 Metc. (Mass.) 240; Com. v. Doherty, 10 Cush. 52; and see Regina v. Clarke, 1 Car. & K. 421, (47 E. C. L.). It is always better, however, to lay the charge of larceny in proper form to avoid objection in case the prisoner, should, as he may, on such a count as this, be found not guilty of breaking and entering but guilty of larceny.'"

See also, *foot-note* to Speers' Case, 17 Gratt. 570.

‡**Same—Larceny—Indictment—Description of Goods.**

—See principal case cited and approved in Wright v. Com., 33 Va. 185.

—On such an indictment, which charges that the prisoner a lot of queensware then and there feloniously did steal, take and carry away, is good after verdict as a charge of larceny, though it does not specify the articles, or state that they were the property of L. or any other person.

4. **Same—Confessions—To One in Authority—Case at Bar.**§—A person committed on a charge of larceny by a justice, is sent in charge of a special constable and the prosecutor to jail, and on the way this constable says to him, "you had as well tell all about it." After they had rode about a mile after this remark, without any other remark being addressed to the prisoner, he voluntarily says to the prosecutor, "I will tell you all about it;" and proceeds to tell how and by whom the breaking and larceny was committed. The constable was one in authority over him; and the statement is not admissible in evidence.

This was an indictment in the Circuit court of the county of Rockbridge, against George Vaughan, a freedman. The indictment contained but one count, and charged that the prisoner did on, &c., feloniously, in the night time, break and enter the plough shop of Hugh F. Lyle, with intent, the goods and chattels of the said Lyle, then and there being found, feloniously to steal, take and carry away, and one lot of queensware of the value of sixty dollars, one drawing knife of the value of one dollar, one saw of the value of two dollars, and one hatchet of the value of one dollar, then and there being found, feloniously did steal, take and carry away, against the peace, &c.

On the trial of the case, the only evidence against the prisoner was his admission. It appears that the prisoner, a freedman of about seventeen years of age, with one Tom Brown, also a freedman, was arrested on the affidavit of Hugh F. Lyle, on the charge of house-breaking and larceny, and without any warning by the magistrate that they were not bound to criminate themselves, upon the confession of Tom Brown, they were committed for trial by a magistrate of Rockbridge county, and the prisoner was sent to jail in charge of

§**Same—Confessions.**—In *Bram v. United States*, 108 U. S. 582, 18 Sup. Ct. Rep. 193, the court said it would not attempt to review in detail numerous decisions of the various courts of last resort in the several states treating of confessions in the divergent aspect in which that doctrine may have presented itself, but that it would content itself with a brief reference to a few of the leading and well-considered cases treating of the subject of inducements, and which were opposite to the case at bar. Among many other cases, it cites the principal case as holding that the language, "You had as well tell all about it," was sufficient inducement to exclude confession made in consequence thereof.

See also, *Thompson v. Com.*, 20 Gratt. 724, and *foot-note*.

See generally, monographic note on "Burglary and Housebreaking" appended to Clarke v. Com., 36 Gratt. 908; monographic note on "Larceny" appended to Johnson v. Com., 24 Gratt. 555; monographic note on "Indictments."

Humphreys, into whose custody as special constable, he was delivered, and also in charge of Hugh F. Lyle, the prosecutor; and that on the way to the jail, Humphreys said to the prisoner, "you had as well tell all about it," referring thereby to the house-breaking and larceny charged against him. After they had rode about a mile, after Humphreys had made the remark above stated, without any other remark being addressed to the prisoner by Humphreys or Lyle, he voluntarily said to Lyle, "I will tell you all about it; and then proceeded to tell how the act had been done, and who were engaged in it. The prisoner, by his counsel, moved the court to exclude the evidence, on the ground that it was induced by what had occurred before the magistrate, and the remarks of Humphreys, a person in authority over the accused. But the court overruled the motion, and admitted the evidence; and the prisoner excepted.

The jury found the prisoner guilty, and fixed the term of his imprisonment in 578 the penitentiary at two years. *And the prisoner thereupon moved the court to arrest the judgment, on the ground that the indictment set forth a substantive charge of grand larceny, in stealing a lot of queensware, which is so uncertain and defective, that he could not upon any subsequent trial for stealing, &c., the specific articles of queensware, plead or prove a former acquittal or conviction. But the court overruled the motion, and entered judgment upon the verdict. And the prisoner applied to this court for a writ of error; which was awarded.

Dorman, for the prisoner.

The Attorney General, for the commonwealth.

JOYNES, J., delivered the opinion of the court:

The indictment in this case contains a single count, in which the prisoner is charged with breaking and entering, in the night time, the shop of Hugh F. Lyle with intent to steal the goods of said Hugh F. Lyle "then and there being found," and with stealing certain articles "then and there being found." Among the articles alleged to have been stolen was "one lot of queensware."

The prisoner having been found guilty by the jury, moved the court to arrest the judgment; and assigned as the ground of the motion that the charge of stealing "one lot of queensware," without further description, is so uncertain that the prisoner could not, if subsequently indicted for stealing the specific articles comprised in the said "lot of queensware," avail himself of the plea of former conviction in this case. And the further ground is taken in the petition that the articles alleged to be stolen are not described as the property of any person. The grounds thus alleged for arresting the judgment both rest upon the assumption that, by the verdict in this case, the petitioner has been found guilty of the crime of larceny, and not merely of

the crime of breaking and entering 579 *the shop with intent to commit larceny. The court has just decided in *Speers v. Commonwealth*, that the effect of a general verdict of guilty upon such a count as the one in this case, is to convict the prisoner of the crime of breaking and entering with intent to commit larceny, and not of the crime of larceny also. The ground upon which the motion in arrest was placed in the court below cannot, therefore, be sustained. And the further ground taken in the petition is equally untenable. As we have held in *Speers v. Commonwealth*, the allegation of an actual larceny is only in aid of the allegation of intent. If that allegation were struck out altogether, enough would remain to describe the offence of which the prisoner has been convicted.

Such being the object for which the charge of an actual larceny is introduced in cases of this character, it need not be laid with the same formality as in an indictment for the larceny itself. *Larned v. Commonwealth*, 12 Metc. R. 240; *Commonwealth v. Doherty*, 10 Cush. R. 52. And see *Regina v. Clarke*, 1 C. & K. 421 (47 Eng. C. L. R.). It is always better, however, to lay the charge of larceny in proper form, to avoid objection in case the prisoner should, as he may, on such a count as this, be found not guilty of the breaking and entering, but guilty of the larceny. I do not mean to intimate, however, that the objections taken in this case would have been sufficient to arrest the judgment, if the prisoner had been found guilty of larceny. The description of the goods stolen as "a lot of queensware," is sufficient, after verdict. And upon a subsequent indictment of stealing the specific articles embraced in the "lot of queensware," the prisoner would not lose the benefit of a plea of former conviction, because he would have a right to establish the identity of the articles by proof. 3 Greenleaf Evid. § 36; 580 2 Leading Crim. Cases *500-561. And so the allegation that the prisoner broke and entered the shop with intent to steal the goods of Lyle "then and there found," and that he "then and there stole the goods described," is a sufficient averment, after verdict, that the goods stolen were the property of Lyle.

But I am of opinion that the court erred in overruling the objection of the prisoner to the admission of the confession offered in evidence against him. The confession was made while the prisoner was in custody of Humphreys, a special constable, who, together with Lyle the prosecutor and owner of the shop and goods, was taking him to jail after he had been committed by the magistrate. While on the road Humphreys said to the prisoner, "you had better tell all about it." After the parties had gone about a mile further, and without, as far as appears, any other remark having been made by any one of them, the prisoner said to Lyle, "I will tell all about it," and proceeded to make the confession which was given in evidence. The confession, though

not made immediately after the remark of Humphreys to the prisoner, seems evidently to have been induced by it. The form of the prisoner's first remark to Lyle indicates that it was made with reference to what Humphreys had said to him, and as the result of reflection in the interval. His reflection upon the remark of Humphreys seems to have led him to the conclusion that it would be better for him to "tell all about it;" and he therefore proceeded to do so.

Humphreys was a "person in authority," within the doctrine established by this court in *Smith's Case*, 10 Gratt. 734; and *Shifflet's Case*, 14 Gratt. 652. That such a remark as that made by Humphreys, proceeding from a person in authority, will render a confession induced by it inadmissible is well established by the English cases, and was recognized in the opinion of Judge Moncure in *Shifflet's Case*, in which all the other judges concurred. 1 Greenleaf Evid. § 219; *Rex v. Kingston*, 4 C. & P. 387 (19 Eng. C. L. R. 434); cases cited, 2 Leading Cr. Cases 164-232.

In another part of the bill of exceptions, the remark of Humphreys is stated to have been, "you had as well tell all about it." But we must take it to have been in the other form, in which it is given in that part of the bill which states the evidence which was admitted by the court. The difference between the two forms of expression is unimportant. One form of expression was calculated to produce as much effect, and the very same effect, upon the mind of the prisoner as the other.

I am of opinion to reverse the judgment, set aside the verdict, and remand the case for a new trial.

Judgment reversed.

582 *Oneale v. The Commonwealth.

January Term, 1867. Richmond.

1. *Marriage—Validity of—Case at Bar.*—A marriage contracted in Virginia after the secession of the state of Virginia and before the re-establishment of the government under the Alexandria constitution, is not therefore invalid.

2. *Bigamy—Foreign Marriage—Proof of.*—On a trial for bigamy, where the charge in the indictment is that the first marriage took place in another state or country, it must be proved to the satisfaction of the jury that a valid marriage had taken place as stated.

3. *Same—Same—Same—Admissions of Accused.**—In such a case the admissions of the prisoner and his acts are competent evidence to prove the mar-

**Bigamy—Foreign Marriage—Proof of—Admissions of Accused.*—In *Womack v. Tankersley*, 78 Va. 248, it is said: "In a criminal prosecution the acts and admissions of the prisoner, coupled with cohabitation and recognition, is sufficient evidence of the marriage to procure his conviction. *Warner's Case*, 2 Va. Cases, 95; *Oneale's Case*, 17 Gratt. 582." See also, *foot-note* to *Bird's Case*, 21 Gratt. 800.

riage, without producing the record, or a witness present at the marriage.

4. *Appellate Practice—Verdict Contrary to Weight of Evidence.*†—The appellate court will not reverse the judgment of the court below overruling a motion of the prisoner for a new trial, on the ground that the verdict is contrary to the evidence, unless it is plainly insufficient to warrant the verdict.

At the October term 1866 of the Circuit court of the county of Rockingham, Timothy Oneale was indicted and tried for bigamy. The indictment charged that on the 24th of April, 1854, in the county of Orange, in the state of New York, the prisoner did marry one Mary Sheridan, a single woman, and that he afterwards, and whilst so married to the said Mary, on the 16th of February, 1865, in the county of Rockingham and state of Virginia, married Caroline Moyerhoeffer, his former wife being alive.

583 On the trial, and after all the evidence had been introduced, the prisoner moved the court to give to the jury eleven instructions: the first, eighth and tenth of which the court gave; but refused to give the second, fourth, fifth, sixth, seventh and ninth, and modified the third and eleventh. All the instructions asked by the prisoner, except the ninth, were intended to exclude from the consideration of the jury as evidence the admissions of the prisoner of the first marriage in New York; and to require as evidence of that marriage the testimony of some one who was present at the marriage, or a proper record of it.

The third instruction as asked was: "That before the jury can find the prisoner guilty, they must be satisfied from the evidence that he was married in the state of New York to Mary Sheridan, and that the marriage was performed under and in accordance with the laws of New York; and they must be satisfied by proper evidence what is sufficient to constitute a valid marriage in the state of New York." And other instructions asked were, that the confessions of the prisoner of his marriage with Mary Sheridan, though supported by proof of cohabitation, are not sufficient to establish such marriage.

As given by the court it was: "That before the jury can find the prisoner guilty, they must be satisfied by the evidence that he was married in New York to Mary Sheridan, and that the marriage was performed under and in accordance with the laws of New York; and they must be satisfied by proper evidence what is sufficient to constitute a valid marriage in the state of New York; and the jury may take into consideration the acknowledgments, the confessions and cohabitation of the prisoner with his alleged first wife, if such has been proved, as evidence of a valid marriage in the state of New York."

The eleventh instruction as asked

†*Appellate Practice—Verdict Contrary to Weight of Evidence.*—See *Kates v. Com.*, 17 Gratt. 561, and *foot-note*.

584 was: "In order to *convict the prisoner, the commonwealth must prove the guilt of the prisoner beyond a reasonable doubt. If, therefore, the jury have a reasonable doubt whether or not the prisoner was lawfully married to Mary Sheridan in New York prior to the alleged second marriage with Caroline Moyerhoeffer, or if the jury have a reasonable doubt as to what the law of New York was to make a valid legal marriage in that state at the time of the alleged marriage with Mary Sheridan, they should find the prisoner not guilty."

This instruction as modified by the court was:

"In order to convict the prisoner, the commonwealth must prove the guilt of the prisoner beyond a reasonable doubt. If, therefore, the jury have a reasonable doubt whether or not the prisoner was lawfully married to Mary Sheridan in the state of New York prior to the alleged second marriage with Caroline Moyerhoeffer, they should find the prisoner not guilty."

The ninth instruction is as follows: "If the jury believe from the evidence that the second marriage charged in the indictment between the prisoner and Caroline Moyerhoeffer was had and solemnized in the county of Rockingham in the year 1864 or 1865, prior to the restoration of the civil government in the state in said county under the Alexandria constitution, and after the secession of the state of Virginia from the United States, they should find the prisoner not guilty."

The prisoner excepted to the opinion of the court refusing to give the instructions asked for, and modifying the third and eleventh instructions, and set out all the evidence in his exception.

The attorney for the commonwealth then moved the court to give the following instruction.

"The jury are instructed that the acts, acknowledgments and confessions of a person accused of bigamy is
585 *as good evidence and as available and sufficient for his conviction as they would be in any other case." This instruction the court gave and the prisoner again excepted.

The jury found the prisoner guilty, and fixed the term of his imprisonment in the penitentiary at two years and six months. And the prisoner thereupon moved the court for a new trial, on the ground that the verdict was contrary to the evidence. This motion the court overruled, and entered a judgment upon the verdict; and the prisoner again excepted, referring for the evidence to the first bill of exceptions; and he applied to this court for a writ of error to the judgment; which was awarded.

The facts as to the first marriage of the prisoner with Mary Sheridan, and his living with her and recognizing her as his wife, are stated by Judge Rives in his opinion. As to the second marriage, it was proved that in 1864 or 1865 a license was issued by the clerk of Rockingham county court for the marriage of the prisoner and

Caroline Moyerhoeffer; and that the certificate of marriage was returned by the minister who married them; but that the license and certificate were lost or destroyed; and it was proved by a witness that he was present at a marriage in Dayton, in the county of Rockingham, in 1864 or 1865, when the prisoner was married by the Reverend Mr. Garber to Caroline Moyerhoeffer.

Woodson, for the prisoner.

The Attorney General, for the commonwealth.

RIVES, J., delivered the opinion of the court:

This is a conviction of bigamy before the Circuit court of Rockingham. Three grounds of error are assigned: 1st, the refusal to give the eleven instructions asked for by prisoner's counsel; 2nd, the
586 giving of the instruction *asked for by the commonwealth's attorney; and 3d, the denial of a motion for a new trial. They are severally set out in the first, second and third bills of exception, together with the action of the court thereon, all consecutively appearing in the record, so that it is unnecessary to recapitulate them here, except so far as it shall be necessary to eliminate the points presented for decision in this cause. The first and second bills of exceptions, with the exception of the ninth instruction in the first bill, turn upon the admissibility and sufficiency of the prisoner's admissions and acts as proof of his alleged first marriage. This is the leading and material question; but before proceeding to its consideration I would first dispose of the question arising under the ninth instruction, which the court overruled; though, I presume, but little stress is laid upon it. This instruction is in these words: "If the jury believe from the evidence that the second marriage between the prisoner and Caroline Moyerhoeffer was had and solemnized in the county of Rockingham in the year 1864 or 1865, prior to the restoration of the civil government of the state in said county under the Alexandria constitution, and after the secession of the state of Virginia from the United States, they should find the prisoner not guilty." It is sufficient to say that marriage is a civil contract, deriving its obligation, like all other contracts, from the consent of the parties; and that it is a legal necessity and a cardinal principle of repose to hold such contracts as unimpaired by changes of government, and subject only to the actual laws and authorities prevailing at the time of the contract. There can, therefore, be no reasonable question of the propriety of refusing this instruction.

As to the residue of the instructions in the first bill, and the comprehensive one given at the instance of the commonwealth's attorney in the second bill, it may be
587 *said, they raise virtually but one question; and that is, of the sufficiency on a trial for bigamy of a prisoner's acknowledgments, coupled with cohabita-

tion and recognition, to procure his conviction. The necessity of proving a marriage in fact, conformable to the laws of the state where had, is expressly conceded by the court; but the jury are instructed that they are entitled to receive and weigh, as evidence of these facts, the admissions and acts of the prisoner; and that "such are as good evidence and as available and sufficient for his conviction as they would be in any other case." It is but just to the court below to construe the concluding phrase "in any other case" as *in pari materia*, and meant only to apply to criminal or quasi-criminal actions, such as for criminal conversation. To this latter suit, it is well known, the same rules of evidence touching prisoner's admissions or acts, are universally applied as to the charge of bigamy.

This question is now for the first time presented to this court for decision. In Warner's Case, 2 Va. Cas. 95, it was held that the production of the marriage registry or certificate was not necessary; but that the marriage could be established in conformity with the laws of Pennsylvania, by the evidence of a witness to the marriage, and to the reputation of the person, as a justice of the peace, before whom the same was solemnized. While this was the only extent to which that judgment went, Judge White, in delivering the opinion of the court, vindicated with great research and ability the general proposition that the confessions and acts of the prisoner should be accepted as proof of marriage.

On consulting the decisions in other states, I find a great conflict of authority; but a decided preponderance in behalf of the same proposition. The courts of New

York, Massachusetts and Connecticut have denied the competency of a prisoner's confessions to establish the first marriage; but a contrary doctrine has prevailed in Pennsylvania, Commonwealth v. Murtagh, 1 Ashmead's R. 272; Forney v. Hallacher, 8 Sergt. & Rawle's R. 159; in Maine, Gayford's Case, 7 Greenl. R. 57; Ham's Case, 2 Fairf. R. 391; and The State v. Hodgskins, 19 Maine R. 155; in Wisconsin, West v. State, 1 Wisconsin R. 209; in Ohio, Wolverton's Case, 16 Ohio R. 173; in Alabama, Langtry v. The State, 30 Alab. R. 536; and in South Carolina, Britton's Case, 4 McCord's R. 256; and Hilton's Case, 3 Rich. R. 434. Out of these numerous references I may be permitted to select specially West's Case, from 1 Wisconsin 209, as affording the best analysis of authorities, and the most satisfactory exposition of the grounds and qualifications of the doctrine. The reasons for establishing a different rule in this country from that most generally asserted in England, are stated with great cogency in the case of Forney v. Hallacher, 8 Sergt. & Rawle's R. 159. Cahagan's Case, 1 Parker's C. R. 378, contains a brief summary and review of these cases, and discloses the fact that the judge pronouncing the opinion was sensible of the weight of authority against him, and seemed to rest his opinion upon precedent cases. Fenton v.

Read, 4 Johns. R. 52; People v. Humphrey, 7 Johns. R. 314, &c. It is observable that he concedes in his opinion, the admissibility, as evidence, of such confessions, but controverts their sufficiency. If admissible, it may be well asked, Why should not the jury be allowed to judge of its sufficiency as in other cases, and the court be precluded from assuming it as a question for law? The course of English adjudications upon this subject has not been uniform. There is the very hard and remarkable case of Catherwood v. Caslon, 13 Meeson & Welsb.

R. 261. It was an action of crim. con. for the seduction of a wife in London; the marriage was proven as having taken place in Beyrout in Syria, at the British consulate, and solemnized by a Presbyterian missionary from America. The plaintiff failed in his action, because the marriage was not before a minister in Episcopal orders, according to the requirements of the English statutes. It may be well to note in this case, there was an offer to conform the proofs to the required statutory formalities, leaving it to be inferred that the case might have been differently settled if it had rested on the allegations of a foreign marriage under the *lex loci*. On the other hand, is the very different and opposite case of Reg. v. Simmосто (1 Carr & Kirwan), 47 Eng. C. L. R. 164. There, proof was offered and received "that the prisoner had several times said that he was married to his first wife by Dr. Sinclair, a Presbyterian minister in orders in New York; that the parties had lived together as man and wife; that witness was present at the christening of a child of theirs," &c.; and these admissions were held to be sufficient evidence of the first marriage. The learned judge who gave this opinion (Wightman, J.), also held in Reg. v. Newton, 2 Moo. & Rob. 503, that the prisoner's admissions, deliberately made, of a prior marriage in a foreign country, are sufficient evidence of such marriage, without proving it to have been celebrated according to the law of the country where it is stated to have taken place. To these might be added the cases from East, cited by Judge White in Warner's Case.

From this brief review and comparison of the American and English adjudications, it will be seen that so far as the weight of authority is concerned, the scale inclines to the rulings of the court in this case. We think the position is also fortified by the peculiar reasons for such a rule in our country, arising out of the diversities of marriage acts in the various states, and the large admixture of foreigners in our population.

590 *The cases that have been cited so fully develop the grounds and reasons of the principle we are considering, it is needless to enforce or recapitulate them here. But it is proper to clear up some ambiguity and confusion that lurk in these decisions. For instance, it is stated that such declarations must not be loose and casual, but solemn and deliberate; must

not be equivocal in their tendency, being as apt to prove a device to hide the shame of a scandalous and meretricious union, as to disclose a marriage in fact. But all these considerations relate, not to the competency, but to the sufficiency of such evidence, and are referable to the jury. If it should appear from the time and circumstances that the declarations were such as might have been made to escape the censure of lascivious cohabitation; or to elude inquiry; in such case they would not be likely to procure nor adequate to justify a conviction; but if they did, redress could be given by the court in the award of a new trial. I do not, therefore, apprehend or appreciate the mischiefs that are deprecated in the event of the jury's being permitted to receive and weigh such testimony.

It must be remembered, that it is not proposed to dispense with the necessity of proving the marriage in fact; that is essentially a part of the body of the crime; and without it, the offence cannot be. But what evidence shall establish that fact, was an inquiry waived in the early case of *Morris v. Miller*, that has undergone so close a scrutiny before all the courts that have pronounced on this question.

Let us then look at the facts of this case. The prisoner stated that he was married in Orange county, New York; that in 1856 or 1857 he removed with his wife and children to Fairfax county in this state; that he continued to reside there till after the battle of Manassas in 1861, when he left that county, and did not return till the

591 winter of *1865; that he recognized Mary Sheridan as his wife, and her children as his own; that after his return in 1865, he again recognized her as his wife and lived with her as such, and complained that she had been badly treated by others; and that he had requested one of the witnesses to act as foster father for one of his children.

Now, I submit that these admissions are not loose or casual, but deliberate; are corroborated by the acts of the prisoner; are neither ambiguous nor equivocal in their tendency, and bear directly upon the gist of the inquiry, namely, the first marriage.

On this state of the proofs, the jury were well warranted in finding the fact, which they tended to establish; but even if this were not so, and this court entertained doubts of the correctness of the verdict, it is its established practice to acquiesce in the denial of a new trial, unless the evidence should be plainly insufficient to warrant the verdict. *Vaiden's Case*, 12 Gratt. 717, and *Kates' Case*, supra 561. The prisoner, therefore, takes nothing by his third bill of exceptions.

All the questions arising in this case, have been thus considered and disposed of; and it only remains to say that the judgment of the court below must be affirmed.

Judgment affirmed.

592 *Hardy and Curry v. The Commonwealth.

January Term, 1867, Richmond.

Criminal Law—Robbery—Indictment—Verdict.—An indictment for robbery charged that the prisoners "did make an assault" upon G., and one gold watch, &c., from the person and against the will of G., &c., "feloniously and violently did steal." &c. The jury acquitted the prisoners of the felony charged, but found them guilty of "assault and battery." On motion in arrest of judgment held the finding valid under ch. 208, § 27 of the Code.

At the April term 1866 of the Circuit court of Loudoun county, the grand jury found an indictment against William Hardy and Charles Curry, that they, on the 8th day of December, 1865, on one John T. Gregg feloniously did make an assault, and him the said John T. Gregg in bodily fear did feloniously put, and one gold watch of the value of one hundred and seventy-five dollars, one gold watch chain of the value of twenty dollars, and four notes in currency (describing them), of the goods and chattels, notes and property of the said John T. Gregg, from the person and against the will of the said John T. Gregg then and there, to wit, &c., feloniously and violently did steal, take and carry away, against the peace, &c.

On the trial the jury found the 593 defendants not guilty *of the felony charged in the indictment, but found them guilty of an assault and battery, and assessed a fine upon each of them of two hundred and fifty dollars. The defendants thereupon moved the court to arrest the judgment, because the verdict found the defendants guilty of an assault and battery, which was no part of the charge set forth in the indictment. But the court overruled the motion, and rendered a judgment against each of the defendants for two hundred and fifty dollars. Whereupon Hardy and Curry applied to this court for a writ of error to the judgment; which was awarded.

Tucker, for the appellants.

The Attorney General, for the commonwealth.

MONCURE, P. I have given to this case

***Criminal Law—Robbery—Indictment—Verdict.**—In *State v. McClung*, 35 W. Va. 285, 13 S. E. Rep. 655, it is said: "It is clear that, upon an indictment for grand larceny there can be a conviction of petit larceny, as the major includes the minor offense.—plainly so in the instance of grand and petit larceny. *Howes' Case*, 26 W. Va. 110; *Whart. Crim. Pl.* § 246; *Hardy and Curry's Case*, 17 Gratt. 592; *Canada's Case*, 22 Gratt. 899; *Code*, § 18, ch. 159." The principal case is cited and followed in all the above cases, also in *Miller v. Com. (Va.)*, 21 S. E. Rep. 500.

†*Code*, ch. 208, § 27: "If a person indicted of felony be by the jury acquitted of part and convicted of part of the offence charged, he shall be sentenced for such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor."

all the consideration of which I am capable and which was so justly due as well to the importance of the question involved, as to the ability and learning with which it has been argued by counsel; and yet I confess that I have found great difficulty in arriving at a result which is satisfactory to my own mind.

The case arises under the Code, page 838, chapter 208, section 27, which now, for the first time, comes up for construction by this court, and is as follows:

"If a person indicted of felony be by the jury acquitted of part, and convicted of part of the offence charged, he shall be sentenced for such part as he is convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor."

The plaintiffs in error were indicted for robbery, in the common form. The jury found them "not guilty of the felony charged in the indictment," but "guilty of an assault and battery," and assessed a fine upon each of them of two hundred and fifty dollars. They moved in

594 *arrest of judgment, because the verdict found them guilty of an assault and battery, which was no part of the charge set forth in the indictment. The Circuit court overruled the motion, and gave judgment against them for the fines and costs. Is this judgment erroneous? or, in other words, is the offence of assault and battery of which they were convicted, substantially charged in the indictment, and is it part of the offence of robbery therein charged? This is the only question we have to decide in this case, though a difficult one it certainly is. The difficulty exists in so construing the statute as, on the one hand, to give fair and full effect to the intention of the legislature, and, on the other, not to subject a party to the danger of conviction for a crime with which he was not duly charged, and concerning which he had not a full opportunity of making his defence.

At common law a count for misdemeanor could not be joined in the same indictment with a count for felony. Nor could a party indicted for felony be convicted on that indictment of a misdemeanor. The two offences were of different grades, required different modes of trial, and were followed by different judgments. This common law rule continued to prevail in Virginia even after the distinctive features between these two grades of offence, which had given rise to the rule, had been abolished or changed, and the reason of the rule had entirely ceased. The effect of this rule was that if the felony charged in the indictment was not fully proved on the trial it was necessary to acquit and discharge the accused, though there might have been the fullest proof before the jury that he was guilty of a highly criminal act, which constituted part of the offence charged against him in the indictment. To be sure he might be indicted again for the misdemeanor. But then the risk, delay, trouble and expense of

this course of proceeding constituted 595 a serious *objection to it, and the question naturally arose, why not avoid this inconvenience, by authorizing a jury to convict of misdemeanor or an indictment for felony, if satisfied from the evidence that the accused is not guilty of the felony, but is guilty of misdemeanor, provided the latter be embraced in the charge contained in the indictment? The accused in such case is not taken by surprise, but may and ought to come prepared to meet the whole charge against him.

It was a rule of the common law, that while more than one offence, even though of the same grade, could not be included in the same count of an indictment, yet as it was necessary to set out all the facts constituting an offence in an indictment for it, and as those facts often in themselves are separate offences, a party might be convicted of any offence substantially charged in the indictment, provided it was of the same grade with the principal or total offence charged. So that if a party were indicted for one felony, as for example murder, he might be found not guilty of murder, but guilty of manslaughter, which is embraced in the charge. The only reason why he could not be convicted of a misdemeanor on such an indictment was the distinction, before referred to, between the two grades of offence. That distinction having been removed, and the reason for the difference in this respect thus having ceased, it remained only for the legislature to authorize a conviction for misdemeanor on an indictment for felony, wherever it could take place consistently with the ends of convenience and justice. Accordingly several legislative enactments have been made in this state on that subject, among which is section 31 of chapter 208 of the Code, page 839, which provides, that "on an indictment for felony, the jury may find the accused not guilty of the felony, but guilty of an attempt to commit such

596 felony; and a general verdict *of not guilty upon such indictment shall be a bar to a subsequent prosecution for an attempt to commit such felony." Now an attempt to commit a felony is by statute made a felony or misdemeanor, according to the nature of the felony attempted to be committed; as may be seen by reference to the Code, p. 813, chap. 199, § 10. Section 31 of chapter 208, above recited, is very much like, though enacted prior in time to section 9, ch. 100, of 14 and 15 Vict., called Lord Campbell's Act, which took the place of section 11, ch. 85, of 1st Vict., called Lord Denman's Act. The doubts and difficulties and diversity of decision which arose under the latter act, and which led to its repeal and the enactment of the former, will appear from the cases collected in a long note in the *Leading Criminal Cases*, pp. 457-463; and from the case of *Regina v. Bird & wife*, 2 Eng. L. & E. R. 428-531, decided by the Court of Criminal Appeal; a case remarkable for the fact that the judges were divided upon the main question

involved, in the proportion of eight to six, and that Lord Campbell, chief justice of the King's Bench, Jervis, chief justice of the Common Pleas, and Baron Parke were of the minority. The judges delivered their opinions seriatim, and at much length; and the argument of counsel, both before the Court of Criminal Appeal and in the earlier stages of the case, is fully reported.

These doubts and difficulties thus existing in the course of legislation and decision on the subject in England, the legislature of this state sought to avoid by two sections, which we find standing almost side by side in the Code; that is, sections 27 and 31 of chap. 208, which have already been recited verbatim. The meaning of the latter section is plain. On an indictment for felony, the accused may be convicted of an attempt to commit such felony. An intention to commit the felony charged, and the doing

of any act towards its commission.
597 without actually *committing it, constitute the offence of which the accused may be convicted as aforesaid. Whenever, therefore, on an indictment for felony, it is proved that the accused intended to commit the felony, and did some act towards its commission, but without completely committing it, the plain duty of the jury is to convict the accused, under section 31, of an attempt to commit such felony. But suppose it is proved, on such an indictment, that the accused committed some act therein stated as part of the felony therein charged, which act is in itself a criminal offence, but that he did not commit the felony nor intend to commit it: what is to be done in that case? Section 27 provides for the case, and declares that he may be convicted of such act and sentenced accordingly.

Let us illustrate the matter by applying the two sections to the case of an indictment for robbery. Suppose it be proved in such a case, that the accused assaulted the person injured with intent to rob him, but failed to complete the robbery; the accused must be convicted under section 31 of an attempt to commit such robbery. But suppose the assault was made without any intention to commit robbery, but that it was an unlawful act, and was substantially charged in the indictment as part of the offence therein charged: what, then, is to be done? Clearly the accused must be convicted of the assault, under section 27.

I suppose the only grounds for raising a doubt as to the propriety of such conviction in the latter case is the question whether an assault is substantially charged in an indictment for robbery and as part of that offence. If it is, then it follows as a matter of course that such a conviction is proper.

Now if it can be said that an assault is not a necessary ingredient of robbery, and not absolutely necessary to be
598 *stated in an indictment for robbery, certainly it is universally stated in such an indictment, and we find it stated in all the forms which are given us of such an indictment by writers on criminal law. Robbery is well defined to be "a felonious

taking of money or goods of any value from the person of another, or in his presence, against his will, by violence, or putting him in fear." 2 Russ. 987; Roscoe 733, citing 2 East P. C. 707. The aim and end of the offence is property; but violence to the person, either actual or threatened, is the means by which it is accomplished. Actual violence is used in a large proportion, and perhaps a majority, of the cases that occur, and in the rest the party robbed is put in fear, which amounts to constructive violence. Personal violence in one form or another, is, therefore, of the essence of the crime, and an assault is not only substantially, but in form, charged in the indictment. The indictment not only charges an actual assault upon the party robbed, but that he was put in bodily fear, and his property feloniously and violently taken and stolen from his person and against his will. It is a case, therefore, which involves personal violence, and calls for a defence to meet it. And if the assault, by means of which the robbery is charged to have been committed, is proved to have been, as it often is, of the most violent and aggravated nature, the accused cannot say that he was taken by surprise by such proof. He must come to his trial prepared to defend himself against the whole charge, and may be convicted of any part of it, which amounts in itself to a criminal offence, though he be not guilty of the whole offence charged. This, I think, is consistent with the obvious meaning and purpose of the section in question. Suppose the indictment was, under ch. 199, § 10, of the Code, for an assault, with the intention, or in other words an attempt by an assault, to commit a robbery: could
599 he *not be convicted of the assault and acquitted of the intention to commit a robbery? I presume there can be no doubt but that he could; and there would seem to be as little doubt but that on an indictment for robbery itself, charging an assault in the universal form, he may be convicted of the assault though acquitted of the robbery.

Now it does not follow that on every indictment for felony containing a charge of an assault there may be a conviction of the assault. In order to authorize such a conviction, the assault must be an essential part of the felony charged, or a necessary means by which it is accomplished. It need not have been made with an intention, and in the execution of an attempt, to commit a felony; in which case indeed the prosecution should be under section 31, and not section 27, as before stated; but it must have been a part of the very act or transaction which is prosecuted as a felony, and not an assault committed at a different time. That on an indictment in the common form for robbery, containing the charge of an assault as in this case, there may be a conviction of the assault, though there is an acquittal of the robbery, and though the assault was not with an intent to rob, was held in England in regard to l

Vict. c. 85, § 11; it being thus considered that "robbery" was a crime which included "an assault," within the meaning of that statute; at least where an assault was charged in the indictment. *Reg. v. Birch*, 1 Den. C. C. 185. That was a unanimous decision of the judges in 1846 on a case reserved, after full consideration of the case, and the several authorities referred to in Greaves' edition of Russell's Criminal Law, vol. 1, p. 778, &c., and his note, p. 782. It seems to follow, a fortiori, that on such an indictment there may be such a conviction under section 27 of our statute.

That section was copied substantially
600 from the *Rev. Stat. of Mass. ch.

137, § 11, under which it was held that on an indictment for rape there may be a conviction of an assault and battery, the latter offence being necessarily charged in such an indictment. And so in the case of an indictment for manslaughter. *Commonwealth v. Drum*, 19 Pick. R. 479. That the assault in such case is charged to have been made "feloniously," cannot prevent a conviction for misdemeanor. The word "feloniously," though necessary in an indictment for felony, becomes surplusage in treating the indictment as one for misdemeanor. It will not make an act felony which is not in itself felony, though it be so in connection with other acts charged in the indictment. *Commonwealth v. Squire*, 1 Metc. R. 528.

I think, therefore, that it was not good ground for arresting the judgment in this case, that the accused were convicted of an assault on an indictment for robbery, though acquitted of the felony.

But they were convicted of an assault and battery, and it is contended that though an assault be substantially charged in the indictment, a battery is not charged therein at all.

A battery is not charged in the indictment in terms, but is it not in effect? The indictment not only charges an assault in terms, but that the robbery was committed by an assault upon John T. Gregg, and violently stealing and taking his property from his person and against his will. Is not this, in effect and substance, a charge of battery as well as an assault? Is not the charge of an assault in itself a sufficient charge of a battery to let in proof and authorize a conviction of battery as well as of an assault?

"An assault is any attempt or offer with force or violence to do a corporeal hurt to another, whether from malice or wantonness, as by striking at him in a
601 threatening *or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability, of actual violence against his person, as by pointing a weapon at him when he is within reach of it. When the injury is actually inflicted it amounts to a battery, which includes an assault, and this, however small it may be, as by spitting in a man's face, or in any way touching him in anger, without lawful provocation."

This is the definition of assault and battery laid down in *Rosc. Cr. Ev.* p. 210, and the authorities therein cited. "Assault" seems to be a generic term, applying to and embracing all offences of personal violence not amounting to a felony, done, or attempted to be done, to another in his presence. In all or almost all the books on criminal law, and especially those of recent date, assault is treated as a separate head of offence under which battery is included, and which is divided only into common and aggravated assaults; those of an aggravated nature being such as some statute has made punishable in a greater degree than a common assault, on account of some attending circumstance of aggravation. It has been often said that an assault is not a battery, and though a battery includes an assault, yet it is not an assault, and therefore the two offences are different. It is true that an assault is not necessarily a battery, because something less than a battery amounts to an assault. A battery set in motion and before it is consummated as a battery, is an assault, but it does not cease to be an assault after it becomes a battery. It is not merged in the battery, for every battery includes an assault. Battery is not an offence of a higher nature or degree than an assault, nor is it otherwise punished, but is merely a name which the law has given to an assault after it has reached the person at which it is aimed. The assault does not then cease to exist as in a case of
merger, but is merely embodied in
602 the battery, which is nothing but

another and a new name for the embodied assault. According to this view, a battery may be proved on the trial of an indictment for an assault without being objectionable on the ground of variance. A prosecutor about to offer such proof on such a trial certainly would not be stopped by the court, at the instance of the accused, upon the ground that the offence charged in the indictment was an assault and not a battery. The answer to such an objection is, that a battery, if it be not in itself an assault of a certain nature and degree, yet certainly includes an assault, and may, therefore, be given in evidence, in order to get in evidence the assault which it includes. And if it be admissible evidence of the assault charged in the indictment, the jury may consider it, not only on the question of guilty or not guilty, but also on the question as to the proper amount of the fine. A greater fine would probably be assessed for an assault included or embodied in a battery than for an assault which had not progressed to a battery. Certainly the court would not instruct the jury to make an apportionment between the battery and the assault included therein, and to assess a fine only for the assault. It would be impossible to make such an apportionment, or to prevent the jury, in assessing a fine for the assault, from taking into the account the aggravation arising from the battery. If, then, that be the case, how can it make any difference if the

jury find the accused guilty of an assault and battery instead of an assault only? Both are, in substance and effect, included in the indictment, and the accused is no more taken by surprise by evidence of one than of the other.

This view is sustained by the cases cited by the attorney general, or some of them, namely *Stewart v. The State of Ohio*, 5 Ohio R. 241; *State v. Bowling*, 10 Humph. R. 52; *State v. Chaffin*, 2 Swan's Ten. 603 R. 493; **Givens v. The State*, 6 Texas R. 344; *Johnson v. The State*, 17 Id. 515; and *Cokely v. The State*, 4 Iowa R. 477.

In the case in 5 Ohio, the indictment was for an assault with intent to kill and murder, and the conviction was for an assault and battery. The only question raised in the case was, whether there could be a conviction for misdemeanor on an indictment for felony, there being no statute in Ohio authorizing such a conviction. The court decided this question in the affirmative, being of opinion that the reason which prevented such a conviction at common law having long since ceased, the rule of law founded thereon ought also to cease. No objection to the verdict seems to have been taken on the ground that it was for assault and battery instead of an assault merely. The cases in Tennessee may have been influenced or controlled by a statute of that state, which declares that "where any person shall be indicted for an assault with intent to kill or commit any other felony, it shall be lawful, in case the jury cannot find such person guilty, as charged, of the intent to commit such felony, to find him guilty of such assault, or assault and battery, as the case may be, and judgment shall be pronounced by the court as upon an indictment for such inferior offence." The cases cited from Iowa and Texas follow and sustain the case in 5 Ohio. In the case in 2 Swan, it was held that if a party be charged with an assault and convicted thereof, he cannot afterwards be punished for the battery committed at the same time. Totten, J., delivering the opinion of the court, said: "The battery includes the assault, and for the assault the defendant has received the legal punishment. He cannot now be punished for the battery, because it cannot be separated from the assault. The one is a necessary part of the other, and if he be now punished for the battery he will thereby be twice punished for the assault; that 604 is, be twice punished for the *same offence, which cannot be done." These observations seem to be sound.

Some authorities were cited by the counsel on the other side, which have the appearance of being adverse to the views above expressed. In the case of *Sweeden v. The State*, 19 Ark. R. 205, it was held that upon an indictment for an assault with intent to murder, the defendant cannot be convicted of an assault and battery. The reasoning of the court certainly tends to show that a battery is not included in a charge for an assault. But it appears that by a statute of Arkansas, assault and bat-

ttery are punished differently, or rather have different penalties affixed to them; both being fines—the former being punished by a less fine than the latter, thereby making the latter the greater offence. This may be a sufficient foundation for the judgment of the court in that case. In *Clark v. The State*, 12 Georgia R. 350, it was held that on an indictment for an assault with intent to murder, the defendant may be found guilty of an assault and battery, where the battery is alleged in the indictment, as was done in that case. But the court did not, and could not, decide (for the question did not arise) that a defendant could not be convicted of assault and battery on an indictment alleging an assault, without in terms alleging a battery.

As to what is said in 1 Hawk. P. C. p. 110, section 1, and repeated by other writers, "that one charged with assault and battery may be found guilty of the former, and yet acquitted of the latter. But every battery includes an assault: therefore, on an indictment of assault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery, it is sufficient." I do not think there is anything in this which is adverse to the view I have above expressed. A person may be guilty of an assault without 605 being guilty of a battery,* because an assault is not necessarily a battery; and therefore, on an indictment for assault and battery, he may be found guilty of the former yet acquitted of the latter. In an indictment for assault and battery, I do not well see how the assault can be "ill laid," if the battery is well laid, as a charge for beating another is necessarily a charge for assaulting him. But if the assault be ill laid and the battery well laid in such an indictment, and the defendant be found guilty of the battery, Hawkins says it is sufficient. Why sufficient? He gives the reason in the same sentence. Because "every battery includes an assault;" and therefore, we may fairly infer, a finding of a battery is a sufficient finding of an assault. Of course it is a sufficient finding of a battery on an indictment for assault and battery, and the writer must therefore have referred to the assault in saying that the finding is sufficient, and this is made certain by the reason which he gives. The passage in Hawkins thus seems to sustain, instead of being opposed to, the view I have expressed.

In conclusion, the case may be thus summed up: The offence charged was robbery; one of the highest known to the law, as it aims both at person and property, and often endangers human life. It was formerly punished with death; and by a recent statute has been again made punishable with death when committed by actual violence or by the threat or presenting of firearms. The facts of the case do not appear upon the record, and we know nothing of their nature but what may be inferred from the pleadings and the verdict. Though they did not amount to robbery, they yet

so much resembled it as to be considered robbery by the committing magistrate, the examining court, the attorney for the commonwealth who preferred the indictment, and the grand jury found it a true bill.

There was some defect in the case, of 606 the "nature of which the record does not inform us, which induced the petit jury to find a verdict of not guilty of the felony charged, but they found a verdict of guilty of an assault and battery, and assessed a fine upon each of the defendants of \$250. We may fairly infer from the amount of the fine that the assault and battery was attended with circumstances of aggravation. No motion was made for a new trial, but only a motion in arrest of judgment, on the ground that the offence found by the verdict was not a part of the offence charged in the indictment, and therefore that the case did not come within the terms of the Code, ch. 208, § 27. The defendants could not have been taken by surprise at the trial. They had committed an assault and battery, which was considered, charged and prosecuted as part of a robbery. The nature of the offence and form of the charge warned them that this act of violence of which they had been guilty, would be proved and relied upon by the commonwealth to sustain the charge. It is not pretended that any other act was proved against them. I think the case comes within the true intent and meaning, as well as the very terms, of the statute, and that the judgment, therefore, ought to be affirmed. But as the defendants were found not guilty of the felony charged in the indictment, I do not think they ought to be made to pay the costs of the prosecution, although convicted of a misdemeanor. I therefore think the judgment ought to be amended in that respect before it is affirmed.

RIVES, J. A single inquiry arises in this case, whether the verdict is good or sustainable under the indictment. The charge was of robbery from the person, and the jury acquitted of the felony, but found the parties guilty of assault and battery, and assessed fines therefor.

It is contended that this verdict is 607 proper under the "pleadings, and in conformity with the provisions of the 27th sect. of chap. 208 of the Code. I do not deem it material to trace the history of this enactment, nor examine the interesting decisions that were cited to us, upon the English statute of 1 Vict. c. 85, § 11, which led to its repeal by 14 and 15 Vict. c. 100, § 10, and suggested to the revisors in 1849, as it now stands in the Code, the 31st sect. of the chapter just mentioned. That history and those decisions, while pertinent to the present inquiry, do not seem to me to impart such aid as would compensate for the pains of stating them, save incidentally, in this cause. We are confined to the interpretation of this statutory provision, which speaks for itself in clear and unambiguous language. "If a person indicted of felony be by the jury acquitted of part,

and convicted of part of the offence charged, he shall be sentenced for such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor." What is "the offence charged" in this case? It is robbery from the person. This charge is clearly resolvable on authority into the two felonies of robbery and larceny on the one hand, and on the other into the felony of robbery and the misdemeanor of an attempt to commit it. If we follow certain decisions of the courts of Massachusetts, we might go further, and rejecting from the charge of assault the epithet 'felonious,' as surplusage, we might again sub-divide the charge so as include "a common assault." These species of assaults, however, are distinguished and held separate in the Commonwealth v. McLaughlin, 12 Cush. R. 615, where a count for a felonious assault and a count for the same transaction, described as a common assault, were joined in the same indictment, and an acquittal under the former and a sentence for the latter were held good. But we are now asked to go a step further, and to consider this 608 charge as embracing substantially a charge of assault and battery.

An indictment is held to the same particularity as a declaration in civil cases, and is required to state the crime with certainty and precision. 2 Hale 169; 2 Stra. R. 904; 1 Arch. 63-4. This is necessary to give notice to the accused, and enable him to prepare for his defence. Most of the little points and subtle distinctions that were at one time availed of to screen the guilty, and had become a reproach to criminal pleadings, were swept away in England by Lord Campbell's famous reform of the criminal law, 14 and 15 Vict. c. 100; with which in the main our own Code consists. But these beneficent changes have not at all assailed, impaired or altered the fundamental principle that the accused should be arraigned on a specific charge, setting forth the facts and circumstances that constitute his offence as contradistinguished from those vague and general charges that were held at the earliest period as bad. This special enactment we are now considering is a proof of this proposition, because it is specially required thereby that the conviction shall be of "part of the offence charged," and no sentence shall be had on such conviction, unless this part of the offence be 'substantially charged in the indictment.'

Usually we do not conceive of robbery without some such violence, menace, constraint or putting in fear, as denotes an assault. Hence, the common form of an indictment sets forth an assault, feloniously made, and it has been held to be error to omit such averment of the felonious assault. Rex v. Pelfryman & Randall, 2 Leach 563; and note to 3 Waterman's Archibald 417. Nevertheless, there may be, I suppose, a putting in fear, unaccompanied by an assault, and in such case, it would become unnecessary to follow the 609 usual precedents in the "averment of

"assault feloniously made." Such an accusation, then, would wholly omit the charge of an assault, either common or felonious. But if the assault may not be charged, what authority have we for going further, in the case of its averment, and declaring that the charge of an assault embraces the charge of a battery also? Can that be on any other principle or for any other reason than because an assault implies or embraces a battery? Surely when one is accused of robbing another, he is not substantially charged with beating him. Robbery may and does occur without any battery; and if the commonwealth seeks or contemplates a finding for the latter, it is but a small burthen upon the commonwealth's attorney to require an averment of it in the indictment, so that the accused may know what charge he has to meet and what defence to make.

Let us now recur to the definition of these offences, and the clear distinction between them, which makes it improper to confound them. An assault is defined to be the offer, with violence, of corporeal hurt to another, without the actual infliction of it; a battery, the unlawful beating of another. Hawkins, in his treatise, deduces from this definition as a clear and indubitable corollary, that "one charged with assault and battery may be found guilty of the former and yet acquitted of the latter." He concedes that every battery includes an assault, and founds upon it this additional principle, that upon an indictment of assault and battery, if the assault be ill laid, the defendant may be found guilty of the battery. 1 Hawk. P. C. p. 100, § 1. Here, then, are two clear cases of distinction and separation between these offences: 1st, you may convict of the assault and acquit of the battery; and 2ndly, you may find the battery, though there be no sufficient charge of the assault. While a battery includes an assault, as before stated,

610 the converse is not true; an assault not only does not include a battery, but repels the idea of it by the very terms of its definition, making it fall short of any touching of the person. How, then, shall we construe an indictment charging an assault, as inclusive of a battery, without violating these elementary principles, so clearly defined by Hawkins, and uncontradicted or doubted by any other writer on criminal law? Here there is an express acquittal of the felony charged in the indictment, but the finding of an offence outside of it, namely, an assault and battery. If we are to hold that assault and battery is substantially charged in this indictment, we cannot do it by reason of its terms, because an assault does not imply or include a battery, but rather precludes the idea of it, as I have shown on authority; nor can we do so by reason of any legal implication, making a charge of robbery embrace a charge of assault and battery, because a robbery may be perpetrated not only without a battery, but even, in exceptional cases, without an assault, as has been also

shown. I am, therefore, wholly at a loss to conceive, upon what principle or reason, the express statutory requirement of a substantial charge, on which to rest the finding in this case, can be satisfied, where there is neither an express nor implied averment of it in the indictment, nor any legal implication or embracing of it in the character of the main offence.

If it could be said that the averment of an assault embraced also that of a battery, or that no robbery could take place without an assault and battery, I would then sustain the finding in this case; but when I find it to be an elementary and unquestioned principle that an assault does not include a battery, but rather repels the idea of it, and that a robbery may occur by any putting in fear, without an assault even, or if attended by an assault, certainly without a battery, I would deem myself
611 *without excuse for sustaining such an extraneous and irrelevant finding under the statute.

In this case, there is the charge of a felonious assault; let it be assumed as comprising the lower grade of a common assault, not depraved by the felonious intent; how and where shall we find a substantial charge of a battery? Shall we be told in the loose and vague language of some of the cases cited to us from the courts of sister states, that a battery is but an aggravated assault or series of assaults? This would seem to me a perversion of the definitions that have been given us of these offences; a blow threatened, but not delivered; a hand raised, but not laid in anger upon another; a menacing movement or gesture towards, but no rude touch of, another's person. These are assaults, and they merge into the battery when that follows as a part of the transaction laid in the indictment. No assault nor series of assaults can ever make a battery; nor as an unavoidable consequence, can any charge of an assault, whether common or felonious, be accepted as a substantial charge of a battery.

The view I have thus presented of this case renders it unnecessary and irrelevant to examine that series of interesting cases in England, sustaining a conviction of a common assault upon an indictment for highway robbery; Reg. v. Ellis, 8 Carr. & Payne 654; upon an indictment for a felonious assault upon a female; Reg. v. Gutteridge, &c., 9 Carr. & Payne 471; and upon an indictment for feloniously cutting another with intent to murder him or to do him some grievous bodily harm. Reg. v. Archer, 2 Moody C. C. 283, &c., &c. These cases arose and were decided under St. 1 Vict., ch. 85, § 10, commonly known as Lord Denman's Act, the language of which is different from that of our statute, namely,

"where the crime charged shall include an assault, &c., *if the evidence shall warrant such a finding, and when such verdict shall be found, the court shall have power to imprison the person so found guilty of assault," &c., &c.

Such were the diversities of opinion and subtleties in the judicial construction of this act, as remarkably displayed in the case of *Reg. v. Bird & Wife*, 2 Eng. L. & Eq. R. 439, that they led to its repeal and substitution by Lord Campbell's Act, 14 and 15 Vict., ch. 100 (1851), which as to this matter corresponds substantially with the 31st sec. of our law, authorizing, under a charge of felony, the finding guilty of "an attempt to commit such felony."

The 27th section of our statute has been framed after the Massachusetts Revised Statutes, 1835, c. 137, § 11, with a difference that it is not now material to consider. This fact seems to impart peculiar importance and significance to the decisions of Massachusetts upon this law. It has been there held that under an indictment for rape or manslaughter, there may be a conviction of assault and battery without any count for the lesser offence. *Commonwealth v. Drum*, 19 Pick. R. 479. The report of this case is brief, and no reasons assigned for the judgment. I am left, therefore, to infer them. They, doubtless, rest on the fact that these crimes cannot be perpetrated without involving assault and battery; and that no averment of this lesser offence is necessary, because it is an inseparable part of the crime alleged in the indictment. But this is not the case, as I have endeavored to show, of a charge of robbery; that may and does occur without any assault and battery. I do not, therefore, consider this case as an authority against the position I occupy.

It is the absence from this indictment of any charge of a battery that I deem fatal to the verdict. I am fortified in this opinion by a case from Georgia. *Clark v.*

613 **The State*, 12 Georgia R. 350. That was a case of an indictment for an assault with intent to murder, where, in addition to this charge of assault, &c., the defendant was also charged in the indictment with having beaten Smith Jones, the individual alleged to have been assaulted; it was held that the party might be found guilty of an assault and battery, the battery having been alleged in the indictment; from which it results that the verdict would have been bad had there been no averment of the battery. Still more direct and decisive is the case of *Sweeden v. The State*, 19 Ark. R. 205. That, like the case just cited from Georgia, was an indictment for an assault with intent to murder, but unlike it in this, namely, it contained no statement of a battery. It was there decided that upon such an indictment the defendant could not be convicted of an assault and battery. This case was the more significant, as it overruled some earlier cases in the state that were relied upon for the opposite doctrine. The judge in deciding that case, uses this strong language: "The bare statement of the proposition, to the professional reader, must be sufficient of itself to convince him upon principle that a man indicted for an assault with intent to kill, cannot legitimately be convicted of an assault and battery."

It is urged that no practical mischief can result from such a course of criminal practice; that if it be true that the robbery charged comprised an assault and battery, the same state of evidence that would exculpate the party of the crime, would be heard on the trial for the misdemeanor. But this seems to me very far from being correct or true. The accused, supposing himself to be arraigned for robbery or some offence substantially included in this charge, might be totally unprepared on the trial to adduce the evidence appropriate to his defence against charge of assault and battery. Conscious of his innocence

614 *of the crime for which he was indicted, he might well rely on the inability of the commonwealth to prove it, and be caught without the evidence he might command to justify or extenuate his conduct in a personal attack upon the prosecutor. I therefore object to this practice as a dangerous innovation upon the ancient rules of certainty and precision heretofore required in criminal accusations, and manifestly tending to the surprise of the accused upon his trial. Nor can this statute, as I have endeavored to show, be interpreted as authorizing this laxity of pleading because it protects in terms the party against such a finding, where the part of the offence of which he is convicted is not 'substantially charged' in the indictment.

The inducements for declining to depart from the strictness of criminal pleading as to its certainty and particularity, are too obvious to be more than suggested. Under our bill of rights, "a man hath a right to demand the cause and nature of his accusation;" the law extends to him every facility and chance for his defence, and guards him against surprise on his trial; but all these invaluable privileges of the citizen, and securities for his safety against vague and inveigling charges, would be most seriously impaired, in my view, by such a latitude of criminal procedure as would tolerate, under a charge of robbery, a verdict for assault and battery.

For these reasons, I feel constrained to dissent, though with great and sincere diffidence, from my brethren in this case, and to declare myself for a reversal of the judgment below.

JOYNES, J., concurred with Moncure, P., in affirming the judgment, and expressed the grounds of his opinion orally, to the following effect:

To ascertain whether a party can be 615 convicted of a *lesser offence under sec. 27, the first question must always be whether it is substantially charged. If the principal felony charged is one which necessarily, and in all cases, includes the lesser offence, then every indictment for the principal felony substantially charges the lesser offence. If the principal felony is such as does not necessarily, and in all cases, include the lesser offence, then it would seem that an indictment for the principal felony would not substantially charge the lesser offence, unless it be embraced in

the mode in which the principal offence is charged. Though there may be a robbery without an assault, yet as an assault is expressly charged in this case, the prisoners had notice that the robbery alleged against them was such a one as included an assault.

But it is not enough that the lesser offence should be "substantially charged." It must be proved by the evidence relied on to establish the principal felony. If the operation of the 27th section is not thus restricted it would lead to the greatest injustice. This section indeed is only an extension of a common law rule, so as to allow a conviction for a misdemeanor as well as for a felony, included in the principal felony charged. Vide 2 Lead. Cr. Cases, 454, and note; Reg. v. Bird, 2 Eng. L. & Eq. R. 439, opinions of dissenting judges.

The provisions of this section, however, require that the party should come prepared to defend himself against every charge embraced by the indictment, and the proof of which is contained in the evidence relied on to establish the principal felony.

It must be presumed that the evidence brought the present case within this principle. It was, therefore, competent for the jury to find the prisoner guilty of an assault.

Upon an indictment for an assault, it is competent for the prosecution to give evidence of a battery occurring at the same time, and as part of the same transaction, so as to show the character of the assault, and the degree of punishment which the jury ought to inflict for it. If the evidence should prove only a battery, and no assault distinct from it, there would be no acquittal. The assault is not merged in the battery even if we regard the battery as an offence legally distinct from the assault, and not merely as an assault with aggravation. If they are distinct offences, they are both misdemeanors. And moreover, they are both punishable in the same way, and both punishable at the discretion of the jury.

If, then, upon the trial of an indictment for an assault, it is competent to give evidence of an assault and battery, it is competent for the jury to consider the evidence, and to believe it, and to measure the punishment by it. Why, then, may they not say, by the form of their verdict, that they do believe it? The finding as to the battery is at most surplusage, and does not vitiate the verdict for the assault. No injustice is done to the defendant by finding the battery, as well as the assault. If the jury may hear evidence of the battery, and assess the punishment with reference to it, though they find a verdict for the assault only, what difference can it make to the defendant, if the jury, hearing the same evidence, and assessing the same punishment, find a verdict for assault and battery? In the case before the court, the same principles apply, and the verdict for the assault is not vitiated by the finding of the battery.

Judgment affirmed.

617

*Davis v. The Commonwealth.

January Term, 1867, Richmond.

1. Criminal Law.*—The killing a dog is not an indictable offence.

This was an indictment in the Circuit court of Pittsylvania county against Simon B. Davis for unlawfully, but not feloniously, killing a dog, the property of James C. Ricketts. On the trial the defendant moved the court to instruct the jury, that a criminal prosecution cannot be sustained for the destruction of dogs. But the court overruled the motion; and the plaintiff excepted.

There was a verdict and judgment for the commonwealth for ten dollars. And thereupon Davis applied to this court for a writ of error; which was awarded.

Barkadale, for the appellant.

The Attorney General, for the commonwealth.

MONCURE, P. The plaintiff in error was convicted on an indictment charging him with having unlawfully, but not feloniously, killed and destroyed a dog, the property of another, and the question is, whether a dog is property within the meaning of the Code, ch. 192, § 53, p. 796, on which the indictment was founded?

That section, so far as it is material to be stated, declares that if a person "unlawfully, but not feloniously, take and carry away, or destroy, deface or injure any property, real or personal, not his own, he shall be deemed guilty of a misdemeanor."

It was well settled at common law that while, on the one hand, a dog is such property as that its owner may maintain a civil action for the unlawful conversion, destruction or injury thereof by another person, it is not such property as to be subject of larceny. And this distinction in regard to the nature of this subject has never been altered by statute, but continues still to prevail, notwithstanding the reason for the distinction has long since ceased. It belongs to the legislature and not to the courts to abolish the distinction, if it be proper to do so.

Now the question is, In which sense was the word "property" used in the statute above mentioned; in the sense of the word in regard to the offence of larceny, or in its sense in regard to a civil action as aforesaid?

If the question were res integra, it would not be entirely free from doubt. For while, on the one hand, the general word property is used in the statute without any restriction, and is broad enough to embrace, literally, every thing which can be the subject of ownership for any purpose; and while every such thing seems to come, as well within the reason as the meaning of the statute, yet, on the other hand, it must be remembered that this is a penal statute,

*See, in accord, Maclin's Case, 3 Leigh 809.

and ought therefore to be construed strictly, so that if the word "property" has one sense in the criminal law and another in the civil law, it may with some reason be argued, that the word, when used in a penal statute, should be construed in the former sense, in the absence of anything to the contrary in the statute. The peculiar language of this statute seems to support this view. "If a person unlawfully, but not feloniously, take and carry away any property," &c. The legislature seems here to

619 *would be felony if it were done feloniously. The statute, in describing the offence, defines larceny, with the exception of the felonious intent, which is expressly excluded. It often happened at common law that on a trial for larceny, though it was proved that the accused unlawfully took and carried away and converted to his own use the goods and chattels of another, yet he was acquitted, because the act was not done "feloniously," or *cum animo furandi*. It was one of the objects of the statute to make the act a misdemeanor, though not done "feloniously." To be sure the statute embraces injuries which could not be the subject of larceny at common law, and to which the word "feloniously" cannot apply, such as to injuries to real property, &c. These were injuries which came within the mischief designed to be prevented by the statute, and they were therefore embraced in its terms. Some of them were made the subjects of larceny by the Code, ch. 192, § 17, p. 789, which declares that "things which savor of the realty, and are, at the time they are taken, part of the freehold, whether they be of the substance or produce thereof, or affixed thereto, shall be deemed goods and chattels of which larceny may be committed, although there be no interval between the severing and taking away."

But I regard the question involved in this case as, in effect, adjudicated. The section in the Code on which the indictment is founded was derived from the act of 1822-3, ch. 34, § 1, Sess. Acts, p. 36, and is the same in substance therewith, so far as concerns this case. The only difference is in the phraseology of the two sections; that of the act of 1822-3 being full and diffuse in the enumeration of subjects, besides containing the general words "any other property, real or personal," while the section in the Code contains only the general words "any property, real or personal." Of

620 course I am now confining my remarks to so much only of the two sections as relates to the present inquiry. A comparison of the two sections will, I think, satisfy the mind that the purpose of the framers of the Code was to make no change in the meaning of the former law, but merely to prune it of the superfluous words with which it abounded. That the same construction ought to be put upon the Code as upon the former law in this respect, is shown by the case of *Paramore v. Taylor*, 11 Gratt. 220, and the cases there referred

to. I think we may safely say that the same words, "property, real or personal," which occur in each of the two sections, have the same meaning in each, and embrace the same, and only the same, subjects. Now these words were construed by the General Court in *Maclin's Case*, 3 Leigh 809, in which it was held that the act of 1822-3, ch. 34, § 1, did not authorize a criminal prosecution for killing dogs belonging to another. There were then on the bench nineteen of the twenty judges that composed that court, all of them men of great eminence and learning in the legal profession. Twelve of them concurred in the decision, and the remaining seven dissented. There seems to have been some difference among the judges composing the majority, upon a question which was mooted in the case; but they all concurred in the opinion that a criminal prosecution cannot be sustained for the destruction of dogs. "By the common law," said Leigh, J., in pronouncing the opinion of the majority, "the property in dogs and other inferior animals is not such as that a larceny can be committed by stealing them, though the possessor has a base property in them, and may maintain a civil action for injuries done to them. And in a penal act, like the one now under consideration, the word 'property,' standing alone, ought to be considered to mean full and complete property, such as, by the common law, may be protected by a public prosecution for the larceny thereof."

621 "I am not prepared to say, and am not called on to say, whether I would have concurred with the majority or the minority had I been a member of the court when that case was decided. Much could have been said on each side, as I have already noticed. But I think the rule *stare decisis* now applies, and that *Maclin's Case* governs this. That decision was made not only by great judges, but by the highest court of appeal in criminal cases at that time in the state. It is therefore of binding authority. It was made in July, 1831, more than thirty-five years ago, and has never since been questioned in any case; but on the contrary has continued to stand side by side with the statute as the correct exposition thereof. The legislature has acquiesced in, and it seems been satisfied with, this construction, and has never made any change, which could so easily have been done if it had been desired, in this respect. The words, "a dog shall be deemed property in the meaning of the criminal law," would have accomplished the purpose. The revision of 1849 was a very fit occasion for the change had it been desired, but no such change was then made; and ever since, section 53, of chap. 192, as it was then enacted, has stood unchanged in the Code. I think it is now too late to overrule that case. To overrule it now, after it has been, as it were, so long engrafted in the Code, would be like making an *ex post facto* law, and punishing a person for an act which was no legal offence when it was

committed. When the act, which is the subject of the present prosecution, was committed, the accused had every reason to believe that the act was not a criminal offence. The act may have been a great moral offence, and there may be the strongest reasons for making such an act a legal offence also. We may well imagine cases in which to steal or kill a person's dog would inflict upon him a great injury, and be an outrage which ought to be punished in the most exemplary manner.

A person may own a dog so valuable as to be a safeguard to his dwelling-house, and the dog may be killed by a wrong-doer for the purpose of getting to the house to commit a burglary. Everybody will say that such an act would deserve very severe punishment; but nobody will say that it ought to be punished by a judicial tribunal without any law making the act punishable. These are considerations which address themselves forcibly to the legislative department, but cannot be entertained by judges. When the legislature makes an act penal which before was not, the law has only a prospective operation, and to attempt to give it a retrospective operation would be to make it unconstitutional as being an *ex post facto* law. When a court overrules a former decision upon the construction of a law, the later decision has, to some extent, the effect of an *ex post facto* law. And this consideration makes the rule *stare decisis* apply with increased force to decisions upon the construction of penal laws.

I do not mean to say we are concluded by a prior decision of our highest appellate court in any case. We have power to overrule it, and ordinarily it is our duty to do so if we consider the decision erroneous. But for the sake of consistency and certainty in the law, we ought not to do so in a doubtful case, even though we may incline to think the decision erroneous; and the authority of a decision is greatly increased by lapse of time and public acquiescence. Sometimes it acquires almost the force of law by becoming a canon of property, or a settled rule of construction of a penal statute, or by being tacitly sanctioned by the legislature. It is on the two last named grounds, and especially the last, that I attribute so much weight to the decision in *Maclin's Case*. The very same words in the very same law which

had been construed in that case, were adopted without change *by the legislature in the revision of the Criminal Code in 1847-8, and of the whole Code in 1848-9, and we ought to consider them as adopted according to that construction. When the legislature adopts a statute of another state, the presumption is that it intends also to adopt the construction previously put upon such statute by the highest appellate court of that state. And a fortiori when the legislature revises the whole Code of our own state and embodies in the new Code a former statute, substantially in the same words, the construction previously put upon those words by our

highest appellate court may be considered as the meaning in which they were intended to be used in the new Code. We must presume that the legislature, engaged in such a work, and aided by revisors selected on account of their legal learning and experience, was at least cognizant of the decisions of our own appellate court upon the construction of our statute law. In this view of the subject, which seems to me to be sound, I do not think that I have given too much weight to the decision in *Maclin's Case*.

I have been referred to several cases decided in other states which have a bearing upon the question I have been considering, and some of which perhaps would lead to a different result from that to which I have come. Those cases are *The State v. McDuffie*, 34 New Hamp. R. 523; *Findlay v. Bear*, 8 Serg. & Rawle's R. 571; *The State v. Latham*, 13 Ired. Law R. 33; *The People v. Maloney*, 1 Parker's Crim. R. 593; and *United States v. Gideon*, 1 Minnes. R. 292. The views of the court in the last named case strongly support the case in 3 Leigh, while those of the court in the first named case are as strongly the other way. But whatever may be the effect of these decisions in the states in which they were pronounced, they can bear no comparison in this state with a decision of our own highest appellate court, which is of binding authority with us.

624 *I am therefore of opinion that the judgment of the Circuit court ought to be reversed and a judgment entered for the plaintiff in error non obstante veredicto. But under the circumstances I do not think there ought to be a judgment for costs against the prosecutor, either in this court or the Circuit court.

JOYNES, J. I concur in a reversal of the judgment in this case with much reluctance. I do so only in consequence of the decision in *Maclin's Case*, and the acquiescence of the legislature during the long period which has since elapsed, within which there have been two revisions of the criminal laws. But for that case, I should entertain no doubt of the correctness of the judgment which we now reverse.

It is conceded on all hands, that an action of trespass may be maintained for killing a dog; and I think the statute was designed to afford an additional restraint to the commission of a trespass by making it a misdemeanor. Such trespasses tend to public mischief, by making the enjoyment of property insecure, and by provoking breaches of the peace; and, moreover, the remedy by indictment will be effectual in many cases, when the remedy by civil action would be unavailing. If a dog is property, so as to authorize a resort to one remedy to protect the enjoyment of it, I cannot see why it is not equally so to authorize a resort to the other. It does not appear to me that we ought to apply to such a case the rules of the common law as to the subjects of larceny. The distinctions made by the old law

on this subject may have been well enough in another age and in a different state of society, but many of them are altogether capricious, and some of them cannot be considered, according to our views at this day, as anything but ridiculous and absurd.

Thus, it is said to be larceny to steal a dove, a crane, a *swan, a partridge or a hare, that has been reclaimed; but not larceny to steal a parrot, a singing bird, a bear, or a squirrel, that has been reclaimed. 2 Bishop Cr. Law, § 684. Tamed hawks, we are told, are the subjects of larceny, because "of their noble and generous nature and courage, serving ob vitæ solatium of princes and nobles and generous persons, to make them better fit for great employments." 3 Inst. 109. Yet it is said to be no larceny to steal a dog, which is at least as noble, as generous and as courageous as a hawk, and a thousand times more useful, and which affords full as much vitæ solatium to princes and nobles, besides the vast amount of it which it affords to commoners who do not indulge in hawks.

These capricious and frivolous distinctions may be too firmly fixed in the law of larceny to be now shaken by the courts: I express no opinion as to that. But be that as it may, I do not think they ought to be adopted in the construction of the statute now under consideration. In this view I understand my brethren to concur; but we all feel constrained to hold that the question is not an open one in this state.

The following is the judgment of the court:

The court is opinion, for reasons stated in writing and filed with the record, that on the principle of the decision in *Maclin's Case*, 3 Leigh 809, it is not an indictable offence to kill a dog, though it may be the ground of a civil action for damages; and whatever doubt may exist as to the correctness of that decision, yet as it has never been overruled, but on the contrary has been tacitly sanctioned by the legislature, by embodying in the act of March 14, 1848, called the "Criminal Code," and in the Code of 1849, without substantial change, the statute which was construed in that case, being the same

in effect, so far as relates to this case, 626 with the 53d section of *chapter 192 of the Code of 1860, on which the prosecution in this case was founded, the court is of opinion that the said decision ought now to be regarded as a binding authority. Therefore it is considered that the said judgment is erroneous, and that the same be reversed and annulled; and this court proceeding to give such judgment as the said Circuit court ought to have given, it is further considered that the said judgment be arrested, and the said Simeon B. Davis, notwithstanding the verdict, go quit and discharged of the accusation made against him in the indictment. But the court is of opinion that under the circumstances of the case it would be improper to give any judgment for costs against the prosecutor either

in this court or in the court below: which is ordered to be certified to the said Circuit court.

627 *Hewitt v. The Commonwealth.

April Term, 1867, Richmond.

1. *Continuances—Judicial Discretion—Appellate Practice.*—A motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and although an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground, unless such action was plainly erroneous.

**Continuances—Judicial Discretion—Appellate Practice.*—There is hardly a proposition of law better settled in Virginia than that a motion for a continuance is addressed to the sound discretion of the court under all the circumstances of the case; and that, although an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground unless such action was plainly erroneous.

The principal case is cited as authority for this proposition in *Harman v. Howe*, 27 Gratt. 696; *Roussell v. Com.*, 28 Gratt. 985; *B. & O. R. Co. v. Wightman*, 29 Gratt. 447; *Walton v. Com.*, 32 Gratt. 856, 864; *The Bland & Giles Co. Judge Case*, 33 Gratt. 447; *Palro v. Bethell*, 75 Va. 838; *Keesee v. The Bank*, 77 Va. 122; *Com. v. Mister*, 79 Va. 10; *Carter v. Wharton*, 83 Va. 267; *Shelton v. Com.*, 89 Va. 464, 16 S. E. Rep. 355; *Welch v. Com.*, 90 Va. 321, 18 S. E. Rep. 278; *Phillips v. Com.*, 90 Va. 408, 18 S. E. Rep. 841; *Norfolk, etc., R. Co. v. Shott*, 93 Va. 45, 23 S. E. Rep. 811; *Davis v. Walker*, 7 W. Va. 450; *State v. Betsall*, 11 W. Va. 737; *Riddle v. McGinnis*, 23 W. Va. 298; *Buster v. Holland*, 27 W. Va. 534; *State v. Harrison*, 36 W. Va. 788, 15 S. E. Rep. 985; *State v. Maier*, 36 W. Va. 770, 15 S. E. Rep. 994. See, in accord, *Hook v. Nanny*, 4 H. & M. 157, and *note*.

See also, *foot-note* to *Harman v. Howe*, 27 Gratt. 678; *foot-note* to *Roussell v. Com.*, 28 Gratt. 990; *foot-note* to *Walton v. Com.*, 32 Gratt. 855; *foot-note* to *The Bland and Giles County Judge Case*, 33 Gratt. 445.

In *Myers v. Trice*, 86 Va. 387, 11 S. E. Rep. 428, the court said: "Professor Minor says: The continuance of a cause to another term of the court, is a matter peculiarly within the discretion of the court below, and the United States courts hold it, as they hold all other matters of discretion, to be no ground upon which error can be imputed. * * * In Virginia the ill exercise of the discretion may be a ground of error; but it is a well established principle, that the appellate court will only reverse a judgment for that cause, when the refusal of the continuance is plainly erroneous; and so in other cases of discretion, as in the second examination of witnesses, etc., citing *Brooks v. Wilcox*, 11 Gratt. 411; *Hewitt's Case*, 17 Gratt. 627; *Fant v. Miller*, 17 Gratt. 187; *Wright v. Rambo*, 21 Gratt. 158; *Harman v. Howe*, 27 Gratt. 678. See 4 Min. Inst., pt. 1st, p. 869.

"The principle thus deduced from the authorities referred to, is unquestionably stated with accuracy by the learned author, but it does not quite reach the peculiar circumstances of the case in hand, which rests upon the ground of *mistake*. The principle applicable in the present case is correctly and clearly stated in 3 Am. & Eng. Enc. Law, p. 817, where the authorities are collected, and where it is

2. Same—Absence of Material Witness.—As a general rule, where a witness for a party fails to appear at the time appointed for the trial, if such party show that a subpoena for the witness has been returned executed, or if not so returned, was delivered to the proper officer of the county or corporation in which the witness resides, a reasonable time before the time for the trial, and shall swear that the witness is material, and that he cannot safely go to trial without his testimony, a continuance ought to be granted, if there be reasonable ground to believe that the attendance of the witness at the next term can be secured; especially if the case has not been before continued for the same cause.

3. Same—To Delay Trial—Continuance Should Be Refused.—Where the circumstances satisfy the court that the real purpose in moving for a continuance is to delay or evade a trial and not to prepare for it, then though the witnesses have been summoned, and the party has sworn to their materiality, and that he cannot safely go to trial without them, the continuance should be refused.

At the April term 1863 of the Circuit court of Bedford county, Wilson C. Hewitt was indicted for an assault and battery committed in February, 1863, upon Rowland D. Buford.

said: "When it appears in the progress of a trial that a cause, if required to proceed, will suffer from the honest mistake of the party or his counsel, a continuance should be granted. But the mistaken advice of counsel not to prepare for trial is insufficient;" citing *Earnest v. Napier*, 15 Ga. 306; *Bargin v. Riggs*, 40 Ill. 61; *Kelsey v. Berry*, 40 Ill. 69. And the same principle was recognized by this court in *Hook v. Nanny*, 4 H. & M. 157, and *note*.

"These authorities distinctly announce the proposition that a motion for a continuance is addressed to the sound discretion of the court, in view of all the circumstances of the case; and that an appellate court will review and reverse the action of an inferior court, if, in the exercise of its discretion, it has harshly or unjustly refused a continuance, and especially where there is nothing in the circumstances to warrant the conclusion that the real purpose in moving for a continuance is to delay or evade a trial, and not to prepare for it."

†Same—Absence of Material Witness.—The principal case was cited as to this point in *Walton v. Com.*, 32 Gratt. 869; *Carter v. Wharton*, 82 Va. 267; *Welch v. Com.*, 90 Va. 321, 18 S. E. Rep. 273; *Phillips v. Com.*, 90 Va. 403, 18 S. E. Rep. 841; *Davis v. Walker*, 7 W. Va. 450.

See also, in accord, *Higginbotham v. Chamberlayne*, 4 Munf. 547; *Deford v. Hayes*, 6 Munf. 390; *B. & O. R. Co. v. Wightman*, 29 Gratt. 433, and *foot-note*.

‡Same—To Delay Trial—Continuance Should Be Refused.—The proposition laid down in the third head-note was approved in *Harman v. Howe*, 27 Gratt. 686; *Early v. Com.*, 86 Va. 935, 11 S. E. Rep. 795; *Welch v. Com.*, 90 Va. 321, 18 S. E. Rep. 273; *Phillips v. Com.*, 90 Va. 403, 18 S. E. Rep. 841; *Riddle v. McGinnis*, 22 W. Va. 298.

Upon a motion for a continuance, upon the ground of the absence of a material witness, the court, if it sees cause to suspect that the party is mistaken, or that his object is delayed, may examine him, as to what he expects to prove by the absent witness. *Harris v. Harris*, 2 Leigh 584.

See generally, monographic *note* on "Continuances" appended to *Harman v. Howe*, 27 Gratt. 676.

This indictment was made upon the evidence of Rowland D. Buford, a witness called on by the grand jury. A summons was thereupon awarded, returnable to the next term of the court, but on the next 628 *day, viz: on the 1st of May, on the motion of the attorney for the commonwealth, writs of *capias* were awarded against Hewitt to the sheriff of every county and the sergeant of every corporation in the state, returnable to the next term.

On the 22d of September, 1863, the defendant was arrested by the sergeant of the corporation of Lynchburg under the process sent to him; and he entered into a recognizance with surety for his appearance on the first day of the next term of the Circuit court of Bedford.

At the April term of the court for 1864 Hewitt appeared by counsel, and an issue was made upon the plea of "not guilty." And the case coming on for trial on the 27th of April, 1864, the jury found him guilty, and assessed upon him a fine of two thousand dollars; for which and the costs the court entered up a judgment.

When the cause was called for trial Hewitt, by his counsel, moved the court for a continuance, on the ground of the absence of material witnesses, viz: John Downes and John Hurley; and in support of his motion offered his own affidavit. This affidavit was full as to the materiality, &c., of the witnesses. It bore date the 23d day of April, 1864. It was admitted that a subpoena had been regularly issued for these witnesses, and had been served on John Downes a short time before he left this state for Baltimore, where he resides; and as to John Hurley, returned not found. A subpoena for Hurley had also been sent to Richmond; and was returned not found. And the sergeant added after the return: "This man has been discharged from Castle Thunder, and don't know where he has gone. T. U. D., Serg't." Hurley was known to have been in Richmond a short time before the subpoena was sent there. He had resided at Liberty until the winter of 1863-4, when he was arrested 629 *by the military authorities and sent to Castle Thunder at Richmond.

It was also admitted that Hewitt was in Liberty on the morning of the day the motion for a continuance was made, and that he left in the cars going west; and the affidavit bore date two days before the court commenced.

The court refused to continue the cause, and ruled the defendant to trial, because the court was of opinion that the defendant was attempting to evade a trial by absenting himself from court, so as to prevent a personal examination in open court, on his motion for a continuance. To this opinion of the court, Hewitt excepted; and obtained a writ of error to the judgment.

Mosby, for the appellant, and The Attorney General, for the commonwealth, submitted the case.

MONCURE, P., delivered the opinion of the court:

A motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and though an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground, unless such action was plainly erroneous. As a general rule, where a witness for a party fails to appear at the time appointed for the trial, if such party show that a subpoena for the witness has been returned executed, or, if not so returned, was delivered to the proper officer of the county or corporation in which the witness resides, a reasonable time before the time for the trial, and shall swear that the witness is material, and that he cannot safely go to trial without his testimony, a continuance ought to be granted. 1 Rob. Pr. old ed. p. 250. The party thus shows, *prima facie*, that he is not ready for trial, though he has used due diligence to be so; and 630 in the absence of anything to "show the contrary, the court ought to give him credit for honesty of intention and to continue the case, if there be reasonable ground to believe that the attendant of the witness at the next term of the court can be secured, especially if the case has not been before continued for the same cause. But circumstances may satisfy the court that the real purpose of the party in moving for a continuance is to delay or evade the trial, and not to prepare for it, and in such case, of course, the motion ought to be overruled.

In this case a motion for a continuance was made by the defendant in the court below, on the ground of the absence of two material witnesses, Downes and Hurley; and he exhibited, in support of the motion, his own affidavit, stating in due form the materiality of the witnesses, and that he could not safely go to trial without their testimony. It was admitted that a subpoena had been regularly issued for said witnesses (directed no doubt to the sheriff of Bedford county, in which the prosecution was pending, though the fact is not so stated in the record), and served on the said Downes a short time before he left the state for Baltimore, where he resided, and returned "not found" as to Hurley. A subpoena for Hurley had been sent to Richmond and returned "not found," with a memorandum made by the officer at the foot of his return in these words: "This man has been discharged from Castle Thunder, and don't know where he has gone. T. U. D., Sgt." Hurley was known to have been in Richmond a short time before the subpoena was sent there. He had resided in Liberty (the county seat of Bedford, in which county the offence was charged to have been committed) till the winter of 1863-4, when he was arrested by the military authorities and sent to Castle Thunder at Richmond. It was also admitted that the defendant Hewitt was in Liberty on the morning of the day on which 631 *the motion was made, and that he

left in the cars going we affidavit bore date two days before the court commenced. The court refused to continue the case, and ruled the defendant into trial, "because," as stated in the bill of exceptions, "the court was of opinion that the defendant was attempting to evade a trial by absenting himself from court, so as to prevent a personal examination in open court, on his motion for a continuance." The case was then tried, and the jury found the defendant guilty and assessed his fine at \$2,000, for which and the costs of the prosecution the court rendered judgment.

The offence for which the defendant was tried was an assault and battery on Rowland D. Buford, which would appear from the amount of the fine to have been an aggravated offence; though as the fine may have been, and probably was, assessed in Confederate currency, we cannot well estimate its true amount in good money. The indictment was found on the 25th of April, 1863, and though found on the testimony of Buford on whom the offence was charged to have been committed, yet it appears that he was not a voluntary prosecutor, but was called on by the grand jury to give evidence. When the indictment was found, a summons was awarded to answer it, returnable to the next term. But on a succeeding day of the same term, to wit, on the 1st of May, 1863, on the motion of the attorney for the commonwealth and for reasons appearing to the court, it was ordered that writs of *capias* be awarded against the defendant, directed to the sheriff of every county and sergeant of every corporation in the state, returnable to the next term. One of these writs, directed to the sergeant of the city of Lynchburg, was executed on the defendant in that city on the 22d of September, 1863, when he entered into a recognizance with surety 632 for his appearance on the "first day of the next term of the court, which was to be in a few days thereafter. As stated in the petition, there was no session of the court at the time fixed for that term, nor until the following spring term in 1864, to which time the defendants' recognizance stood over by operation of law, and it bound him for his appearance then as if it had been taken with express condition therefor. Code, ch. 161, § 15. Instead of making his appearance then, in discharge of his recognizance, and although he was in Liberty, the county seat of Bedford, on the morning of the day on which the case was called for trial, yet he left in the cars going west on the same morning (for what place bound, or on what business does not appear), leaving his affidavit aforesaid to be used as the ground-work of a motion for a continuance. Under these circumstances we cannot say that the court was not warranted in the opinion, "that the defendant was attempting to evade a trial by absenting himself from court, so as to prevent a personal examination in open court on his motion for a continuance." And certainly we cannot say that the court plainly erred in refusing to continue the case.

Judgment affirmed: but without damages.

INDEX.

ACCOUNTS.

1. Though a cross-bill sets up a special charge against a party, if upon taking the account by a commissioner this item is not charged, and the plaintiff in the cross-bill does not except to the report for the failure to make the charge, it will be considered as abandoned by the plaintiff.

Penn's adm'r v. Spencer & als., 85

2. On a bill to impeach deeds of trust for fraud, though the deeds are sustained, the plaintiff is entitled to an account of the fund.

Idem, 85

3. How trustee's account should be stated. See *Trusts and Trustees*, No. 2, and

Harvey's adm'r, &c. v. Steptoe's adm'r & als., 289

4. An administration account settled in a cause in which the heirs are not parties, is not even *prima facie* evidence as against the heirs.

Robertson & als. v. Wright & als., 534

5. The mere rendering of an account by one party to another, is not sufficient to make it an account stated. For that purpose there must be either an actual statement and adjustment of the account by the parties by going over the items together and striking a balance, or an admission by one party of the correctness of the balance struck by the other, or some other evidence to show that the party sought to be charged has, by his language or conduct, admitted the correctness of the account.

Idem, 534

6. If an account has been rendered by one party to another, the court cannot presume, in the absence of all evidence on the subject, that the party who received it has acknowledged its receipt and the correctness of the account.

Idem, 534

7. For the mode of settling an agent's account. See *Partnership*, No. 14, and

Robertson & als. v. Read's adm'r & als., 544

8. When claim, though probably just originally, lost through lapse of time. See *Laches and Lapse of Time*, No. 4, and

Idem, 544

ACTIONS.

1. A personal representative of several remaindermen dying during the lifetime of the life-tenant, takes as tenant in common with the surviving remaindermen, and must be joined in an action for recovery of the property.

Clarkson & als. v. Booth, 490

2. In such case he is but one plaintiff, though in several rights.

Idem, 490

3. If the stamp law of another state only says that a note shall be unavailable as evidence unless stamped, it may be sued on in this state. *Contra* if it is declared void.

Fant & als. v. Miller & Mayhew, 47

4. Though plaintiff in an action takes the benefit of the act for the relief of insolvent debtors, and surrenders his interest in the suit, it may still proceed in his name.

Peshine v. Shepperson, 472

5. If a tenant is sued in ejectment for the land so held by him, his landlord is entitled, under the act, Code, ch. 135, § 5, to be made a party defendant to defend the action.

Mitchell, &c. v. Baratta & als., 445

Same v. Riviera & als., 445

6. What will constitute a libel and sustain the action. See *Libel*, No. 2, 3, 4, and

Adams v. Lawson, 250

7. Negligence is the gravamen of the action for injury to a vessel on the water.

Union Steamship Company v. Nottinghams, 115

8. When public officer liable for his own or his agent's negligence. See *Negligence*, No. 1, 2, 3, 4, 5, 6, 7, and

Sawyer v. Corse, 230

9. How far municipal corporations liable for negligence of their officers.

634 *See *Municipal Corporations*, No. 5, 6, and *Idem*, 230

The City of Richmond v. Long's adm'rs, 375

10. When second action may be maintained on an official bond. See *Official Bonds*, No. 2, and

Sangster & als. v. The Commonwealth, 124

11. When action may be maintained by the principal against the purchaser of goods from his agent. See *Principal and Agent*, No. 4, and

Peshine v. Shepperson, 472

12. Action may be maintained upon the official bond of the sheriff against him and his sureties for taking goods of A under an attachment against the goods of B.

Sangster & als. v. The Commonwealth, 124

ADMISSIONS.

1. See *Evidence*, No. 1, 2, and

Tabb's curator v. Cabell & als., 160

2. See *Bigamy*, No. 3, and

Oneale's Case, 582

ADVERSARY POSSESSION.

1. When the possession of a life-tenant and purchaser from her is not adverse to, but in subordination to the rights of the remaindermen. See *Parties to Actions at Common Law*, No. 3, and

Clarkson & als. v. Booth, 490

AGENTS.

See *Principal and Agent*.

ALEXANDRIA.

See *Municipal Corporations*.

AMENDMENTS.

It is intended to commit the estate of David C to the sergeant of L, but by a clerical mistake the name is written Daniel. After action brought by the sergeant under this committal as personal representative of David, the court, on his motion, corrects the mistake by an order entered *nunc pro tunc*. This order relates back to the first, and the estate of David was well committed.

Clarkson & als. v. Booth, 490

ANIMALS.

The killing a dog is not an indictable offence.

Davis' Case, 617

ANSWER.

1. The rule in equity practice that the answer of the defendant, upon any matter stated in the bill and responsive to it, is evidence in his favor, applies where a material disclosure is called for by the bill and made in the answer.

Fant v. Miller & Mayhew, 187

2. A plaintiff cannot destroy the weight of the whole answer by proving that the defendant is unworthy of credit, nor can he incidentally do so by proving that the answer is false in one respect or several respects; the only effect of such proof being to destroy the weight of the answer to the extent to which it is disproved by that amount of evidence which is required by the rule in chancery.

Idem, 187

3. The answer of a defendant to a pure bill of discovery, when used on a trial at law, is used as a matter of evidence, the whole of which is to be read as the testimony of a witness, including not only the admissions against the interest of the respondent, but all assertions in his favor, subject, however, to be credited or discredited in whole or in part, by the court or jury, according to its own intrinsic weight, or its relative weight in comparison or connection with the other evidence in the action at law. *Idem*, 187

4. Where a plaintiff goes into equity for relief on the ground of discovery, the court will give to the answer of the defendant the same effect that would be given to it in a court of law; except that the plaintiff cannot contradict the answer by other evidence, as he would thereby prove himself out of court.

Idem, 187

5. What the effect of an answer in another cause when used as evidence. See *Evidence*, No. 1, 2, 3, 4, and

Tabb's curator v. Cabell & als., 160

APPELLATE COURT.

1. The purchaser of infant's land, where the sale is confirmed and a conveyance, not having been made a party, appeal dismissed as improvidently awarded, and the cause sent back for further proceedings.

Londons v. Echols & als., 15

2. How an appellate court may pass upon the question of usury. See *Usury*, No. 6, and *Brockenbrough's ex'ors v. Spindle's adm'rs*, 21

635 *3. In action at law upon a note executed in a foreign state, the defendant moves to exclude the note as evidence, because by the law of the state where it was made it was not competent evidence; and he offers the statute of that state in evidence upon that motion, which is rejected; the court being of opinion that the note might be read in evidence, notwithstanding the provisions of the statute. If the court gave the correct construction to the statute, the rejection is not ground for reversing the judgment, though it were held that it was for the jury to construe the statute.

Fant & als. v. Miller & Mayhew, 47

4. The parties obtaining an appeal failing to have it perfected by service of process upon the appellees, or publication when that is proper, the court will, on the motion of an appellee who has appeared, make a rule upon the appellants to speed the cause; and if they fail to perfect the appeal in the time appointed, or show good cause for their failure, the appeal will be dismissed.

Michie & als. v. Michie's adm'r & als., 109

5. When judgment will not be reversed for informality in entering it. See *Practice at Common Law*, No. 3, and

Sangster & als. v. The Commonwealth, 124

6. When appellate court will not reverse a decree, for continuance of a case by a commissioner, or re-examination of a witness by the court. See *Practice in Chancery*, No. 6, 8, and

Fant v. Miller & Mayhew, 187

7. An exception to a deposition, whether endorsed on it, or taken and entered on its face in the process of taking it, or written on a separate paper and filed in the cause (except upon the ground of incompetency, in which case no exception is necessary), not having been brought to the notice of the court below, or passed upon by that court, ought to be considered as having been waived, and cannot be noticed by the appellate court; and a general judgment or decree of the court below against the party making the exception, cannot be considered as involving a decision upon the exception.

Fant v. Miller & Mayhew, 187

8. Where a plaintiff who has recovered a judgment which, as rendered, is clearly erroneous, seeks to avoid a reversal by striking out a part of the judgment, it is incumbent on him to satisfy the court either by materials in the record or by fair presumption, that this can be done without injustice to the defendant. If this cannot be done, the defendant is entitled to have the erroneous judgment reversed.

The Orange and Alexandria Railroad Company v. Fulvey, for Cowherd, 366
Same v. Cowherd, 366

9. Where if no exception to the opinion of the court refusing new trial, this court cannot reverse. See *Practice at Common Law*, No. 14, and

James River and Kanawha Company v. Adams, 427

10. Parties agree to dispense with a trial by jury, and refer the whole matter of law and fact to the judgment of the court, under the act, Code, ch. 162, § 9, p. 629; and all the evidence is stated on the record; though no exception is taken to the judgment of the court. **Held:**

1st. It sufficiently appearing that the evidence was intended to be a part of the record, it will be so considered, though there was no exception.

Mitchell, &c. v. Baratta & als., 445
Same v. Riviera & als., 445

2d. In such a case the evidence, and not the facts proved, should be stated.

Idem, 445

3d. The opinion of the judge who decided the case should not be reversed, unless it is plainly erroneous, especially if the evidence or a part of it be oral; and especially if it be conflicting.

Idem, 445

11. A cause is tried upon the general issue, and there is a verdict and judgment for the plaintiff, whilst there is a demurrer to one special plea, and an objection to the admission of another, not acted on by the court. If these pleas present no bar to the action, the failure of the court to pass upon them affords no ground for reversing the judgment.

Peshine v. Shepperson, 472

12. In a prosecution for a felony, after verdict and judgment the appellate court will not reverse the judgment and order a new trial on the ground that the verdict is contrary to the evidence, unless it is plainly insufficient for a conviction.

Kates' Case, 561
Oneale's Case, 582

13. See *Continuance of a Cause*, No. 1, and *Hewitt's Case,* 627

636 *ASSAULT AND BATTERY.

When on an indictment for robbery prisoner may be convicted of assault and battery. See *Criminal Jurisdiction and Proceedings*, No. 6, and

Hardy & Curry's Case, 592

ASSETS.

1. Where a grantor in a deed of trust to secure debts, which conveys real and personal estate, dies intestate before a sale of the trust subject, the *quasi* equity of redemption descends to his heirs, and the surplus proceeds of the real estate, after the trust is satisfied, is applicable ratably to the payment of the debts of the grantor binding the heirs. If he by will directs the sale of his real estate for payment of debts, such surplus proceeds are equitable assets to be distributed among all the creditors.

Harvey's adm'r, &c. v. Sleptoe's adm'r & als., 289

2. In such a case the *quasi* equity of redemption in the personal estate embraced in the deed, is legal assets. *Idem,* 289

3. In such a case in order to ascertain how much of the assets in the hands of the trustee and administrator is equitable and how much is legal assets, the debts paid by him as trustee will be apportioned ratably between the two funds. *Idem,* 289

ASSIGNOR AND ASSIGNEE.

1. The assignee of a bond transfers it for value, without assignment, but undertakes verbally to guarantee it, if the transferee calls upon him to do so, to enable him to dispose of it. The transferee disposes of it without calling for the guaranty. The assignee is no longer liable on his promise to guarantee.

Fant & als. v. Fant, who sues, &c., 11

2. See *Securities, passim*, and *Fant v. Miller & Mayhew,* 187

ATTACHMENTS.

See *Sheriffs*, No. 1, and *Sangster & als. v. The Commonwealth,* 124

BIGAMY.

1. A marriage contracted in Virginia after the secession of the state of Virginia and before the re-establishment of the government under the Alexandria constitution, is not therefore invalid. *Oneale's Case,* 582

2. On a trial for bigamy, where the charge in the indictment is that the first marriage took place in another state or country, it must be proved to the satisfaction of the jury that a valid marriage had taken place as stated. *Idem,* 582

3. In such a case the admissions of the prisoner and his acts are competent evidence to prove the marriage, without producing the record, or a witness present at the marriage. *Idem,* 582

4. The appellate court will not reverse the judgment of the court below overruling a motion for a new trial on the ground that the verdict is contrary to the evidence, unless it is plainly insufficient to warrant the verdict. *Idem,* 582

BONDS.

1. The transferer of a bond undertakes verbally to guarantee it, if the transferee

calls upon him to do so, to enable him to dispose of it. If it is disposed of without calling upon the transferor, his obligation to guarantee is at an end.

Fant & als. v. Fant, who sues, &c., 11
2. See *Official Bonds*.

CASE AGREED.

1. When before the defendant files a plea, the parties agree a case, and submit it to the decision of the court, the want of a plea or issue is cured by the agreement.

Sawyer v. Corse, 230

2. When there is a declaration and no plea, and a case agreed is submitted to the court for its decision, the plaintiff's cause of action, as set forth in the declaration, is submitted to the court without reference to any particular form of defence; and the defendant is entitled to judgment, if the facts stated afford him a defence of which he might have availed himself under any form of pleading.

Idem, 230

3. When there is an issue in a cause, and it is submitted to the court upon a case agreed, the decision must be restricted to the issue.

Idem, 230

4. A case agreed is a substitute for a special verdict, and is subject to like *rules. It must state facts and not merely the evidence of facts; and the court cannot infer other facts from those stated, unless they result as a legal conclusion, or unless the parties agree that it may be done.

Idem, 230

5. Parties agree to dispense with a jury and submit the whole case to the court, and all the evidence is spread upon the record. This is not a case agreed.

Mitchell, &c. v. Baratta & als., 445

Same v. Riviera & als., 445

COLLATERAL SECURITIES.

See *Securities*.

CONFESSIONS.

A person committed on a charge of larceny by a justice, is sent in charge of a special constable and the prosecutor to jail, and on his way this constable says to him, "You had as well tell all about it." After they had rode about a mile after this remark, without any other remark being addressed to the prisoner, he voluntarily says to the prosecutor, "I will tell you all about it;" and proceeds to tell how and by whom the breaking and larceny was committed. The constable was one in authority over him; and the statement is not admissible in evidence against the prisoner.

Vaughan's Case, 576

CONSTRUCTION OF STATUTES.

1. The real purpose and intention of the legislature is the thing to be ascertained in the construction of a statute; and to effect this the general meaning of the words may be restricted.

Orange and Alexandria Railroad Company v. The City Council of Alexandria, 176

2. Though it is true that laws conferring the power of taxation upon municipal corporations are to be construed strictly, it is also true that exemptions from taxation are to be construed strictly; and where the power has once been conferred, it is not to be crippled or destroyed by strained interpretations of subsequent laws.

Idem, 176

CONTINUANCE OF A CAUSE.

1. A motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and although an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground unless such action was plainly erroneous.

Hewitt's Case, 627

2. As a general rule, where a witness for a party fails to appear at the time appointed for the trial, if such party show that a subpoena for the witness has been returned executed, or if not so returned was delivered to the proper officer of the county or corporation in which the witness resides, a reasonable time before the time of the trial, and shall swear that the witness is material and that he cannot safely go to trial without his testimony, a continuance ought to be granted, if there be reasonable ground to believe that the attendance of the witness at the next term can be secured; especially if the case has not been continued for the same cause.

Idem, 627

3. Where the circumstances satisfy the court that the real purpose in moving for a continuance is to delay or evade a trial, and not to prepare for it, then though the witnesses have been summoned, and the party has sworn to their materiality, and that he cannot safely go to trial without them, the continuance should be refused.

Idem, 627

CONVEYANCES—*Fraudulent*.

When though no actual fraud, deed will be held voluntary and void. See *Executors and Administrators*, No. 2, and

Harvey's adm'r, &c. v. Steptoe's adm'r & als., 289

COURTS.

Sunday being *dies non juridicus*, is not one of the days of the term of a court.

Michie & als. v. Michie's adm'r & als., 109

COVENANTS.

1. In the agreement between a canal company and a contractor for building a dam, the company is to furnish the cement upon the written order of the contractor; but "if from any cause the company shall not be able to supply *it as required, they shall not be responsible for any damages arising to the contractor from the want of the same." It is not a sufficient excuse for failing to furnish the cement that the company had not sufficient on hand to supply

it as required. It was their duty to use due and reasonable diligence to obtain and keep on hand a sufficient supply for that purpose. Their failure to do so is a breach of the covenant, for which the contractor may recover damages.

James River and Kanawha Company v. Adams, 427

2. The agreement for the construction of a lock provides, that it is to be done with such changes and alterations thereof as might thereafter be adopted by the company; they paying all the additional expense for increase of work or materials caused by such change or alterations. The company may change the location and materials of the lock; and by so doing they incur no other liability than that prescribed in the contract itself.

Idem, 427

3. In such a case, notwithstanding any modification, change or alteration in the plan, construction or material used, the contractor continues the work, and his work is estimated and paid for according to the terms of the contract, the contractor is not entitled to recover for any such work done, beyond the estimates, or for loss of time or consequence thereof, unless the company has acted in bad faith.

Idem, 427

4. The company is only liable for a failure to comply with its covenant after its execution; but the contractor may show that it was executed prior to its date.

Idem, 427

5. When monthly estimates conclusive. See note to,

Idem, 441

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. In a prosecution for a felony, after a verdict and judgment, the appellate court will not reverse the judgment and order a new trial on the ground that the verdict is contrary to the evidence, unless it is plainly insufficient for a conviction.

Kates' Case, 561

2. When after reversal of a judgment against a prisoner for felony, a *nolle prosequi* may be entered, and a new indictment found. See *Larceny*, No. 2, and

Hughes' Case, 565

3. To a count in an indictment for house-breaking with intent to steal and stealing therefrom, there may be added a count for simple larceny of the same goods; and on the trial the jury may find the prisoner guilty on each count, and fix a several punishment for each offence.

Speers' Case, 570

4. An indictment which charges a breaking into the house of L with intent to steal and stealing therefrom, is an indictment for house-breaking, and is good.

Vaughn's Case, 576

5. In such an indictment if the actual larceny is properly stated, the prisoner may be found guilty of the larceny, though acquitted of the house-breaking.

Idem, 576

6. An indictment for robbery charged that the prisoners "did make an assault" upon G, and one gold watch, &c., from the person and against the will of G, &c., "feloniously

and violently did steal," &c. The jury acquitted the prisoners of the felony charged, but found them guilty of "assault and battery." On motion in arrest of judgment, held the finding valid under chapter 208, § 27, of the Code.

Hardy and Curry's Case, 292

DAMAGES.

1. See *Trespass, passim*, and

Peshine v. Shepperson, 472

2. Goods improperly taken under an attachment, owner entitled to recover value at the time they were taken.

Sangster & als. v. The Commonwealth, 124

3. Upon a contract to deliver stock, the damages for the failure to deliver it is the value of the stock at the time it ought to be delivered.

The Orange and Alexandria Railroad Company v. Fulvey, for Cowherd, 366

Same v. Cowherd, 396

DECEIT.

If there be usury in the transfer of a bond, and the assignee with the knowledge of the usury, transfers the bond without assignment, he is thereby guilty of a deceit, and the right of action arises on the transfer; and the statute of limitations will begin to run from that time.

Fant & als. v. Fant, who sues, &c., 11

639

*DEPOSITIONS.

1. A witness ought not to write his deposition or his answer beforehand; nor ought they to be written for him beforehand by counsel or any other person; but he ought to answer the questions orally or from memory, as they are propounded to him.

Fant v. Miller & Mayhew, 187

2. Parties or their counsel may orally or by writing, previous to the examination of a witness, direct his attention to the facts in regard to which he is intended to be examined; and he may refresh his memory in regard to such facts, by examining books or papers, and make memoranda from them or otherwise, especially of dates and amounts, and use such memoranda for the purpose of refreshing his memory, at the time of giving his evidence.

Idem, 187

3. A party has a right to be personally present when depositions are taken by his adversary, and a notice which does not afford him an opportunity to be present is insufficient; and his exception to the deposition on that ground ought to be sustained.

Idem, 187

4. If a party gives notice of the taking of several depositions at different places on the same day, so that the opposing party cannot be present to cross-examine all the witnesses, he may select which examination he will attend, and the other depositions will be suppressed.

Idem, 187

5. An exception to a deposition, whether endorsed on it, or taken and entered on its face in the process of taking it, or written on a separate paper and filed in the cause (except upon the ground of incompetency, in which case no exception is necessary), not having been brought to the notice of the court below, or passed upon by the court, ought to be considered as waived, and cannot be noticed by the appellate court; and a general judgment or decree of the court below against the party making the exception, cannot be considered as involving a decision upon the exception. *Idem*, 187

6. If depositions are read on a trial without objection, or if objection is made, without an exception taken to their admission, upon another trial of the cause, they will not be excluded for the failure to prove notice to take them, unless the party objecting has given notice to the other party of his intention to object to them, in time to enable the party offering them to take them again, and the witnesses are alive at the time of such notice. *Peshine v. Shepperson*, 472

DEVISEES.

Devisees how far liable to creditors of J for debts of their testator paid by J. See *Executors and Administrators*, No. 4, and

Harvey's adm'r, &c. v. Steptoe's adm'r & als., 298

EJECTMENT.

1. If a tenant is sued in ejectment for the land so held by him, his landlord is entitled, under the act, Code, ch. 135, § 5, to be made a defendant to defend the action.

Mitchell, &c. v. Baratta & als., 445

Same v. Riviera & als., 445

2. If a plaintiff in ejectment would have been entitled at the time the Code of 1849 went into effect, and at the time of the institution of his suit, to recover in a writ of right, he is entitled to recover in the present action of ejectment, under the provisions of the Code, ch. 135, §§ 2 and 38, and ch. 149, § 19. *Idem*, 445

3. A case of comparison of titles in ejectment. *Idem*, 445

EQUITABLE JURISDICTION AND RELIEF.

1. On a bill to impeach deeds of trust for fraud, though the deeds are sustained, the plaintiff is entitled to an account of the fund.

Penn's adm'r v. Spencer & als., 85

2. When heirs will be bound by a decree, made in a cause in which the suit was brought in the name of their ancestor, after his death. See *Practice in Chancery*, No. 4, and

Doggett & als. v. Helm & als., 96

3. If upon the death of a life-tenant of slaves, the executor declines or neglects to recover the slaves, and sell them for division, as the will authorizes him to do, the remaindermen may sue in equity to recover and divide them among the parties entitled.

Tabb's curator v. Cabell & als., 160

4. When a creditor for necessities furnished a ward may proceed in equity upon the official bond of the guardian, 640 "against him and his sureties, for satisfaction of his claim. See *Guardian and Ward*, No. 4, 5, and

Barnum & als. v. Frost's adm'r & als., 398

ESTOPPEL.

1. When heirs will be bound by a decree, though suit brought in the name of their ancestor after his death. See *Practice in Chancery*, No. 4, and

Doggett & als. v. Helm & als., 96

2. In a suit against parties claiming under C, plaintiffs rely on statements in the answer of C in another cause. The parties claiming under C are not estopped by these statements; but they have only the effect of admissions or declarations, not made in the pleadings in the cause, and their weight is to be ascertained by the circumstances connected with them.

Tabb's curator v. Cabell & als., 160

3. In such a case the parties claiming under C are not concluded by the admissions of C of the legal rights of the plaintiff in the subject of controversy. *Idem*, 160

4. Though there is no replication to an answer, yet the averment of a fact of which the defendant could have no personal knowledge, will not be held conclusive of it. *Idem*, 160

5. When partner will be concluded by a settlement. See *Partnership*, No. 8, and

Foster's curator v. Rison & als., 321

6. The record of the County court states that F, a sheriff, who had been required to give a new bond, "this day appeared in court and executed and acknowledged such new bond, and the securities thereto being considered sufficient by the court, the same is ordered to be certified." In the absence of fraud, this record is conclusive that the bond was properly executed; and evidence will not be admitted to contradict it.

Vaughn & als. v. The Commonwealth, 386

To the same effect is

Calwell v. The Same, 391

7. Upon issue on the plea of *non est factum*, by C, one of the parties to such bond, proof that his name is not in his handwriting, but in that of H, another party; that C was not at the courthouse the day the bond was taken, but was at his home ten miles off; that on the day before the bond was taken he asked H who would sign it, and being told that D, with others, would sign it, he told H if D signed it H might sign it for him, but D did not sign it, is not sufficient to outweigh the record and sustain the defence. *Idem*, 391

EVIDENCE.

1. In a suit against parties claiming under C, plaintiffs rely on statements in the answer of C in another case. The parties claiming

under C are not estopped by these statements; but they have only the effect of admissions and declarations not made in the pleadings in the cause, and their weight is to be ascertained by the circumstances connected with them.

Tabb's curator v. Cabell & als., 160

2. In such a case the parties claiming under C are not concluded by the admissions of C of the legal rights of the plaintiffs in the subject in controversy. *Idem*, 160

3. Though there is no replication to an answer, yet the averment of a fact of which the defendant could have no personal knowledge, will not be held conclusive of it.

Idem, 160

4. C, under whom defendant claims, having stated in her answer in another case, that a certain arrangement was made by the consent of the parties interested, the defendant must be bound by this admission, unless he can clearly establish that it was made under a mistake. *Idem*, 160

5. For the effect of an answer as evidence and how far it may be discredited, see *Answer*, No. 1, 2, 3, 4, and

Fant v. Miller & Mayhew, 187

6. How witness should give his testimony. See *Witnesses*, No. 3, 4, and *Idem*, 187

7. When exceptions to depositions considered as waived. See *Depositions*, No. 5, and *Idem*, 187

8. When exceptions to testimony too broad, may be overruled. *Idem*, 187

9. In an action for libel the plaintiff may introduce evidence in chief of his general good character, before the defendant has introduced any evidence.

Adams v. Lawson, 250

11. When an administration account not evidence against the heirs. See *Executors and Administrators*, No. 13, and

Robertson & als. v. Wright & als. 534

12. What necessary to constitute an account stated or rendered. See *Accounts*, No. 5, 6, and *Idem*, 534

13. What evidence admissible to show the damages sustained in trespass *quare clausum fregit*. See *Trespass, passim*, and

Peshine v. Shepperson, 472

14. When confessions of prisoner not admissible in evidence against him. See *Confessions*, No. 1, and

Vaughan's Case, 576

15. When in prosecution for bigamy admissions of the prisoner evidence. See *Bigamy*, No. 3, and

Oneale's Case, 582

EXCEPTIONS—To Depositions.

1. When party may except for insufficient notice of taking depositions. See *Depositions*, No. 3, 4, and

Fant v. Miller & Mayhew, 187

2. When exception to depositions will be considered as waived. See *Appellate Court*, No. 6, and *Idem*, 187

3. An exception by a party to the reading of any and all letters from third persons to the other party, filed in the cause, as *res inter alios gesta*, except such as the exceptor made evidence by reading them himself, some of which letters are competent evidence for some purposes, is too broad, and may be properly overruled on that ground. The exception should specify the letters or parts of letters intended to be excepted to. *Idem*, 187

EXECUTORS AND ADMINISTRATORS.

S by his will gives certain personal property to his son J, out of which he directs J to pay his debts, and gives him the remainder. J conveys his whole estate, real and personal, to T, in trust to pay specific debts, some of which are his own and others are debts of S. He dies in 1828, and by his will authorizes his executors to sell his whole estate for payment of debts. T qualifies as administrator c. t. a. Afterwards T as trustee sells the whole estate, and after selling enough to pay the debts provided for in the deed, he allows an agent of the widow of J to buy eight slaves at a price far below what they would have brought if there had been fair competition. **Held:**

1. By accepting the legacy J was not bound to pay the debts of S beyond the value of the property given him.

Harvey's adm'r, &c. v. Steptoe's adm'r & als., 289

2. There being no actual fraud in the execution of the deed, it is nevertheless voluntary and void to the extent of the debts of S secured by it, as against the creditors of J not secured by it.

Idem, 289

3. But though the deed is void as to creditors, it is valid as between the parties, and T is not responsible for the debts of S secured by the deed, which he paid, either as trustee or administrator. *Idem*, 289

4. The devisees and legatees of S are responsible to the creditors of J for the amount of debts of S paid out of J's trust fund, to the extent of the value of the property received by such devise or legatee.

Idem, 289

5. T being trustee and administrator when he sold the trust property after the death of J, it was his duty to pay to himself, as trustee under the will, so much of the surplus money remaining after payment of the debts secured by the deed, as arose from real estate, and to himself as administrator, so much of said surplus as arose from the sale of the personal estate or the collection of debts; and there was no need of any election on his part to fix the liabilities of his sureties as administrator. This is not like the executor of two estates or of executor and guardian. *Idem*, 289

6. If the fund was not by intentment of law transferred upon the close of the trust, from himself as trustee to himself as administrator, he and his sureties would still be liable for a *devastavit* for his failure to

account as administrator for the money so due from himself. *Idem*, 289

7. The liability of his sureties does not extend merely to the balance of the personal fund actually in his hands as trustee, but extends to the whole amount of that fund for which he is liable, upon a proper settlement of his accounts, including what he may have wasted as trustee.

Idem, 289

8. It was the duty of T to be present at the sale, and to superintend and control it; and if the sale was so conducted as to prevent fair competition, whether cognizant of the circumstances or not, he is bound to make good the loss, and should be charged, in the settlement of his account, with
642 *the fair value of the slaves sold to the widow, and interest upon it, just as if the money had been received.

Idem, 289

9. The widow, though not present at the sale, must be bound by the act of her agent, and having accepted the benefit of the purchase, she is liable to the extent of the loss, to indemnify T and his sureties.

Idem, 289

10. In a bill by a creditor against a trustee and executor of his debtor to have payment of his debt, and charging deed fraudulent, and voluntary in part, court makes a decree directing a commissioner, among other things, to take an account of debts of testator. The statute of limitations ceased to run against creditors from the date of that decree. *Idem*, 289

11. A personal representative of several remaindermen dying during the lifetime of the life-tenant, takes as tenant in common with the surviving remaindermen, and must be joined in an action for recovery of the property.

Clarkson & als. v. Booth, 490

12. In such case he is but one plaintiff, though in several rights. *Idem*, 490

13. It is intended to commit the estate of David C to the sergeant of L, but by a clerical mistake the name is written Daniel. After action brought by the sergeant under this committal, as representative of David, the court, on his motion, corrects the mistake by an order entered *nunc pro tunc*. This order relates back to the first, and the estate of David was well committed.

Idem, 490

14. An administration account settled in a cause in which the heirs were not parties, is not *prima facie* evidence against the heirs.

Robertson & als. v. Wright & als., 534

FOREIGN LAWS.

1. A plea of usury of a foreign state must state what the law of usury is in that state.

Fant & als. v. Miller & Mayhew, 47

2. *QUÆRE*: Whether on a trial at law the construction and effect of the law of a foreign state are to be determined by the jury or by the court. *Idem*, 47

3. If the law of the state where a note is made, declares that it shall be void unless it is stamped, it is void everywhere, and an action cannot be maintained upon it in another state. *Idem*, 47

4. If in such a case the law only declares that the note shall not be available as evidence, an action may be maintained upon it in another state. The Maryland act is of this kind. *Idem*, 47

5. For the usury law of Maryland, see *Usury*, No. 8, 9, and *Idem*, 47

FRAUD.

See *Principal and Agent*, No. 2, 4, and

Harvey's adm'r, &c. v. Steptoe's adm'r & als., 289

Peshine v. Shepperson, 472

GUARANTY.

The assignee of a bond transfers it for value, without assignment, but undertakes verbally to guarantee it, if the transferee calls upon him to do so, to enable him to dispose of it. The transferee disposes of it without calling for the guaranty. The assignee is no longer liable on his promise to guarantee.

Fant & als. v. Fant, who sues, &c., 11

GUARDIAN AND WARD.

1. A guardian is not personally responsible for the support and education of his ward unless he consents to become bound for him.

Barnum & als. v. Frost's adm'r & als., 398

2. A guardian placing his ward with a third person, to be supported and educated, though he may undertake to pay the ward's expenses, does not thereby relieve the ward's estate; but the person with whom the ward has been placed may proceed in equity to subject the profits of the ward's estate to the payment of her expenses. *Idem*, 398

3. Bonds executed by the guardian, as guardian, showing on their face that they are given for the ward's expenses, and which, at the time, he promises to pay out of the profits of the ward's estate as soon as he can collect them, will not relieve the ward's estate from liability for these expenses.

Idem, 398

4. If the condition of the guardian's bond is as prescribed by the statute, and the
643 guardian wastes the profits of *the ward's estate, a creditor for the support of the ward, though she has taken the bonds of the guardian for the same, not thereby intending to release the ward's estate, may proceed in equity against the guardian and his sureties, and subject them to the payment of the amount due her.

Idem, 398

5. The condition of the guardian's bond is to pay and deliver to the ward her estate, when thereto required by the justices. A creditor for necessities furnished to the ward, may be substituted to the rights of the ward upon the bond, against the guard-

ian and his sureties, for the payment of her debt. *Idem*, 398

HEIRS.

1. When heirs will be bound by a decree dismissing a bill in a suit brought in the name of their ancestor with others claiming in the same right after his death. See *Practice in Chancery*, No. 4, and *Doggett & als. v. Helm & als.*, 96
2. An administration account settled in a cause in which the heirs are not parties, is not *prima facie* evidence against the heirs. *Robertson & als. v. Wright & als.*, 534

HUSBAND AND WIFE.

1. A full settlement made upon the wife of an insolvent man, though a partial provision previously made for her by her father's will. *Penn's adm'rs v. Spencer & als.*, 85
2. A married woman may engage in trade on her separate account, and enter into partnership for that purpose, by the consent of her husband; and she will be entitled to the profits of the trade against her husband, even though his agreement be merely voluntary; and against his creditors, at least to some extent, if the agreement be founded on valuable consideration paid by or for the wife. *Penn & als. v. Whitehead & als.*, 503
3. A married woman having a separate estate, may engage in trade with the consent of her husband, and may to the extent of her power over it, subject her estate to the payment of the debts; and she will be entitled to the profits of the trade as against her husband and his creditors, to the extent, at least, to which such profits may not be due to the labor, skill, capital or credit furnished by her husband. *Idem*, 503
4. Where the husband furnishes all or a portion of the labor and skill, or a portion of the capital and credit, used in carrying on the business, the wife will be entitled even against his creditors, to such portion of the profits as will compensate her for what she has contributed to the business either in the shape of capital or credit. To the extent to which a just apportionment can, it will be made. *Idem*, 503
5. If the power to dispose of or charge the wife's separate estate is not denied either expressly or by implication, she has the power as an incident to her separate estate. *Idem*, 503
6. Property is conveyed to a trustee, on a consideration flowing from the wife, for her separate use for life, to remain in her possession for the support of herself and her issue and family, and for no other purpose; and with power to dispose of it by will among her family. She has the power to charge her life estate with the payment of the debts of the business in which she is engaged. *Idem*, 503
7. In such a case the wife is entitled to have the debts of the business paid out of the assets, in exoneration of her separate life estate. *Idem*, 503
8. A wife being without any adequate means of support for herself and family, and her husband being insolvent, she, with his

consent, and for the purpose of obtaining a support, engaged in a mercantile business for her separate use, by the aid of her friends in loaning her money or selling her goods on the credit of the business. Her stock in trade will be liable for the payment of her debts thus contracted; and so liable in preference to the proper debts of her husband, even though the necessary labor and skill employed in conducting the business, was furnished by him and his minor sons. *Idem*, 503

9. In such a case any claim which the husband may have for the services of himself and his minor sons, will be subordinate to the claims of the creditors of the concern, to priority of payment out of the assets. *Idem*, 503

10. A business in which the wife is engaged, with the consent of her husband, is carried on by the labor and skill of her husband and his minor sons; and he is indebted and insolvent. The profits of the business, after paying off its debts and expenses, are liable to the creditors of the husband. *Idem*, 503

11. The expenses of the support of the husband and his wife and family are a part of the necessary expenses of the business, without which there could be no profits. *Idem*, 503

INDICTMENTS.

1. In an indictment for larceny, the name of the owner of the property charged to have been stolen must be stated; and if it appears that the person so stated to have been the owner was a married woman at the time of the larceny, it is error, and the prisoner should be acquitted. *Hughes' Case*, 565

2. An indictment which charges a breaking into a house with intent to steal, and the stealing therefrom, is an indictment for house-breaking, and not for larceny; and is good.

Speers' Case, 570
Vaughan's Case, 576

3. To such a count may be added a count for simple larceny of the same goods. And the jury may find the prisoner guilty on each count, and fix a several punishment for each offence. *Speers' Case*, 570

4. In such an indictment for house-breaking, if the actual larceny is properly stated, the prisoner may be found guilty of the larceny though acquitted of the house-breaking. *Vaughan's Case*, 576

5. Such an indictment, which charges that prisoner a lot of queensware then and there feloniously did steal, take and carry away, is good after verdict as a charge of larceny, though it does not specify the articles, or state that they were the property of any person. *Vaughan's Case*, 576

INFANTS.

1. In a suit for the sale of infant's lands, a sale having been made and confirmed, and a conveyance made to the purchaser, he must

be brought before the court as a party, before the court will inquire into the validity of the sale. *Londons v. Echols & als.*, 15

2. In such a case if an appeal is allowed before the purchaser is made a party in the cause, it will be dismissed as improvidently awarded, and the cause sent back for further proceedings. *Idem*, 15

3. An infant may be a partner, and his father, though indebted and insolvent, may release to his son all claim to his services; and the consent of the father to the son's becoming a partner is a release of his services.

Penn & als. v. Whitehead & als., 503

INSOLVENT DEBTORS.

1. A sale by the sheriff of the interest of an execution debtor, in an estate, before it is ascertained, is void; and the purchaser, if he took possession of the property, will be liable for the rents, hires and other profits of the property, and for the value of such of it as he has sold or otherwise converted to his own use, or has been lost by his act or willful neglect; and he will be entitled to be reimbursed for the amount paid by him to the sheriff for the property.

Penn's adm'r's v. Spencer & als., 85

2. After a suit is instituted, the plaintiff, being in custody at the suit of a creditor, confesses judgment, and takes the benefit of the act for the relief of insolvent debtors, surrendering his interest in the suit he had brought. This is no bar to the action; but it may still be prosecuted in his name.

Peshine v. Shepperson, 472

3. A father indebted and insolvent may release to his minor son all claim to his services; and the consent of the father to the son's becoming a partner in a concern is a release of his services.

Penn & als. v. Whitehead & als., 503

4. See *Husband & Wife*, and *Idem*, 503

INSTRUCTIONS TO THE JURY.

1. If one instruction asked embraces two distinct matters, one of which should not, and the other should be given, the court should not reject the whole, but should separate them, and refuse to give the one and give the other. *Peshine v. Shepperson*, 472

2. Though an instruction as asked is not wholly correct, yet if the general refusal of it may mislead the jury, the court should accompany the refusal with an explanation to the jury, or *should give them an instruction stating the correct proposition. *Idem*, 472

INSURANCE.

1. Contracts of insurance are to be construed accurately, and neither liberally nor severely, and without favor to either party.

The Merchants Insurance Company v. Edmund Davenport & Co., 138

2. Policies of insurance are to be construed as a whole, and particular clauses or passages are not to be wrested from their context, so as to destroy the unity of the contract and

create conflict, where there should be agreement; but one part is to be elucidated by the other, so as to reconcile them, if practicable, to one common intent or design, present to the minds of the contracting parties.

Idem, 138

3. The M. Co. issues to E, a policy of insurance in the usual form and at the usual rates, dated December 24, 1860, on a cargo of coffee to be shipped on board the S from Rio to Richmond or some other Atlantic port in the U. S. The cargo is shipped on the 10th of May, and in July is seized or captured some miles outside the capes of Virginia by a U. S. vessel. The insurers and insured are all citizens of Virginia. The policy is unaffected by the public events that had occurred; the capture and condemnation was of enemy's property; and the insurer is liable upon the policy. *Idem*, 138

JUDGMENTS.

1. When appellant entitled to have erroneous judgment reversed. See *Appellate Court*, No. 7, and

The Orange and Alexandria Railroad Company v. Fulvey, for Cowherd, 366
Same v. Cowherd, 366

2. A court of law cannot render a judgment, that defendant shall deliver to plaintiff so many shares of stock. Upon a contract to deliver stock in payment of debt or otherwise, a court can only award damages for the failure to deliver it. *Idem*, 366

3. Judgment for a certain sum of money; but it may be discharged by the transfer and delivery, within six months, of certain stock at par. The stock not having been delivered within the time, on motion for execution on the judgment, the court cannot presume that the sum stated in the judgment is the amount the plaintiff was entitled to recover, and rejecting the latter part of the judgment as surplage, award execution thereon for the money. *Idem*, 366

4. When informality in entering judgment no ground for reversal. See *Practice at Common Law*, No. 3, and

Sangster & als. v. The Commonwealth, 124

LACHES AND LAPSE OF TIME.

1. See *Revolutionary Claims*, No. 1, and *Doggett & als. v. Helm & als.*, 96

2. How laches in bringing suit by a partner may affect him. See *Partnership*, No. 4, and *Foster's curator v. Rison & als.*, 321

3. See *Principal and Agent*, No. 3, and *Tebbs v. Duval & als.*, 349

4. A claim probably just originally, disallowed and rejected in consequence of its staleness, and of the probable impossibility from lapse of time and the death of parties, of ascertaining the facts of the case and doing justice; and also because it may reasonably be presumed that the said claim, if originally just, had been abandoned or satisfied.

Robertson & als. v. Read's adm'r & als., 544

LANDLORD AND TENANT.

1. If a tenant is sued in ejectment for the land so held by him, his landlord is entitled, under the act, Code, ch. 135, § 5, to be made a party defendant to defend the action.

Mitchell, &c. v. Baratta & als., 445

Same v. Riviera & als., 445

LARCENY.

1. In a trial for larceny, to convict the prisoner there must be satisfactory proof that the property stolen was the property of the person stated in the indictment.

Jones' Case, 563

2. In an indictment for larceny, the name of the owner of the property charged to have been stolen, must be stated; and if it appears that the person so stated was a married woman at the time of the larceny, it is error, and the prisoner should be acquitted.

Hughes' Case, 565

646 *3. In such a case if there is a verdict and judgment against the prisoner, which on appeal is reversed, when the case goes back a *nolle prosequi* may be entered, and a new indictment may be found.

Idem, 565

4. An indictment which charges a breaking into a house with intent to steal, and the stealing therefrom, is an indictment for house-breaking, and not for larceny; and is good.

Speers' Case, 570

Vaughan's Case, 576

5. To such a count may be added a count for simple larceny of the same goods. And the jury may find the prisoner guilty on each count, and fix a several punishment for each offence.

Speers' Case, 570

6. On an indictment for house-breaking with intent to steal, and stealing therefrom, if the actual larceny is properly stated, the prisoner may be found guilty of the larceny, though acquitted of the house-breaking.

Vaughan's Case, 576

LEGACIES AND LEGATEES.

1. A case in which legacies were held to be made good out of the real estate if the personal estate was not sufficient.

Smith's ex'or v. Smith & als., 268

2. When acceptance of a legacy will not bind the legatee to pay debts beyond the amount of the legacy. See *Executors & Administrators*, No. 1, and

Harvey's adm'r, &c. v. Steptoe's adm'r & als., 289

3. How far legatees bound to the extent of their legacies to pay debts of testator. See *Executors & Administrators*, No. 4, and

Idem, 289

LEX LOCI.

1. A paper signed in blank in Virginia is sent to Maryland, to be filled up there. It is filled up there, and at the same time and place

is endorsed to the holders, for value; the note being in fact for the accommodation of the payee. This is a Maryland contract to be governed by the Maryland law; though the note is headed V. a place in Virginia.

Fant & als. v. Miller & Mayhew, 47

LIBEL.

1. In an action of libel, when the writing on its face relates to the plaintiff, and the words are libellous in themselves, the innuendo is unnecessary, and may be rejected as surplusage. *Adams v. Lawson*, 250

2. To constitute a libel, it is not necessary that the writing should impute an offence which may be indicted or punished. It is sufficient if the language tends to injure the reputation of the party, to throw contumely, or to reflect shame or disgrace upon him, or to hold him up as an object of scorn, ridicule or contempt. And the words will be understood in their plain and ordinary import.

Idem, 250

3. A libel may be in the form of insinuation as well as of positive assertion.

Idem, 250

4. To write to the plaintiff—"As you will make considerable by being summoned to court, I would advise you to go and pay George Bowman the balance you owe him for his wild hogs you killed," is libellous. "I hope you will stop swearing lies about the trees," and "I will close this letter by advising you either to quit lying or preaching, one," are libellous. *Idem*, 250

5. The letter containing the libel is sent sealed. The writer afterwards states in the presence of several persons, that he had got W to write the letter for him, and he had signed his own name to it, and kept a copy; and states the contents of the letter; but without producing a copy of it. This was a publication of the libel. *Idem*, 250

6. In an action for libel, the plaintiff may introduce evidence in chief of his general good character before the defendant has introduced any evidence. *Idem*, 250

LIMITATIONS.

1. Testator had twelve children, six of them unmarried daughters. He directed his estate to be divided into twelve parts, and he gave a part to each child. He then says: "It is my will and desire that if any of my children die without heirs, for their part to be equally divided amongst all my children then living." This is a good executory bequest in favor of the children surviving one dying without issue.

Norris v. Johnston, 8

2. When devise over on death of remainderman will vest in her children surviving her. See *Wills*, No. 6, and

Tebbs v. Duval & als., 349

647 *3. Bequest of slaves to a daughter B and her husband A. If B die having no bodily heir, she and A to enjoy them during their life, but not to remove them out of the state; and at their death to be equally divided among the rest of testator's children.

OFFICIAL BONDS.

1. Sheriffs, No. 1, 2, and

Sangster & als. v. The Commonwealth, 124

2. Other actions may be maintained on an official bond, though in a previous action judgment has been rendered for the penalty, to be discharged by the payment of the sum assessed in that action, and of such further sums as might be afterwards assessed or found due upon *scire facias*, assigning a further breach. *Idem*, 124

3. In an action on an official bond, the judgment is not entered for the penalty to be discharged, &c., but for the sum assessed or agreed as the damages in the case. When this is by agreement, it is no error; and in any case it is a mere informality in the entry of the judgment by the clerk, and is not ground for staying or reversing the judgment. *Idem*, 124

4. When the record of the taking of sheriff's official bond is conclusive. See *Estoppels*, No. 5, and

Vaughan & als. v. The Commonwealth, 386
Catwell v. The Same, 391

5. What evidence will not outweigh the record in such a case. See *Estoppels*, No. 6, and *Idem*, 391

6. How creditor for necessities furnished a ward, may proceed upon the official bond of the guardian against him and his sureties. See *Guardian & Ward*, No. 4, 5, and

Barnum & als. v. Frost's adm'r & als., 398

650 *PARTIES AT COMMON LAW.

Bequest of slaves to a daughter B and her husband A; and if B die, having no bodily heir, she and A to enjoy them during their life, but not to remove them out of the state; and at their death, to be equally divided among the rest of testator's children. B survives her husband, sells the slaves, and dies, never having had a child. **HOLD:**

1. The contingent limitation to the other children is valid; and all the children alive at the death of the testator, take equally.

Clarkson & als. v. Booth, 490

2. Some of the children having died in the lifetime of B, their personal representatives, and the surviving children, are tenants in common of the slaves, and must join in the action to recover them. *Idem*, 490

3. B and the purchaser from her, held not adversely, but in subordination to the rights of the remaindermen; and on the death of B the possession in law vested in the surviving children, and the personal representatives of the deceased children, whether the personal representatives had then been or were afterwards appointed; and they sue in their own right, and not as representatives. *Idem*, 490

4. The personal representative of one of

the children dying after the action brought, it abates as to him, and cannot be revived in the name of another personal representative, but must proceed in the name of the survivors in the action. *Idem*, 490

5. One person being personal representative of several of the children, he is but one plaintiff, and though one of his intestates died after B, and he is described as the personal representative of each intestate, that is surplusage, and there is no misjoinder of plaintiffs. *Idem*, 490

6. It is intended to commit the estate of David C to the sergeant of L, but by a clerical mistake the name is written Daniel. After action brought by the sergeant under this committal, the court, on his motion, corrects the mistake by an order entered *nunc pro tunc*. This order relates back to the first, and the estate of David was well committed. *Idem*, 490

PARTIES IN EQUITY.

1. When a purchaser of infant's lands must be made a party, before the court will inquire into the validity of the proceedings. See *Infants*, No. 1, and

Londons v. Echols & als., 15

2. When remaindermen of slaves may sue for them. See *Tenant for Life*, No. 1, and

Tabb's curator v. Cabell & als., 160

PARTNERSHIP.

1. The act, Code, ch. 149, § 5, in relation to the limitation of actions by one partner against another, for the partnership accounts, does not alter the act, 1 Rev. Code of 1819, ch. 128, § 4, p. 488.

Foster's curator v. Rison & als., 321

2. In the act, Code, ch. 149, § 5, the words "five years from a cessation of the dealings in which they are interested together," does not refer to the cessation of the active operations of the partnership; but when the affairs of the partnership are wound up.

Idem, 321

3. Though the time prescribed by the statute may not begin to run until the business of the partnership is wound up, yet the parties may have a partial settlement of the partnership accounts before, or may bring a suit for such settlement.

Idem, 321

4. Though all the business of a partnership may not be wound up, there may be *laches* in bringing a suit for the settlement, which will affect the party guilty of the *laches*, so that doubtful questions made so by his *laches*, must be solved against him.

Idem, 321

5. A partial settlement, to which there is no valid objection, is conclusive upon the parties to it as far as it goes, and leaves open only the unsettled portion of the account. And the statute begins to run from the time of the settlement as to that portion of the account embraced in it. *Idem*, 321

6. An authority by one partner to another

to make a settlement with a third, who has been the acting partner, of the partnership accounts, may be implied from the relations and previous dealings of the parties, especially in reference to the subject of the settlement. *Idem*, 321

7. If such a settlement is made by 651 *one partner acting for himself and another, it is not invalidated by the fact that it is accompanied by a deed which he is not authorized to execute for the other partner. The instrument may be void as a deed, and still be good evidence of the terms of the settlement. *Idem*, 321

8. Partners having made a valid settlement of the partnership transactions, are concluded by the settlement as to any matters embraced therein. *Idem*, 321

9. One partner, for himself and another, settles the partnership accounts with the acting partner, and receives payments of money for himself and the other. As to the money so received the statute of limitations will run from the time he received it. *Idem*, 321

10. Though, in such a case, it may be necessary to go into chancery to ascertain the portions which each of the parties is entitled to receive, yet the statute will run against the claim. *Idem*, 321

11. The fact that the party was ignorant of the existence of the debt due from the partner who collected the money, until within five years before the institution of the suit, is not sufficient to repel the bar of the statute. To have that effect such ignorance must proceed from the fraud of the partner collecting the money. *Idem*, 321

12. An infant may be a partner, and his father, though indebted and insolvent, may release to his son all claim to his services; and the consent of the father to the son's becoming a partner is a release of his services. *Penn & als. v. Whitehead & als.*, 503

13. M, A and R, partners, dissolved their partnership; M being a large creditor, to whom debts due to the concern were transferred in payment, with the agreement that if any of these debts could not be collected other debts were to be transferred in lieu of such. A was the acting party and transferred debts to M in lieu of such as could not be collected. In settling the account between M and the partnership, and A and the partnership, M is to be credited, as of the date of the agreement, with a debt returned; and he is to be charged with the amount of the debt, principal and interest, transferred in lieu of the first, as of the date of the transfer; and A is to be credited in his account with the same as of the same date, as if it had been paid in money. *Robertson & als. v. Read's adm'r & als.*, 544

14. In such a case, on the dissolution of the partnership, they place a large amount of bad and doubtful debts in the hands of G, an attorney, for collection; and G is also the

agent of M, to whom A and R are indebted. G makes considerable collections from the debts in his hands, and is directed by A and R to apply their portion to satisfy the debts they owe M. HELD: G's account is to be settled with annual rests, bearing interest from the end of the year, and applying his disbursements to the principal, on the principles applicable to the accounts of fiduciaries. And the funds in his hands, principal and interest, to which A and R are entitled, are to be applied at proper periods to the payment of the debts due by A and R to M. *Idem*, 544

PLEADING.

1. A plea of usury of a foreign state must state what the law of usury is in that state. *Fant & als. v. Miller & Mayhew*, 47

2. In an action of debt upon a negotiable note, the defence that the plaintiffs are not holders for value of the note, may be made under the plea of "nil debet." *Idem*, 47

3. In an action of libel when the writing on its face relates to the plaintiff, and the words are libellous in themselves, the innuendo is unnecessary, and may be rejected as surplusage. *Adams v. Lawson*, 250

4. One person being personal representative of several remaindermen, he joins with the other remaindermen in an action to recover the property. He is but one plaintiff, and though one of his intestates died after the life-tenant, and he is described as personal representative of each of his intestates, suing in his own right, the description is surplusage, and there is no misjoinder of plaintiffs. *Clarkson & als. v. Booth*, 490

PRACTICE AT COMMON LAW.

1. A special plea is demurred to, and the demurrer is sustained. At the same term, on motion of plaintiffs, the order is set 652 aside, the defendants withdraw *their joinder in the demurrer, the plaintiffs withdraw their demurrer, and then move the court to strike out the plea; which is done. The plea being defective, or setting up a defence which may be made under the general issue, which is then in the record, the striking out the plea does the defendant no injury, and is not error. *Fant & als. v. Miller & Mayhew*, 47

2. QUÆRE: Whether on a trial at law the construction and effect of the law of a foreign state are to be determined by the jury or by the court. *Idem*, 47

3. In an action on an official bond, the judgment is not entered for the penalty to be discharged, &c., but for the sum assessed or agreed as the damages in the case. Where this is by agreement it is no error; and in any case it is a mere informality in the entry of the judgment by the clerk, and is not ground for staying or reversing the judgment. *Sangster & als. v. The Commonwealth*, 124

4. See *Sheriffs*, No. 2, and *Idem*, 124

5. See *Official Bonds*, No. 3, and *Idem*, 124

6. When before the defendant files a plea the parties agree a case, and submit it to the decision of the court, the want of a plea or issue is cured by the agreement.

Sawyer v. Corse, 230

7. When there is a declaration and no plea, and a case agreed is submitted to the court for its decision, the plaintiff's cause of action, as set forth in the declaration, is submitted to the court, without reference to any particular form of defence; and the defendant is entitled to judgment if the facts stated afford him a defence of which he might have availed himself under any form of pleading.

Idem, 230

8. Where there is an issue in a cause, and it is submitted to the court upon a case agreed, the decision must be restricted to the issue.

Idem, 230

9. A case agreed is a substitute for a special verdict, and is subject to like rules. It must state facts and not merely evidence of facts; and the court cannot infer other facts from those stated, unless they result as a legal conclusion, or unless the parties agree that it may be done.

Idem, 230

10. In an action for libel, the plaintiff may introduce evidence in chief, of his general good character, before the defendant has introduced any evidence.

Adams v. Lawson, 250

11. A court of law cannot render a judgment that defendant shall deliver to plaintiff so many shares of stock. Upon a contract to deliver stock in payment of a debt or otherwise, a court can only award damages for the failure to deliver it.

The Orange and Alexandria Railroad Company v. Fulvey, for Cowherd, 366

Same v. Cowherd, 366

12. Judgment for a certain sum of money; but it may be discharged by the transfer and delivery, within six months, of certain stock at par. The stock not having been delivered within the time, on motion for execution on the judgment, the court cannot presume that the sum stated in the judgment is the amount the plaintiff was entitled to recover, and rejecting the latter part of the judgment as surplusage, award execution thereon for the money.

Idem, 366

13. In an action of covenant assigning numerous breaches, there is a verdict for the plaintiff, and on a motion by the defendant for a new trial, on the ground that the verdict is against law and the evidence, and that the damages are excessive, the jury report to the court the items which constituted the elements of their verdict; and the court being of opinion, that as to some of the items the plaintiff is not entitled to recover, gives the plaintiff the option to reduce the verdict by the amount of these items, or to have a new trial; and the plaintiff agrees to take the verdict according to the opinion of the court. There is nothing in the action of the court to which either party can object.

James River & Kanawha Co. v. Adams, 427

14. In such a case the court states in its judgment, the items disallowed and those allowed; and the defendant does not except to the opinion of the court. The defendant cannot object in the appellate court, that the verdict is against law and evidence, or that the verdict is excessive.

Idem, 427

15. If depositions are read on a trial without objection, or if objection is made, without an exception taken to their admission, upon another trial of the cause they will not be excluded for the failure to prove notice to take them, unless the party objecting has given notice to the other party of his intention to object to them, in time to enable the party offering them to take them again, and the witnesses are alive at the time of such notice.

Peshine v. Shepperson, 472

16. If one instruction asked embraces two distinct matters, one of which should not, and the other should be, given, the court should not reject the whole, but should separate them, and refuse to give the one and give the other.

Idem, 472

17. Though an instruction as asked is not wholly correct, yet if the general refusal of it may mislead the jury, the court should accompany the refusal with an explanation to the jury, or should give them an instruction stating the correct proposition.

Idem, 472

18. After a suit is instituted, the plaintiff, being in custody at the suit of a creditor, confesses judgment and takes the benefit of the act for the relief of insolvent debtors, surrendering his interest in the suit he had brought. This is no bar to the action; but it may still be prosecuted in his name.

Idem, 472

19. What evidence may be introduced, and what damages recovered, in trespass. See *Trespass, passim*, and *Idem*, 472

20. See *Continuance of a Cause*, No. 1, 2, 3, and *Jewett's Case*, 672

PRACTICE IN CHANCERY.

1. For the mode of proceeding in equity under the 10th section, ch. 141, of the Code of 1860, in relation to usurious loans. See *Usury*, No. 1, 3, and

Brockenbrough's ex'ors v. Spindle's adm'rs, 21

2. Though a cross-bill sets up a charge against a party, if upon taking the account by a commissioner, this item is not charged, and the plaintiff in the cross-bill does not except to the report, for the failure to make this charge, it will be considered as abandoned by the plaintiff.

Penn's adm'r v. Spencer & als., 85

3. A cross-bill is filed to impeach deeds of trust set up by co-defendants; both plaintiff in cross-bill and these defendants claiming satisfaction out of the same fund. Though the deeds are sustained, plaintiff is entitled to have an account of the fund. And if it is doubtful if the debt for which one of the deeds is given, is not in part due to the plaintiff,

that should be inquired into, and in the absence of fraud, the deed to be held valid for the balance. *Idem*, 85

4. When a suit in equity is brought in the name of several heirs, all having the same interest, if one of them is dead at the time the suit is brought in his name, and his heirs or their agent is cognizant of the fact that the suit is so brought, and makes no objection, but intends to claim the benefit of the decree, they will be bound by the decree dismissing the bill.

Doggett & als. v. Helm & als., 96

5. To what extent an answer is evidence, and may be discredited. See *Answer*, No. 1, 2, 3, 4, and

Fant v. Miller & Mayhew, 187

6. A commissioner properly has much latitude of discretion in granting continuances of proceedings before him; and the court whose order he is executing, will not overrule his action in that respect, unless it is plainly erroneous. Still less will an appellate court reverse a decree for that cause.

Idem, 187

7. If the circumstances of the case and justice require that a second examination of the same witness should take place, an order will be made to permit it. *Idem*, 187

8. Unless it was palpably improper to grant leave for the second examination of a witness, an appellate court will not, for this cause, reverse the decree; as the Circuit court ought to possess much latitude of discretion on such questions. *Idem*, 187

9. There being a balance of a mixed fund composed of legal and equitable assets, how the court will ascertain the amount of each fund and apportion it. See *Assets*, No. 3, and

Harvey's adm'r, &c. v. Steptoe's adm'r & als., 289

PRACTICE IN CRIMINAL CASES.

See *Criminal Jurisdiction and Proceedings*.

PRESUMPTIONS.

1. When master of vessel will be presumed to have performed his legal duty. See *Navigation*, No. 2, and

Union Steamship Company v. Nottinghams, 115

2. See *Securities*, No. 1, and

Fant v. Miller & Mayhew, 187

3. In eastern Virginia, a party in possession of land, tracing back his title for more than seventy years, it is a presumption of law that a grant has issued for the land, and it is not therefore subject to entry, and grant as waste and unappropriated.

Matthews v. Burton, 312

PRINCIPAL AND AGENT.

1. See *Securities, passim*, and

Fant v. Miller & Mayhew, 187

2. At a sale by a trustee of the trust subject, an agent improperly influenced the bidding so as to prevent fair competition,

and purchased property for his principal at a great sacrifice. The principal, though not present at the sale, having accepted the benefit of the purchase, is liable to the extent of the loss, to the creditors, and to indemnify the trustee.

Harvey's adm'r, &c., v. Steptoe's adm'r & als., 289

3. See *Partnership*, No. 6, 7, 8, 9, 10, 11, and

Foster's curator v. Rison & als., 321

4. One of several parties interested in a suit attends to its prosecution, and devotes much time and labor to it. Not having pressed his claim to compensation for a long time, he will, under the circumstances, be considered as having abandoned it.

Tebbs v. Duval & als., 349

5. A salesman of a merchant agrees with a creditor of his principal, to sell him goods in payment of his debt; and at night, without the knowledge of the principal and against his wishes, known to both of them, the goods are selected and sent off by the purchaser. The purchaser acquires no title to the goods by his purchase, and is liable to the merchant for the value of the goods, and for any damages he has sustained by the taking and carrying away the goods.

Peshine v. Shepperson, 472

6. In such a case if the salesman, at the same time packs up and sends off other goods, to pay other creditors of his principal, the purchaser is not liable for the value of these goods, unless he aided, assisted and concurred in their being so taken and carried away for the other creditors; and the burthen is on the plaintiff to prove this. *Idem*, 472

7. What damages merchant is entitled to recover in such case against the purchaser. See *Trespass*, No. 3, 4, 5, 6, and

Idem, 472

8. How agent's accounts are to be settled. See *Partnership*, No. 14, and

Robertson & als. v. Read's adm'r & als., 544

9. A mail carrier is not an officer of the government, but the private agent of the contractor for carrying the mail; and the contractor is liable to third persons for any injury sustained through the negligence or default of such agent in the performance of his duties.

Sawyer v. Corse, 230

10. The fact that the mail carrier did not take the oath prescribed, does not make the contractor an insurer; but he is liable to third persons for injury caused by the negligence or default of the carrier.

Idem, 230

PROMISSORY NOTES.

1. If the law of the state where a note is made, declares that it shall be void unless it is stamped, it is void everywhere, and an action cannot be maintained upon it in another state.

Fant & als. v. Miller & Mayhew, 47

2. If in such a case the law only declares that the note shall not be available as evidence, an action may be maintained upon it in another state. *Idem*, 47

3. The stamp act of the state of Maryland does not avoid the instrument, but renders it unavailable as evidence; and an action may be maintained in Virginia upon a note made in Maryland, though it be not stamped as required by the Maryland statute. *Idem*, 47

4. A paper signed in blank in Virginia, is sent to Maryland to be filled up there. It is filled up there, and at the same time and place, is endorsed by the payee to the holders, for value; the note being in fact for the accommodation of the payee. This is a Maryland contract, to be governed by the law of Maryland, though the note is headed W, a place in Virginia. *Idem*, 47

5. Negotiable notes made for the accommodation of F, are endorsed by 655 *him to the holders, in consideration of money previously advanced by them to him, of money advanced to him at the time of the transfer, and of notes of F falling due at a future day, which they undertake to pay, and do pay as they fall due; all of which amount to the full amount of the notes so endorsed to them. The holders are holders for value. *Idem*, 47

6. In debt on a negotiable note the defence that the plaintiff is not a holder for value, may be made under the plea of *nil debet*. *Idem*, 47

REMAINDERMEN.

1. When personal representative of a remainderman is tenant in common with the other remaindermen, and must join in an action to recover the property. See *Executors and Administrators*, No. 11, and

Clarkson & als. v. Booth, 490

REVENUE LAWS.

1. If the law of the state where a note is made declares that it shall be void unless it is stamped, it is void everywhere, and an action cannot be maintained upon it in another state.

Fant & als. v. Miller & Mayhew, 47

2. If in such a case, the law only declares that the note shall not be available as evidence, an action may be maintained upon it in another state. *Idem*, 47

3. The stamp act of the state of Maryland does not avoid the instrument, but renders it unavailable as evidence; and an action may be maintained in Virginia, upon a note made in Maryland, though it has not been stamped as required by the Maryland statute. *Idem*, 47

REVOLUTIONARY CLAIMS.

1. Bill in relation to land warrants issued for services in the revolutionary war, dismissed on the ground of *laches* and lapse of time.

Doggett & als. v. Helm & als., 96

2. When a claim for revolutionary services is brought before the court, the ordinary rules of evidence must be applied to it. *Idem*, 96

SALES.

1. When a sale of goods by salesman of merchant unauthorized and void. See *Principal and Agent*, No. 4, 5, and *Peshine v. Shepperson*, 472

SECURITIES.

M is a wholesale merchant, and F is a jobber in the city of B; and F makes an arrangement with M, to obtain accommodation from time to time, in the form of loans, discounts and the sale of goods, on the terms of placing the bonds, notes and accounts of his customers in the hands of M as collateral security. There is no agreement as to the mode in which these collaterals are to be dealt with by the parties. F, afterwards, fails largely indebted to M, who holds these collaterals in large number and amount, the debtors being scattered widely over the country. It is to be inferred:

1. That before the failure of F, it was not intended or expected that M was to do more than hold the credits thus placed in his hands, receiving the amount of such as might from time to time be paid to him; but taking no steps to enforce such payments, nor even to notify the collateral debtors of the assignment of their debts.

Fant v. Miller & Mayhew, 187

2. That it was not intended that F should be authorized to collect or renew or otherwise deal with the collaterals, except upon the terms of his paying or delivering to M the money collected or the renewed notes; or substituting others equally good for any that might be withdrawn for the purpose of collection or renewal. *Idem*, 187

3. After the failure of F it became the right and duty of M to collect, as far and as soon as he could, all the collaterals in his hands, apply the proceeds to the payment of his claim against F, and pay him the surplus, if any. And M was bound to use common diligence, such as a man of business and common prudence would exercise about his own affairs in the situation in which M was then placed. *Idem*, 187

4. M was assignee of these collaterals, bound to use the diligence due by an assignee under the circumstances; and he was not only a principal, as being interested in 656 the subject, *but he was agent of F to the extent of his interest, and bound to perform the duty pertaining to his agency. The duty of M was to realize as much as possible out of the collaterals, at the earliest practicable period; and he was invested with all the powers necessary or proper to enable him to attain this object. *Idem*, 187

5. The first thing to be considered by M was the security of the collaterals, and the next their collection. If a debt were good he should sue; if doubtful he might give time and get security; if it was good policy not to sue he might decline it, and might compound

and compromise a debt, if, looking to the interest of the creditor, in the exercise of a sound discretion, that was deemed best; and new securities taken by M, might properly be in his own name. *Idem*, 187

6. In determining whether it would be good policy to sue for a debt, or give time on getting security, or to accept a compromise, the fact that M acted under the advice of and upon information derived from his counsel, affords at least *prima facie* evidence, that such action was *bona fide* and proper. *Idem*, 187

SHERIFFS.

1. A sheriff who takes the property of A, under an attachment against the property of B, thereby not only commits a trespass, but plainly violates the duty of his office, and breaks the condition of his official bond; and his sureties are liable for his act.

Sangster & als. v. The Commonwealth, 124

2. In an attachment in equity against B and A, the property of A is taken as the property of B, and being perishable, it is sold under an order of the court; and afterwards the court decrees that the sheriff pay the proceeds of sale to A. The sheriff failing to pay, A moves against him and his sureties in the County court, and judgment is entered for the penalty of his bond, to be discharged by the payment, &c., which is paid. Previous to the decision of the court in favor of A, he brought an action on the official bond of the sheriff, against him and his sureties, for trespass in taking his goods; and the former judgment and its payment was set up in defence. **Held**:

1. The action is not thereby barred; but A may recover the difference between the value of the goods at the time they were taken under the attachment, and the amount of the proceeds of sale paid to A. *Idem*, 124

2. That it was not necessary to proceed by *scire facias* on the former judgment, but an action on the bond might be sustained. *Idem*, 124

3. The record of a County court states that F, a sheriff, who had been required to give a new bond, "this day appeared in court and executed and acknowledged such new bond, and the security thereto being considered sufficient by the court, the same is ordered to be certified." In the absence of fraud, this record is conclusive that the bond was properly executed; and evidence will not be admitted to contradict it.

Vaughan & als. v. The Commonwealth, 386

To the same effect is, *Calwell v. The Same*, 391

4. What evidence is not sufficient to outweigh the record. See *Estoppels*, No. 5, and *Idem*, 391

SPECIFIC PERFORMANCE.

1. When a vendor of land has notified the purchaser that he will not perform the contract, the purchaser may file a bill for a spe-

cific execution of it without making a tender to the vendor of the securities provided for therein.

White v. Dobson & al., 262

2. There being two parcels of land embraced in the contract, each at a specific price, if the vendor can make a good title to but one, the vendee is entitled to have a conveyance of that parcel, if he will pay the stipulated price of that parcel, and accept it in full satisfaction of the contract. *Idem*, 262

3. The vendee is entitled to have, if he elects it, an account of the rents, issues and profits of the land, and to have them set off against the purchase money; or if he elects to waive an account, he shall not pay interest on the purchase money. *Idem*, 262

STAMP ACT.

See *Revenue Laws*.

657

*STATUTES.

1. The act of March 18th, 1856, § 25, imposing taxes for the support of the state government, construed in,

Orange and Alexandria Railroad Company v. The City Council of Alexandria, 176

2. The act, Code, ch. 149, § 5, in relation to limitations of action between partners, construed in,

Foster's curator v. Rison & al., 321

3. The act, Code, ch. 135, § 5, in relation to landlords defending the title, construed in,

Mitchell, &c. v. Baratta & als., 445

Same v. Riviera & als., 445

4. The act, Code, ch. 162, § 9, p. 629, in relation to dispensing with jury trials, construed in,

Idem, 445

5. The act, Code, ch. 135, §§ 2 and 38, and ch. 149, § 19, in relation to actions of ejectment, construed in,

Idem, 445

6. The act, Code, ch. 208, § 27, in relation to the finding by the jury of part of the offence charged, construed in,

Hardy's and Curry's Case, 592

7. The act, Code, ch. 192, § 53, in relation to the destruction of property, construed in,

Davis' Case, 617

8. The act, Code of 1860, ch. 141, § 10, in relation to bills charging usury, construed in,

Brockenbrough's ex'ors v. Spindle's adm'rs, 21

STOCKS.

1. Upon a contract to deliver stock, the damages for the failure to deliver it is the value of the stock at the time it ought to be delivered.

The Orange and Alexandria Railroad Company v. Fulvey for Cowherd, 366

Same v. Cowherd, 366

SUBSTITUTION.

1. How tenant for life of slaves selling one of them, may substitute other slaves for the one sold. See *Tenant for Life*, and

Tabb's curator v. Cabell & als., 160

2. If in such a case the law only declares that the note shall not be available as evidence, an action may be maintained upon it in another state. *Idem*, 47

3. The stamp act of the state of Maryland does not avoid the instrument, but renders it unavailable as evidence; and an action may be maintained in Virginia upon a note made in Maryland, though it be not stamped as required by the Maryland statute. *Idem*, 47

4. A paper signed in blank in Virginia, is sent to Maryland to be filled up there. It is filled up there, and at the same time and place, is endorsed by the payee to the holders, for value; the note being in fact for the accommodation of the payee. This is a Maryland contract, to be governed by the law of Maryland, though the note is headed W, a place in Virginia. *Idem*, 47

5. Negotiable notes made for the accommodation of F, are endorsed by 655 *him to the holders, in consideration of money previously advanced by them to him, of money advanced to him at the time of the transfer, and of notes of F falling due at a future day, which they undertake to pay, and do pay as they fall due; all of which amount to the full amount of the notes so endorsed to them. The holders are holders for value. *Idem*, 47

6. In debt on a negotiable note the defence that the plaintiff is not a holder for value, may be made under the plea of *nil debet*. *Idem*, 47

REMAINDERMEN.

1. When personal representative of a remainderman is tenant in common with the other remaindermen, and must join in an action to recover the property. See *Executors and Administrators*, No. 11, and

Clarkson & als. v. Booth, 490

REVENUE LAWS.

1. If the law of the state where a note is made declares that it shall be void unless it is stamped, it is void everywhere, and an action cannot be maintained upon it in another state.

Fant & als. v. Miller & Mayhew, 47

2. If in such a case, the law only declares that the note shall not be available as evidence, an action may be maintained upon it in another state. *Idem*, 47

3. The stamp act of the state of Maryland does not avoid the instrument, but renders it unavailable as evidence; and an action may be maintained in Virginia, upon a note made in Maryland, though it has not been stamped as required by the Maryland statute. *Idem*, 47

REVOLUTIONARY CLAIMS.

1. Bill in relation to land warrants issued for services in the revolutionary war, dismissed on the ground of *laches* and lapse of time.

Doggett & als. v. Helm & als., 96

2. When a claim for revolutionary services is brought before the court, the ordinary rules of evidence must be applied to it. *Idem*, 96

SALES.

1. When a sale of goods by salesman of merchant unauthorized and void. See *Principal and Agent*, No. 4, 5, and *Peshine v. Shepperson*, 472

SECURITIES.

M is a wholesale merchant, and F is a jobber in the city of B; and F makes an arrangement with M, to obtain accommodation from time to time, in the form of loans, discounts and the sale of goods, on the terms of placing the bonds, notes and accounts of his customers in the hands of M as collateral security. There is no agreement as to the mode in which these collaterals are to be dealt with by the parties. F, afterwards, fails largely indebted to M, who holds these collaterals in large number and amount, the debtors being scattered widely over the country. It is to be inferred:

1. That before the failure of F, it was not intended or expected that M was to do more than hold the credits thus placed in his hands, receiving the amount of such as might from time to time be paid to him; but taking no steps to enforce such payments, nor even to notify the collateral debtors of the assignment of their debts.

Fant v. Miller & Mayhew, 187

2. That it was not intended that F should be authorized to collect or renew or otherwise deal with the collaterals, except upon the terms of his paying or delivering to M the money collected or the renewed notes; or substituting others equally good for any that might be withdrawn for the purpose of collection or renewal. *Idem*, 187

3. After the failure of F it became the right and duty of M to collect, as far and as soon as he could, all the collaterals in his hands, apply the proceeds to the payment of his claim against F, and pay him the surplus, if any. And M was bound to use common diligence, such as a man of business and common prudence would exercise about his own affairs in the situation in which M was then placed. *Idem*, 187

4. M was assignee of these collaterals, bound to use the diligence due by an assignee under the circumstances; and he was not only a principal, as being interested in the subject, *but he was agent of F to the extent of his interest, and bound to perform the duty pertaining to his agency. The duty of M was to realize as much as possible out of the collaterals, at the earliest practicable period; and he was invested with all the powers necessary or proper to enable him to attain this object. *Idem*, 187

5. The first thing to be considered by M was the security of the collaterals, and the next their collection. If a debt were good he should sue; if doubtful he might give time and get security; if it was good policy not to sue he might decline it, and might compound

and compromise a debt, if, looking to the interest of the creditor, in the exercise of a sound discretion, that was deemed best; and new securities taken by M, might properly be in his own name. *Idem*, 187

6. In determining whether it would be good policy to sue for a debt, or give time on getting security, or to accept a compromise, the fact that M acted under the advice of and upon information derived from his counsel, affords at least *prima facie* evidence, that such action was *bona fide* and proper. *Idem*, 187

SHERIFFS.

1. A sheriff who takes the property of A, under an attachment against the property of B, thereby not only commits a trespass, but plainly violates the duty of his office, and breaks the condition of his official bond; and his sureties are liable for his act.

Sangster & als. v. The Commonwealth, 124

2. In an attachment in equity against B and A, the property of A is taken as the property of B, and being perishable, it is sold under an order of the court; and afterwards the court decrees that the sheriff pay the proceeds of sale to A. The sheriff failing to pay, A moves against him and his sureties in the County court, and judgment is entered for the penalty of his bond, to be discharged by the payment, &c., which is paid. Previous to the decision of the court in favor of A, he brought an action on the official bond of the sheriff, against him and his sureties, for trespass in taking his goods; and the former judgment and its payment was set up in defence. *Held*:

1. The action is not thereby barred; but A may recover the difference between the value of the goods at the time they were taken under the attachment, and the amount of the proceeds of sale paid to A. *Idem*, 124

2. That it was not necessary to proceed by *scire facias* on the former judgment, but an action on the bond might be sustained. *Idem*, 124

3. The record of a County court states that F, a sheriff, who had been required to give a new bond, "this day appeared in court and executed and acknowledged such new bond, and the security thereto being considered sufficient by the court, the same is ordered to be certified." In the absence of fraud, this record is conclusive that the bond was properly executed; and evidence will not be admitted to contradict it.

Vaughan & als. v. The Commonwealth, 386

To the same effect is, *Calwell v. The Same*, 391

4. What evidence is not sufficient to outweigh the record. See *Estoppels*, No. 5, and *Idem*, 391

SPECIFIC PERFORMANCE.

1. When a vendor of land has notified the purchaser that he will not perform the contract, the purchaser may file a bill for a spe-

cific execution of it without making a tender to the vendor of the securities provided for therein.

White v. Dobson & al., 262

2. There being two parcels of land embraced in the contract, each at a specific price, if the vendor can make a good title to but one, the vendee is entitled to have a conveyance of that parcel, if he will pay the stipulated price of that parcel, and accept it in full satisfaction of the contract. *Idem*, 262

3. The vendee is entitled to have, if he elects it, an account of the rents, issues and profits of the land, and to have them set off against the purchase money; or if he elects to waive an account, he shall not pay interest on the purchase money. *Idem*, 262

STAMP ACT.

See *Revenue Laws*.

657

*STATUTES.

1. The act of March 18th, 1856, § 25, imposing taxes for the support of the state government, construed in,

Orange and Alexandria Railroad Company v. The City Council of Alexandria, 176

2. The act, Code, ch. 149, § 5, in relation to limitations of action between partners, construed in,

Foster's curator v. Rison & al., 321

3. The act, Code, ch. 135, § 5, in relation to landlords defending the title, construed in,

Mitchell, &c. v. Baratta & als., 445

Same v. Riviera & als., 445

4. The act, Code, ch. 162, § 9, p. 629, in relation to dispensing with jury trials, construed in, *Idem*, 445

5. The act, Code, ch. 135, §§ 2 and 38, and ch. 149, § 19, in relation to actions of ejectment, construed in, *Idem*, 445

6. The act, Code, ch. 208, § 27, in relation to the finding by the jury of part of the offence charged, construed in, *Hardy's and Curry's Case*, 592

7. The act, Code, ch. 192, § 53, in relation to the destruction of property, construed in, *Davis' Case*, 617

8. The act, Code of 1860, ch. 141, § 10, in relation to bills charging usury, construed in, *Brockenbrough's ex'ors v. Spindle's adm'rs*, 21

STOCKS.

1. Upon a contract to deliver stock, the damages for the failure to deliver it is the value of the stock at the time it ought to be delivered.

The Orange and Alexandria Railroad Company v. Fulvey for Cowherd, 366

Same v. Cowherd, 366

SUBSTITUTION.

1. How tenant for life of slaves selling one of them, may substitute other slaves for the one sold. See *Tenant for Life*, and

Tabb's curator v. Cabell & als., 160

2. When a creditor for necessities furnished a ward, may be substituted to the right of the ward to proceed upon the guardian's bond, against him and his sureties, to have satisfaction of his debt. See *Guardian & Ward*, No. 5, and

Barnum & als. v. Frost's adm'r & als., 398

SURETIES.

1. For what sureties of an executor responsible. See *Executors and Administrators*, No. 7, and

Harvey's adm'r, &c. v. Steptoe's adm'r & als., 289

2. When sureties in the official bonds of a sheriff, estopped by the record, from denying that it was properly executed by them. See *Estoppels*, No. 4, 5, and

Vaughan & als. v. The Commonwealth, 386

Calwell v. The Same, 391

3. When a creditor for necessities of a ward may subject the sureties of the guardian in his official bond, for the payment of his claim. See *Guardian and Ward*, No. 4, 5, and

Barnum & als. v. Frost's adm'r & als., 398

SURPLUSAGE.

1. See *Pleadings*, No. 3, 4, and

Adams v. Lawson, 250

Clarkson & als. v. Booth, 490

SUNDAY.

1. Sunday being *dies non juridicus*, is not one of the days of the terms of the court.

Michie & als. v. Michie's adm'r & als., 109

-TAXES.

1. See *Municipal Corporations*, and

Orange & Alexandria Railroad Company v. The City Council of Alexandria, 176

TENANT FOR LIFE.

C tenant for life of slaves, remainder to her children, who are of full age, sells one of them, and declares that she substitutes two of her own slaves, which are of greater value, in place of the one sold, with the consent of her children. **Held:**

1. If the substitution was with the consent of the children, both she and they are concluded.

Tabb's curator v. Cabell & als., 160

2. *If the substitution was made without the consent of the children, C is concluded by it, and the children may enforce it in equity. *Idem*, 160

3. It is not material when the declaration was originally made, or in what form of words, or whether or not it was in writing. It is enough that it appears clearly from her deliberate declaration, that she had made such an appropriation of the slaves, and that she then considered them as hers

for life only, with remainder to her children. *Idem*, 160

4. C is a trustee for the remaindermen. If having sold one of the slaves, she had invested the proceeds in other property, the remaindermen would have been entitled to it; and upon the same principle, having substituted her own slaves for the one sold, the remaindermen are entitled.

Idem, 160

5. If upon the death of the life-tenant of slaves, the executor declines or neglects to recover the slaves, and sell them for division, as the will authorized him to do, the remaindermen may sue in equity to recover and divide them among the parties entitled.

Idem, 160

6. A life-tenant and remaindermen compromise a suit in which they take a decree for less than half the amount of principal and interest reported to be due from the executor, and the decree directs the fund to be invested, and the interest paid to the life-tenant for her life, and then the fund to be divided among the remaindermen after the death of the life-tenant. The whole fund will be considered as principal to be equally divided among the remaindermen.

Tebbs v. Duval & als., 349

TENANTS IN COMMON.

1. The personal representative of one or more remaindermen, dying during the lifetime of the life-tenant, is tenant in common with the surviving remaindermen, and must be joined with the remaindermen in an action to recover the property.

Clarkson & als. v. Booth, 490

2. See *Parties at Common Law*, No. 3, 4, 5, and *Idem*, 490

TRESPASS.

1. A salesman of a merchant agrees with a creditor of his principal, to sell him goods in payment of his debt; and at night, without the knowledge of the principal, and against his wishes, known to both of them, the goods are selected and sent off by the purchaser. The purchaser acquires no title to the goods by his purchase, and is liable in trespass to the merchant for the value of the goods, and for any damages he has sustained by the taking and carrying away of the goods.

Peshine v. Shepperson, 472

2. In such a case, if the salesman at the same time packs up and sends off other goods, to pay other creditors of his principal, the purchaser is not liable for the value of these goods, unless he aided, assisted, and concurred in their being so taken and carried away for the other creditors; and the burden is on the plaintiff to prove this.

Idem, 472

3. In such a case, no special damage being laid, the merchant is entitled to recover for all such damages as are the natural, proximate and necessary result of the act of the purchaser; and injury to the credit and

business standing of the merchant, and the injury to his business, resulting therefrom, are properly recoverable as the natural, proximate and necessary consequences of the acts of the purchaser. *Idem*, 472

4. In such a case, to ascertain such damages, the nature and extent of the merchant's business, and whether profitable, or unprofitable, are proper subjects of inquiry. *Idem*, 472

5. In such a case the probable profits of the business are not the measure of damages; but they may be proved by general evidence, as well as the character and extent of the business, as affording the best guide to the jury of which the case admits. *Idem*, 472

6. Where the act complained of is accompanied by circumstances of aggravation, they may be proved under the general allegation of *alia enormia*, without further specification, when they do not afford a substantial ground of action. *Idem*, 472

TRUSTS AND TRUSTEES.

1. What debts secured by deed trustee may pay. See *Executors and Administrators*, No. 3, and

Harvey's adm'r, &c. v. Steptoe's adm'r & als., 289

2. It is the duty of a trustee to be present at the sale of the trust subject, and to superintend and control it; and if the sale is so conducted as to prevent fair competition, whether cognizant of the circumstances or not, he is bound to make good the loss, and should be charged in the settlement of his accounts, with the fair value of the property so sold, and interest upon it, as if the money had been received. *Idem*, 289

3. Whilst the execution of a trust is in progress, the account of the trustee should be stated on the principles of executor's accounts. But when it is substantially closed, it should be stated on the principle of debtor and creditor, interest to be charged upon each sum received from the end of six months after its receipt, and disbursements first applied to interest whilst there is any due. *Idem*, 289

4. Though a deed of trust to secure debts, is voluntary in part, and therefore void as to creditors to that extent, yet it is valid between the parties, and the trustee is not responsible for the voluntary debts, secured by the deed, which he paid. *Idem*, 289

5. How trustee in a deed who becomes executor of the grantor, should treat the surplus of the trust fund. See *Executors and Administrators*, No. 5, and *Idem*, 289

USURY.

1. The 10th section, ch. 141, of the Code of 1860, authorizing a debtor, by bill requiring no discovery of the defendant, to pray an injunction to prevent the sale of property conveyed to secure the payment of money or other thing borrowed at usurious interest,

&c., was designed to adopt the principle of the case of *Marks v. Morris*, 2 Munf. 407, which had been overruled by the *Bank of Washington v. Arthur*, 3 Gratt. 173, and *Bell v. Calhoun*, 8 Id. 22, and therefore permits such bill to be filed against the representatives of the lender after his death.

Brokenbrough's ex'ors v. Spindle's adm'r's, 21

2. Where a borrower is entitled to relief under this section of the statute, he is to be relieved from the whole debt, both principal and interest, and not merely the usurious excess. *Idem*, 21

3. The issue "whether or no the transaction is usurious," directed by this section to be made by the court and tried at its bar by a jury, is the sole object and not an incident of the suit. Its purpose is, not to inform the conscience of the court, but to conclude the question of fact; and the court is bound to decree in accordance with the verdict, unless for good cause a new trial be granted.

Semble—The better practice is, that all proceedings under this statute, including the trial of the issue, should be in chancery, although in this case the issue was tried on the law side of the court, and such practice upheld. *Idem*, 21

4. It is the established rule of this court, that to convict a person of usury, the usury must be proved beyond a rational doubt to the contrary. *Idem*, 21

5. S, in urgent need, asks G where he can get money. G applies to B, and is told by B he has no money to lend. Believing that Virginia state stock would relieve S, it is suggested by G that such stock would answer in lieu of money; to this proposal B replies that he might perhaps accommodate S, and G informs S of what B said. Subsequently B caused the required amount of stock to be transferred in accordance with the directions of S, who executes to B his bond for \$11,000, payable three years after date, with legal interest. The sum of \$11,000 was the *par* value of the stock, whilst its market value at the time was but \$91 in the hundred. HELD: The transaction was a fair sale, and not a device to cover a usurious loan of money. The case not distinguishable in principle from *Selby v. Morgan*, 3 Leigh 577, which is approved and confirmed. *Idem*, 21

6. The question of usury is a question of law and fact; and the facts being ascertained, it is for the court to determine whether they constitute usury. And the appellate court will pass upon the question either upon an instruction setting out the facts proved, and asking the court to instruct the jury that they do not constitute usury, or upon a motion for a new trial, where the court certifies the facts proved. *Idem*, 21

7. A plea of usury of a foreign state must state what the law of usury is in that state.

Fant & als. v. Miller & Mayhew, 47 660

*8. By the usury law of Maryland a contract or evidence of debt, though

tainted with usury, is not null and void, but is a valid contract, upon which an action may be maintained to recover the principal and six *per cent. per annum* interest thereon; and is void for the excess. *Idem*, 47

9. In an action in Virginia upon a note made in Maryland, on which more than six *per cent. per annum* of interest was charged, the plaintiff may recover the principal and six *per cent. per annum*; and where a separate note was given for the excess of interest, which is still in the hands of the plaintiff unpaid, he will be permitted to recover the principal of the note sued on and six *per cent. per annum* interest thereon. *Idem*, 47

WASTE AND UNAPPROPRIATED LAND.

1. In Eastern Virginia, a party in possession of land, tracing back his title for upwards of seventy years, it is a presumption of law that a grant has issued for the land, and it is not therefore subject to entry and grant as waste and unappropriated.

Matthews v. Burton,

312

WILLS.

1. C, by his will, lends to his wife E, for and during her natural life, all his personal and real estate. At her death he gives the property to be equally divided between a child living, and one of which his wife was then *en ventre*. After other bequests over on failure of issue of his children, he says: It is also my desire that my wife should never marry without entering into a marriage contract to secure the property for the benefit of her and my children. **Held**: The last clause does not affect the provision in favor of the wife, so as to reduce her interest upon her marriage.

Rayfield & Wife v. Gaines & als., 1

2. Clear and unambiguous provisions in a will, expressly made, cannot be controlled by mere inference and argument from general and ambiguous provisions in other parts of the will. *Idem*, 1

3. Testator had twelve children, six unmarried daughters. He directed his estate to be divided into twelve parts, and gave a part to each child. He then says: "It is my will and desire, that if any of my children die without heirs, for their part to be equally divided amongst all my children then living." This is a good executory bequest in favor of the children surviving one dying without issue.

Norris v. Johnston,

8

4. "All the rest and residue of my estate which may at any time come to the hands of my executor, either from the lapsing of the aforesaid legacies or otherwise," held, upon a consideration of the whole will and surrounding circumstances, to include the testator's real estate.

Smith's ex'ors v. Smith & als., 268

5. Legacies held to be made good out of the real estate if the personal estate is not sufficient. *Idem*, 268

6. C died leaving one daughter and two sons. By his will he says: "I give the above recited land and negroes to my said daughter B during her natural life, and then to her children living at her death, to be equally divided; if none, then to my sons W and J for life, then to be equally divided between them and their children. He makes a similar provision for each son and his child or children, with the same limitation over to the daughter and son and their children. W and J died without children. B died leaving children surviving her, and the children of others who died before her. **Held**: That on the death of W and J the whole property vested in B for life, and on her death passed to her children who survived her, to the exclusion of the children of her deceased children.

Tebbs v. Duval & als.,

349

7. Where a will affords no satisfactory clue to the real intention of the testator, the court must, from the necessity of the case, resort to legal presumptions and rules of construction. But such rules yield to the intention of the testator apparent in the will; and have no application where the intention thus appears. *Idem*, 349

8. Bequest of slaves to a daughter B and her husband A. If B die having no bodily heir, she and A to enjoy them during their life, but not to remove them out of the state, and at their death to be divided equally among the rest of testator's children. B survives her husband and dies never having had a child. The contingent limitation to 661 the other children is valid, *and all the children alive at the death of the testator take equally.

Clarkson & als. v. Booth,

490

WITNESSES.

1. The assignee of a bond transfers it for value, without assignment, but undertakes verbally to guarantee it, if the transferee calls upon him to do so, to enable him to dispose of it. The transferee disposes of the bond without calling for the guaranty. The assignee is no longer liable on the promise to guarantee, and is not therefore an incompetent witness for the holder against the obligors.

Fant & als. v. Fant, who sues, &c., 11

2. There being a plea of usury in the transfer of the bond by the obligee to the assignee, if he transferred it with the knowledge that there was such usury, he was then guilty of a deceit, and the right of action arose upon the transfer; and if time has barred that action, the assignee is not therefore an incompetent witness for the holder of the bond against the obligors. *Idem*, 11

3. A witness ought not to write his deposition or his answers beforehand; nor ought they to be written for him beforehand, by counsel or any other person; but he ought to answer the questions orally or from memory, as they are propounded to him.

Fant v. Miller & Mayhew,

187

4. Parties or their counsel may orally or by writing, previous to the examination of a witness, direct his attention to the facts in regard to which he is intended to be examined; and he may refresh his memory in regard to such facts, by examining books or papers, and making memoranda from them or otherwise, especially of dates and amounts, and use such memoranda for the purpose of refreshing his memory at the time of giving his evidence. *Idem*, 187

5. See *Depositions*.

REPORTS OF CASES
DECIDED IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA:
BY PEACHY R. GRATTAN.

VOLUME XVIII.

FROM OCTOBER 1, 1867, TO OCTOBER 1, 1868.

JUDGES
OF THE
SUPREME COURT OF APPEALS
DURING THE TIME OF THESE REPORTS.

RICHARD C. L. MONCURE, PRESIDENT.
WILLIAM T. JOYNES. ALEXANDER RIVES.

Attorney General: THOMAS RUSSELL BOWDEN.

**Entered according to Act of Congress, in the year one thousand eight hundred
and sixty-eight, for the**

COMMONWEALTH OF VIRGINIA,

In the Clerk's Office of the Eastern District of Virginia.

TABLE OF CASES REPORTED.

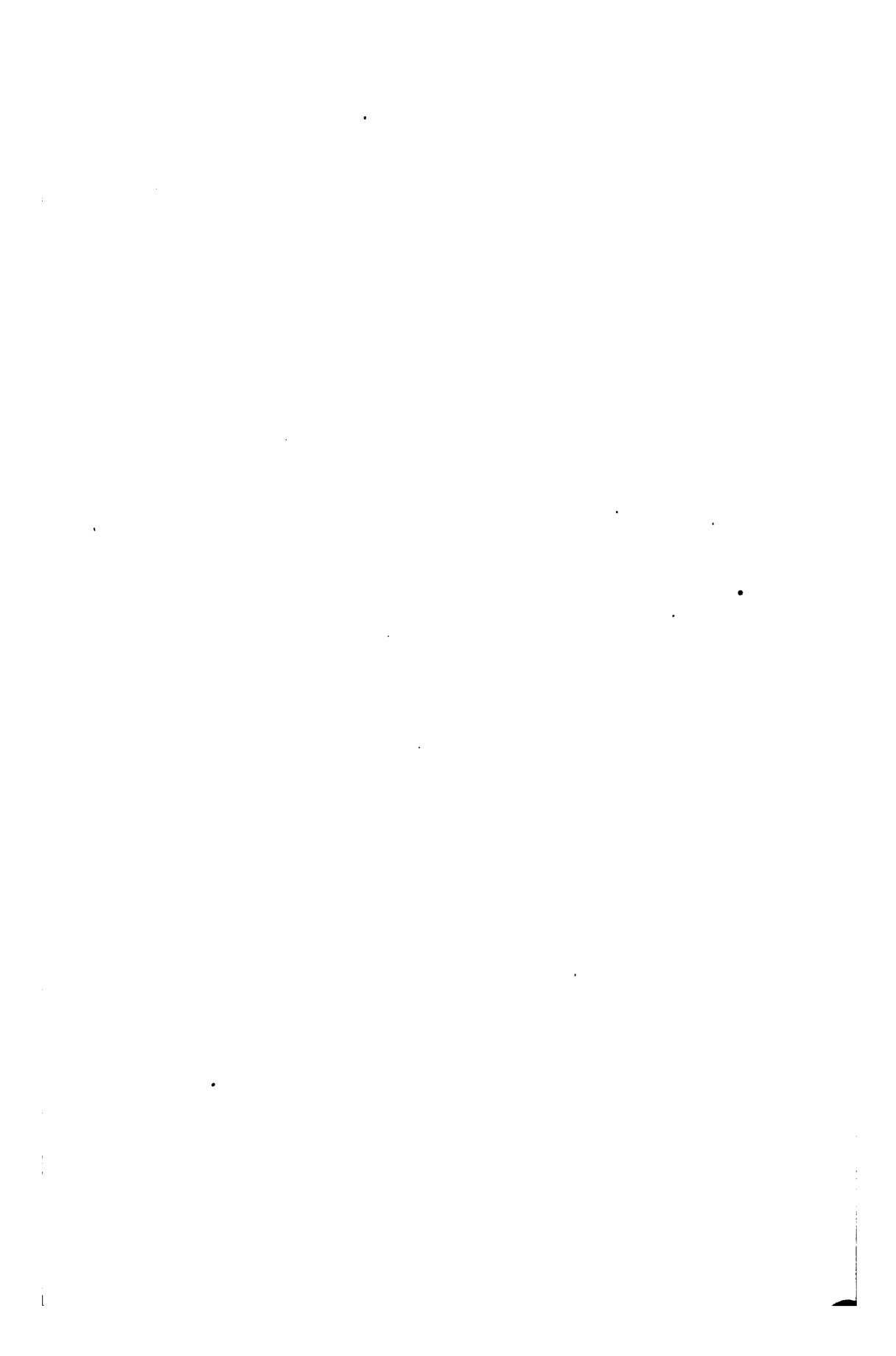
Allen & als. <i>v.</i> Hart.....	722	Hart & als. <i>and</i> Cronie.....	739
Anderson <i>v.</i> The Commonwealth.....	295	Hill & als. <i>v.</i> Bowyer & als.....	364
Arents <i>v.</i> The Commonwealth	750	Hill's ex'or <i>and</i> Brummel & Co.....	873
Ballard & als. <i>v.</i> Whitlock.....	235	Hoxton & als. <i>v.</i> Griffith & als.....	574
Bennett <i>v.</i> Hunter.....	100	Hunter <i>and</i> Bennett.....	100
Boswell & al. <i>and</i> Charron & Co.....	216	James Gray's Sons <i>and</i> Brummel & Co..	873
Boulware <i>v.</i> Newton.....	708	James River & Kanawha Co. <i>v.</i> Little-	
Bowyer & als. <i>and</i> Hill & als.....	364	john.....	53
Brent <i>v.</i> Washington's adm'r.....	526	Jett's case.....	933
Broughton <i>v.</i> Coffey.....	184	Jones & Co. <i>v.</i> The City of Richmond... 517	
Brummel & Co. <i>v.</i> Enders, Sutton & Co..	873	Kemp & als. case.....	969
Brummel & Co. <i>v.</i> Hill's ex'or.....	873	Kephart <i>and</i> Millan.....	1
Brummel & Co. <i>v.</i> James Gray's Sons...	873	Lawhorne, ex parte.....	85
Butler <i>and</i> Ragland & Co.....	323	Littlejohn <i>v.</i> Ferguson & als.....	53
Cannon & als. <i>and</i> Gordon & als.....	387	Littlejohn <i>and</i> James River & Kanawha	
Cazenove <i>and</i> Portner & Recker.....	100	Co.....	53
Chandler & als. <i>and</i> Drake's ex'or.....	909	Martin <i>v.</i> Snowden, trustee.....	100
Charron & Co. <i>v.</i> Boswell & al.....	216	Mason's ex'x & als. <i>and</i> Rhett & wife... 541	
Churn <i>and</i> Ward & als.....	801	Matthew's case.....	989
City of Richmond <i>and</i> DeVoss & als....	338	Mettert's adm'r <i>v.</i> Hagan	231
City of Richmond <i>and</i> Jones & Co.....	517	Midlothian Coal Mining Co. <i>v.</i> Finney &	
City of Richmond <i>and</i> Thomas & als....	583	als.....	304
City of Richmond <i>and</i> Wade & als....	583	Millan <i>v.</i> Kephart.....	1
Clafin & Co. <i>v.</i> Steenbock & Co.....	842	Newton <i>and</i> Boulware.....	708
Coffey <i>and</i> Broughton.....	184	Nutt, trustee, <i>and</i> Corbett.	624
Commonwealth <i>and</i> Anderson.....	295	Old's case.....	915
Commonwealth <i>and</i> Arents.....	750	Omohundro's ex'or <i>v.</i> Crump.....	703
Commonwealth <i>and</i> Garner.....	989	Paxton, trustee, <i>and</i> Williamson, trustee	475
Commonwealth <i>and</i> Jett.....	933	Portner & Recker <i>v.</i> Cazenove.....	100
Commonwealth <i>and</i> Kemp & als.....	969	Ragland & Co. <i>v.</i> Butler.....	323
Commonwealth <i>and</i> Matthews.....	989	Rhett & wife <i>v.</i> Mason's ex'x & als.....	541
Commonwealth <i>and</i> Old.....	915	Rixey <i>and</i> Utterbach & als.....	313
Commonwealth <i>and</i> Trim.....	983	Robinson & als. <i>v.</i> Gardiner & als.....	509
Commonwealth <i>and</i> Walker & als.....	13	Rosenbaums <i>v.</i> Weeden, Johnson & Co..	785
Corbett <i>v.</i> Nutt, trustee.....	624	Rucker <i>and</i> Dearing's adm'x.....	426
Cronie <i>v.</i> Hart & als.....	739	Scott's ex'x <i>v.</i> Scott.....	150
Crump <i>and</i> Omohundro's ex'or.....	703	Smith, &c. <i>and</i> Turner.....	830
Davis & als. <i>and</i> Faulkner & als.....	651	Snowden, trustee, <i>and</i> Martin.....	100
Davison <i>and</i> Stevens & al.....	819	Stearns & als. <i>and</i> Taylor.....	244
Dearing's adm'x <i>v.</i> Rucker.....	426	Steenbock & Co. <i>and</i> Clafin & Co.....	842
DeVoss & als. <i>v.</i> The City of Richmond.	338	Stevens & al. <i>v.</i> Davison.....	819
Drake's ex'or <i>v.</i> Chandler & als.....	909	Taylor <i>v.</i> Stearns & als.....	244
Enders, Sutton & Co. <i>and</i> Brummel &		Thomas & als. <i>v.</i> The City of Richmond.	583
Co.....	873	Trim's case.....	983
Faulkner & als. <i>v.</i> Davis & als.....	651	Turner <i>v.</i> Smith, &c.....	830
Ferguson & als. <i>and</i> Littlejohn.....	53	Utterbach & als. <i>v.</i> Rixey.....	313
Finney & als. <i>and</i> Midlothian Coal Min-		Wade & als. <i>v.</i> The City of Richmond... 583	
ing Co.....	304	Walker & als. <i>v.</i> The Commonwealth... 13	
Foster <i>and</i> Woodward, Baldwin & Co... 200		Ward & als. <i>v.</i> Churn.....	801
Gardiner & als. <i>and</i> Robinson & als.... 509		Washington's adm'r <i>and</i> Brent.....	526
Garner's case.....	989	Weeden, Johnson & Co. <i>and</i> Rosenbaums	785
Gordon & als. <i>v.</i> Cannon & als.....	387	Whitlock <i>and</i> Ballard & als.....	235
Griffith & als. <i>and</i> Hoxton & als.....	574	Williamson, trustee, <i>v.</i> Paxton, trustee.. 475	
Hagan <i>and</i> Mettert's adm'r.....	231	Woodward, Baldwin & Co. <i>v.</i> Foster 200	
Hart <i>and</i> Allen & als.....	722		

TABLE OF CASES CITED.

Abrahams v. Peyton, 16 Gratt. 470.....	114	Baker v. Lorillard, 4 Comst. 257.....	663
Adams and Lovett, 3 Wend. 380	811	Baltimore & Ohio R. R. Co. v. Polly, Woods & Co., 14 Gratt. 448... ..	799, 816
Adams and North Pa. R. R. Co., 54 Penn. 94.....	796	Bank of Albion v. Smith, 27 Barb. 489	213, 214
Adams and Whitworth, 5 Rand. 333.....885, 888, 894, 895, 905, 906,	907	Bank of Australia and Ashurt, 37 Eng. L. & E. 195.....	777
Adams v. Wordley, 1 Mees. & Welsh. 374.....	206	Bank of England and Davis, 2 Bing. 393, 9 Eng. C. L. 401.....	352, 359
Agra and Masterman's Bank, 2 Law Rep. ch. 397.	768	Bank of Georgia v. United States Bank, 10 Wheat. 333.....	359
Alcock v. Hill, 4 Leigh 622.....	27, 43	Bank of Kentucky v. Schuylkill Bank, 1 Pars. Sel. Cas. 180.....	354, 359
Alden v. Beall, 11 Gill & John. 123.....	579	Bank of Louisiana v. City of New Orleans, 5 Amer. Law Reg. N. S. 555..	783
Aler and Pulliam, 15 Gratt. 54. 242, 849,	866	Bank of Metropolis v. Brent's ex'or, 1 Pet. U. S. 89.....	214
Alexander and Calloway, 8 Leigh 114	375, 381, 384	Bank of Tennessee and Seay, 3 Sneed 558	881, 899
Alexander and Watson, ex'or, 1 Wash. 353.....	448	Bank of United States v. Deveaux, 5 Cranch 87... ..	949
Allen v. Furbish, 4 Gray 504.....	204	Bank of United States v. Dunn, 6 Pet. U. S. 51.....	208
Allen v. Jaquish, 21 Wend. 628.....	11	Bank of United States and Irwin, 1 Barr. 349.....	835
Alling and Crane, 3 Green C. L. 425.....	24	Bank of United States v. Patten, 5 How. Miss. 200.....	737
Alsept v. Eyles, 2 H. Bl. 111.....	21	Bank of United States and Levy, 1 Binn. 27.....	359
Alston and McGahey, 2 Mees. & Welsh. 206.....	637	Bank of United States and Renner, 9 Wheat. 591.....	213
Ambler v. Wyld, 2 Wash. 36.....	466	Bank of Virginia and Reynolds, 6 Gratt. 174.....	540
American Print Works v. Lawrence, 3 Zabr. 603.....	520	Bank of Virginia and Stainback, 11 Gratt. 260.....	363
Amy and United States, Quar. Law Jour. July, 1859, 163.	945, 956, 967	Bank of Washington and Walker, 3 How. U. S. 62.....	910
Anderson and Berry, 22 Ind. 36.....	811	Bank of Woodstock and Salin, 21 Verm. 363.....	354
Anderson v. Commonwealth, 18 Gratt. 295.....	513	Barratta, &c., and Mitchell, 17 Gratt. 465.	871
Anderson & al. v. DeSoer, 6 Gratt. 363... ..	76	Barclay and Coosa River Steam Co., 30 Alab. 120.....	249, 262
Anderson v. Lively, 6 Leigh 77.....	70, 75	Barker's Case, 2 Va. Cas. 122.....	930
Anderson v. Tompkins, 1 Brock. 456.....	404	Barker and Howes, 3 John. 506.....	197
Anderton and Newman, 2 New Rep. 224. 161		Barker v. Prentis, 6 Mass. 430.....	205
Andrews v. Partington, 2 Cox 223...562, 563		Barlow and Pindar, 31 Verm. 529.....	905
Antonio's Case, 3 Brev. 562.....	938, 953	Barnes v. Billington, 1 Wash. C. C. 29... ..	26
Archer v. Ward, 9 Gratt. 622.....	242	Barnett and Vanhook, 4 Dev. 268.....	809
Argyle's ex'or and Miller, 5 Leigh 460..	662	Barney and Brackett, 28 New York 303..	808
Armstrong and Barnwell & Cruger, 3 John. Cas. 5.....	760	Barough v. White, 4 Barn. & Cr. 325, 10 Eng. C. L. 345.....	762
Armstrong and Beaver County, 44 Penn. 63.....	767	Barry v. Moore, 3 New Hamp. 132.....	213
Ashurst v. Bank of Australia, 37 Eng. L. & E. 195.....	777	Bartlett v. Long, 4 Wheat. 122.....	262
Aspinwall and Commissioners of Knox County, 21 How. U. S. 539.....	356, 358, 767	Baskerfield and Burrill, 11 Beav. 534.....	533
Atkinson and White, 2 Wash. 94.....	468	Bassett and Cox, 3 Ves. 155.....	547
Aude v. Dixon, 6 Exch. 869.....	900, 902, 903	Bassett and Stone, 4 Minnes. 483.....	250
Austin and Fletcher, 11 Verm. 447...808, 811		Bateman v. Mayor, &c., 3 Hurl. & Nor. 323.....	362
Aylett's ex'or and Moore's ex'or, 1 Hen. & Mun. 29.....	401	Baugh v. Nelson, 9 Gill 299.....	246, 262
Aymar and North River Bank, 3 Hill N. Y. 262.....	363	Baumbach v. Bade, 9 Wisc. 559.	250, 288
Ayres v. Lewellin, 3 Leigh 609.....	242	Baylor's lessee v. Dejarnette, 13 Gratt. 152.....	688, 689, 690
Babcock and Crease, 23 Pick 334.....	299	Beall and Alden, 11 Gill & John. 123.....	579
Bade and Raumbach, 9 Wisc. 559.....	250, 288	Bean & al. v. Simmons, 9 Gratt. 389.....	838
Badham v. Mee, 1 Rus. & My. 631.....	547	Beard and Keene, 98 Eng. C. L. 371.....	759
Bailey v. Mayor, &c., of New York, 3 Hill 531.....	346		
Baily v. Gentry, 1 Miss. 164.....	249, 250, 258		
Bainbridge v. Wade, 12 Queen's Bench 317, 21 Eng. C. L.....	208		
Baird v. Rice, 1 Call 18.....	49		
Baker v. Holtzaffell, 4 Taunt 45.....	165		

Beard and Right, 13 East. 210.....	505	Brantley and Fowlew, 14 Pet. U. S. 318. 758
Beaumarchais and Commonwealth, 3 Call 122	448, 451, 705	Brashear and Lapsley, 4 Litt. 34.....
Beaver County v. Armstrong, 44 Penn. 63	767	..... 281, 282, 288
Bechtel and Hoffman, 52 Penn. 190	770	Brashear v. West, 7 Pet. U. S. 608.....
Beecher and Murphy, 3 Cush. 511.....	363	Breckenridge and Pitman, 3 Gratt. 127..
Beeckman v. Lansing, 3 Wend. 446.....	27	397.....
Beirne v. Dunlap, 8 Leigh 514.....	471	Bremridge and Evans, 35 Eng. L. & E. 808
..... 438, 439, 440, 442, 471		Brent's ex'or v. Bank of Metropolis, 1
Beirne and McClung, 10 Leigh 394.....	745	Pet. U. S. 89.....
Belfour v. Weston, 1 T. R. 310.....	165	..... 214
Bell v. Lord Ingestre, 12 Queen's Bench 317, 64 Eng. C. L.....	207	Brewer & ux. v. Opie, 1 Call 212.....
Bennett's Case, 8 Leigh 745.....	986	..... 578
Bennett v. Boggs, 1 Bald. 74.....	247	Bridgport Bank v. New York & New
Benson v. Whittam, 5 Sim. 32.....	562	Haven R. R. Co., 30 Conn. 231.....
Berry v. Anderson, 22 Ind. 36.....	811	..... 359
Berry and Tate, 2 Bailey S. C.....	920	Brigham & al. v. Coburn, 10 Gray 329..
Besant v. Cross, 10 Com. Bench 895, 70 Eng. C. L.....	206	..... 636
Beverley and Kinney, 2 Hen. & Mun. 518	138	Brockenbrough's ex'ors v. Spindle's
Bibb and Pleasants, 1 Wash. 8.....	465	adm'rs, 17 Gratt. 21.....
Bibb and Reid, 5 Alab. 281.....	811	..... 886
Biddle and Field, 1 Yeates 132.....	205	Bronson v. Kinzie, 1 How. U. S. 311.....
Biddle and Green, 8 Wheat. 1.....	274	..... 247, 248, 249, 250, 251. 262
..... 252, 253, 254, 274		Bronson v. Newberry, 2 Doug. Mich. 38
Bigelow and Colton, 13 Gray 309.....	211	..... 250, 251, 257, 258, 262, 286, 298
Billington and Barnes, 1 Wash. C. C. 29.	26	Bronson and Rodes, 34 New York 649...
Billing and Tucker, 2 Jur. N. S. 483	533	..... 445
Billups v. Sears & als., 5 Gratt. 31.....	423	Brooks v. Mitchell, 9 Mees. & Welsb. 15. 762
Bilmeyer v. Evans, 4 Wright 324.....	284	Brown v. Casamajor, 4 Ves. 498.....
Bissell v. City of Jeffersonville, 24 How. U. S. 287.....	361	Brown and Cowles, 4 Call 477.....
Bissell v. Mich. E. & N. Ind. R. R. Co., 22 New York 258.....	362	..... 540
Black v. Shreve, 2 Beasl. 455.....	811	Brown v. Davies, 3 T. R. 80.....
Black & al. v. Zacharie & Co., 3 How. U. S. 483.....	351	Brown v. DeWinton, 6 C. B. 336, 60 Eng. C. L.....
Blades v. Arundale, 1 Mau. & Sel. 711...	27	..... 881
Blair v. Williams, 4 Litt. 34.....	288	Brown v. Ferguson, 4 Leigh 37.....
..... 252, 253, 258, 281, 282, 288		..... 301
Blow v. Maynard, &c., 2 Leigh 20.....	745	Brown v. Quilter, Amb. 621.....
Blunt and Ladd, 4 Mass. 402.....	19	..... 165
Boehm v. Sterling, 7 T. R. 423.....	780, 781	Brown v. Wiley & al., 20 How. U. S. 442. 210
Boggs and Bennett, 1 Bald. 74.....	247	Bruce v. Schuyler, 8 Smeedes & Marsh. 9. 262
Bogle & als. v. Vowles, 1 Call 244... 448, 451		Bruce and Taylor, Gilim. 88.....
Boisseau and May, 8 Leigh 164.....	775	..... 885, 887, 888, 893, 895
Boston and Thayer, 19 Pick. 511.....	346	Brumred v. Del Hoy, 1 Spence 328.....
Boston Water Power Co. and Sewal, 4 Allen 277.....	359	Bryan v. Hyre, 1 Rob. 94.....
Bostwick and People, 32 New York 445.....	807, 811	Buchanan v. Clark, 10 Gratt. 154.....
Boswell v. Jones, 1 Wash. 322.....	978	..... 32
Bourne v. Hatcher, 11 B. Monr. 23.....	224	Buck and Lamphear, 5 Amer. Law Reg. N. S. 224.....
Bowden v. Laing, 14 Sim. 113.....	546	..... 537
Bower v. Swadlin, 1 Atk. 294.....	24	Bugbee and Howard, 24 How. U. S. 461..
Bowker v. Burdekin, 11 Mees. & Welsb. 127	805, 808, 809	..... 251, 298
Boycot and Manley, 2 Eil. & Bl. 46, 75 Eng. C. L.....	207	Bullitt's ex'ors v. Winston, 1 Munf. 269.
Boyd and Steele, 6 Leigh 541.....	26, 31, 49	..... 18, 22, 26, 49, 51
Boyle and Greenhow, 7 Blackf. 56.....	899	Bull v. Vardy, 1 Ves. Jr. 271.....
Brachan v. Griffin, 3 Call 375.....	718	..... 547
Brackett v. Barney, 28 New York 303....	808	Bumgardner v. Circuit Court of Howard
Bradford and Rathbone, 2 Alab. 401.....	262	county, 4 Miss. 50.....
Bradley and Parker, 2 Hill N. Y. 584....	808	..... 268
Brainerd and City of New London, 22 Conn. 552.....	520	Bunell v. Bunell, Amb. 660.....
Branch and Kevan & als., 1 Gratt. 274...	395, 396, 398, 403	..... 563
Branson and Harvey, 1 Leigh 108.....	67	Burch and Enders' ex'ors, 15 Gratt. 64... 24
		Burdikin v. Bowker, 11 Mees. & Welsb. 127.....
		..... 805, 808, 809
		Burk and Green, 23 Wend. 496.....
		..... 22, 46
		Burrill v. Baskerfield, 11 Beav. 534.....
		..... 533
		Burroughs v. Payton, 16 Gratt. 470.....
		..... 114
		Bushnell v. Parsons, Pre. ch. 218.....
		..... 563
		Butcher v. Carlile, 12 Gratt. 520.. 488, 439, 471
		Butchers & Drivers' Bank and Farmers
		& Mech. Bank, 16 New York 125.....
		..... 363
		Butler v. Palmer, 1 Hill N. Y. 324.. 246, 252
		Buxton v. Horne, 1 Show 174.....
		..... 19
		Byrnes and Crowell, 4 John. 287.....
		..... 242
		Califf and Hawthorn, 2 Wall. U. S. 16... 288
		Callaway v. Alexander, 8 Leigh 114.....
		..... 375, 381, 384
		Calvert v. Godfrey, 6 Beav. 97.....
		..... 663
		Caperton's ex'ors & als. and Lewis & als., 8 Gratt. 148.....
		..... 398
		Carcemi v. The People, 18 New York 129. 977
		Carew and State, 13 Rich. 498.....
		..... 288
		Carlile and Butcher, 12 Gratt. 520... 438, 471
		Carr's adm'r v. Glascock's adm'r, 3 Gratt. 343.....
		..... 27, 32
		Carryl and Taylor & als., 20 How. U. S. 583.....
		..... 959
		Carter and Jones, 15 Mees. & Welsb. 718. 8

Carter and Smith, 3 Rand. 167.....	639	Coe and Goode, cited in Boehm v. Sterling, 7 T. R. 423.....	780
Cartwright v. Gardner, 5 Cush. 273.....	8	Colby v. Dennis, 36 Maine 9.....	262
Casamajor and Brown, 4 Ves. 598.....	562	Cole and Emolt, Dyer 212.....	161
Catakill Bank v. Messenger, 9 Cow. 37....	24	Cole and Lightfoot, 1 Wisc. 26.....	262
C. C. & C. R. Co. and Zabriskie, 23 How. U. S. 381.....	361	Collins v. Godefroy, 1 Barn. & Ad. 950..	23
Central Savings Bank and Mills, 16 Gratt. 94.....	31	Colton and Bigelow, 13 Gray 309.....	211
Chadwick v. Moore, 8 Watts & Serg. 49.....	249, 250, 258,	Colt & als. and Stockholders Cochituate Bank, 1 Gray 382.....	516
Chaffin and Pope, Amer. Law Reg. April, 1868, 578.....	284	Com. Bank v. Chambers, 8 Smeedes & Marsh. 9.....	262
Chambers and Com. Bank, 8 Smeedes & Marsh. 9.....	262	Commercial Bank v. Hughes, 17 Wend. 94.....	512
Chambers v. George, 5 Litt. 335.....	440	Commissioners Knox County v. Aspinwall, 21 How. U. S. 539.....	356, 358, 767
Chandler v. Temple, 4 Cush. 285.....	808	Commissioners of Miami County and Moran, 2 Black U. S. 722.....	754
Chapman and Newman, 2 Rand. 93....	66, 82	Commonwealth v. Beaumarchais, 3 Call 122.....	448, 705
Chapron & al. and Chenault, 5 Missouri 468.....	864	Commonwealth v. Conner, 2 Va. Cas. 30. 920	
Chapron and Newkirk, 17 Illinois 344....	249, 262	Commonwealth and Davis, 16 Gratt. 134. 377	
Cheaney v. Hooser, 9 B. Monr. 330.....	622	Commonwealth and Fox's adm'r, 16 Gratt. 1.....	860
Cheetham and Leeds, 2 Cond. Eng. ch. 74.....	169	Commonwealth v. Fuller, 8 Metc. 313....	953
Cheetham v. Ward, 1 Bos. & Pul. 630....	24	Commonwealth and Hampton, 7 Harr. Pa. 329.....	246, 252
Chenault v. Chapman & al., 5 Missouri 438.....	864	Commonwealth v. Hickman, 2 Va. Cas. 323.....	920
Chesson and Phelps, 12 Ired. Law 194....	8	Commonwealth and Martin, 1 Mass. 347..	28
Chesterfield v. Janssen, 2 Ves. 147....	885, 886	Commonwealth and Million, 1 B. Monr. 310.....	224
Child and Wood, 20 Illinois 209.....	249, 262	Commonwealth and Newell, 2 Wash. 88..	920
Chinn v. Murray, 4 Gratt. 348.....	80	Commonwealth v. Peas, 2 Gratt. 629.....	925
Chowning v. Cox & als., 1 Rand. 306....	401	Commonwealth of Pa. and Prigg, 16 Pet. U. S. 539.....	939
Chowning v. Taylor's adm'r, 3 Leigh 654.	401	Commonwealth and Trimble, 2 Va. Cas. 122.....	930
Circuit Court of Howard county and Bumgardner, 4 Miss. 50.....	258	Conkey v. Hart, 14 New York 22.....	252, 258, 262
City Bank of New York v. Merritt, 1 Green 131.....	866	Conner v. Commonwealth, 2 Va. Cas. 30. 920	
City of Bridgeport and Rose, 17 Conn. 243.	772	Conococheague Bank and Rees, 5 Rand. 326.....	898
City of Buffalo and Howell, &c., 15 New York 519.....	520	Conrad v. Ithaca, 16 New York 158.....	346
City of Dayton v. Place, 4 Ohio N. S. 380.	346	Cooke and Freeman, 2 Exch. 663.....	361
City of Detroit and Hollingsworth, 3 McLean 472.....	776	Cooper v. Hepburn, &c., 15 Gratt. 551.....	671, 698
City of Dubuque and Gelpcke & als., 1 Wall. U. S. 175.....	754, 766, 776	Cooper and Monk, 2 Str. 763, 2 Ld. Ray. 1477.....	165
City of Jeffersonville and Bissell, 24 How. U. S. 287.....	361	Coosa River Steam Co. v. Barclay, 3 Alab. 120.....	249, 262
City of Lafayette v. Cox, 5 Ind. 38.....	520	Corbett and Donnelly, 3 Seld. 500....	262
City of Muscatine and Meyer, 1 Wall. U. S. 384.....	766	Corbin v. Emerson, 10 Leigh 663.....	82
City of New London v. Brainerd, 22 Conn. 552.....	520	Corcoran and Judson, 17 How. U. S. 612.	65
City of New Orleans and Bank of Louisiana, 5 Amer. Law Reg. N. S. 555.....	783	Corporation of Washington and Weightman, 1 Black U. S. 39.....	346
City of Richmond v. Daniel, 14 Gratt. 388.	520	Corse and Sawyer, 17 Gratt. 230....	346
City of Syracuse and Kinney, 30 Barb. 349.....	590, 595, 599,	County Commissioners and Williams, 35 Maine 345....	243, 252
Clarence and Crutchley, 2 Mau. & Sel. 90.....	881, 889, 895,	County Levy, 5 Call 139.....	602
Clark and Buchanan, 10 Gratt. 154.....	31	County of Washington and McCoy, 7 Amer. Law Reg. 143.....	772
Clark v. Clement, 6 T. R. 525.....	24	Cousins and Kingley, 47 Maine 91.....	262
Clark v. Jones, 1 Denio 510.....	8	Coverly and Prescott, 7 Gray 217.....	211
Clark v. Long, 4 Rand. 451.....	82, 84	Cowing and Nelson, 6 Hill 336.....	905
Clark v. Mayor, &c., of Washington, 12 Wheat. 40.....	346	Cowles v. Brown, 4 Call 477.....	549
Clarke v. White, 12 Pet. U. S. 178.....	77	Cowles and Harvey, 6 Gratt. 393.....	191
Clement and Clark, 6 T. R. 525.....	24	Cowles v. Townsend, 31 Alab. 133.....	206
Clore's case, 8 Gratt. 606.....	974	Cowman v. Harrison, 17 Eng. L. & E. 290.....	547
Coates and Hirsh, 86 Eng. C. L. 757.....	229	Cox v. Bassett, 3 Ves. 155.....	547
Coburn and Brigham & als., 10 Gray 329.	636	Cox and Chowning, 1 Rand. 306.....	407
Cocke and Moseley, 7 Leigh 224.....	81	Cox and City of Lafayette, 5 Ind. 38....	520



Good v. Coe, cited in Boehm v. Sterling, 7 T. R. 423	780	Harrison v. Harrison's ex'or, 2 Gratt. 16	557, 566
Goode and Hicks, 12 Leigh 479.....	807, 808	Harrison's Justices v. Holland, 3 Gratt. 247.....	604
Goold and Morse & als., 1 Kent. 281.....	285	Harrison v. Lane, 5 Leigh 514.....	32
Gorton and Izon, 5 Bing. 501, 35 Eng. C. L. 198.....	165	Harrison v. Middleton, 11 Gratt. 548....	6
Goshen v. Stonington, 4 Conn. 209.....	246	Harrison v. Murrell, 5 Monr. 359... 156,	173
Goupy & al. v. Harden & als., 7 Taunt. 159, 2 Eng. C. L. 58.....	204	Harrison v. Sterry, 5 Cranch 289.....	404
Governor v. Kellett, 11 Georg. 286.....	810	Harrington and Williams, 11 Ired. 616... 663	
Graham and Eckhols, 1 Call 492.....	39	Hart and Conkey, 14 New York 22	252, 258, 264
Graham and Hoane, 3 Camp. 57.....	206	Hart and Rex, 1 Mood. C. C. 486.....	902
Graham & al. and Maddox, 2 Metc. Ky. 56.....	772	Hart v. Windsor, 13 Mees. & Welsb. 68. 174	
Graham and Pierpoint, 4 Wash. C. C. 232.	404	Harvey v. Branson, 1 Leigh 108.....	67
Graves v. Dolphin, 1 Sim. 66	547	Harvey v. McLaughlin, 1 Price 264.....	533
Gray v. Monroe, 1 McLean 528.....	266	Harvey and Preston, 2 Hen. & Mun. 55. 242	
Grayson v. Lilly, 7 B. Monr. 6... ..252,	253	Harvey v. Skipwith, 16 Gratt. 410.....	191
Green v. Biddle, 8 Wheat. 1.....	274	Hatcher and Bourne, 11 B. Monr. 23.....	224
..... 252, 253, 254,	274	Hatch v. Searles, 31 Eng. L. & E. 219... 903	
Green v. Burke, 23 Wend. 496.....	22, 46	Hatz's ex'ors and Krampf's ex'x, 52 Penn. 525.....	770
Green and Evans, trustee, 15 Gratt. 153..	228	Haven and Griswold, 25 New York 596. 363	
Green and Gates, 4 Paige 355.....	169	Hawes and Starkweather, 10 Wisc. 125. 250	
Greenhow v. Boyle, 7 Blackf. 56.....	899	Hawes and Eastern Counties R. Co., 35 Eng. L. & E. 8.....	362
Green v. Spicer, 1 Rus. & Myl. 395.....	547	Hawkins and Free, 8 Taunt. 92, 4 Eng. C. L. 31.....	206
Green v. Watts, 1 Ld. Ray. 274	242	Hawkins v. Gatherlecole, 31 Eng. L. & E. 305.....	860
Gregory and Packham, 4 Hare 396.....	529	Hawksland v. Gatchel, Cro. Eliz. 835... 806	
Gregory and Pelham, 1 Eden 520.....	685	Hawthorne v. Califf, 2 Wall. U. S. 10. 288	
Griffin and Brachan, 3 Call 375.....	718	Hayward and McCracken, 2 How. U. S. 61.....	251, 285, 287, 289
Grimball v. Ross, Charl. 175.....	250, 263	Heath v. Van Cott, 9 Wisc. 316.....	213
Grim v. School Directors, &c., 51 Penn. 219.....	808	Heaverin v. Donnell, 7 Smeedes & Marsh. 244.....	213
Griswold v. Haven, 25 New York 596....	363	Heffernan's adm'r v. Grymes, 2 Leigh 512	67
Groves and Hare, 3 Anstr. 693.....	166	Heiskell and Jackson, 1 Leigh 257.....	226
Grymes and Heffernan's adm'r, 2 Leigh 512	67	Henderson v. McPike, 35 Missouri 225... 433	
Guerrant v. Tinder, Gilm. 36.....	978	Hendrick's case, 5 Leigh 707.....	939, 953, 957, 967
Gundry v. Pinniger, 14 Beav. 94, 9 Eng. L. & E. 148.....	535	Henley and Mantz, 2 Hen. & Mun. 308... 862, 863	
Hacket and Mercer County, 1 Wall. U. S. 83.....	754, 766	Henry and Erskine, 9 Leigh 188.....	67
Haggin v. Kilby, 3 J. J. Marsh. 208	224	Hepburn, &c., and Cooper, 15 Gratt. 551	663, 698
Haile and Mason, 12 Wheat. 370.....	262	Hepburn and Dubois, 16 Pet. U. S. 1.... 114	
Halbert, &c., and Rae, 17 Illinois 572 ..	728	Hewett v. Hewett, 2 Eden's ch. 332.....	681
Haley and Cuthbert, 8 T. R. 390... ..912		Heydon's case, 3 Rep. 7	860, 862
Haley v. Williams, 1 Leigh 140.....	745	Heyward v. Judd, 4 Minnes. 483.... 250, 263	
Halling and Down, 4 Barn. & Cres. 330, 10 Eng. C. L. 347.....	782	Hickman and Commonwealth, 2 Va. Cas. 323.....	920
Hamlett v. Hamlett's ex'or, 12 Leigh 350.	578	Hicks v. Goode, 12 Leigh 479.....	807, 808
Hammond v. Neame, 1 Swanst. 35... 562,	563	Hightower and Ivy, 2 Port. 308.....	213
Hampton v. Commonwealth, 7 Harr. Pa. 329.....	246, 252	Hill and Alcock, 4 Leigh 622.....	27, 43
Hancock and Gay, 1 Rand. 72.....	662	Hill v. Ely, 5 Serg. & Raw. 363.....	205
Hancock and Nicholas, 4 Hen. & Mun. 491	727	Hill & als. and Marks & als., 15 Gratt. 400.....	400
Hand and Mede, 5 Amer. Law Reg. 82... 288		Hirsh v. Coates, 86 Eng. C. L. 757.....	229
Haney v. Sharp, 1 Dana 442.....	946	Hill & als. v. Sutherland's ex'or, 1 Wash. 133.....	450
Hansford v. Elliott, 9 Leigh 79.....	529, 539	Hitt and Humphrey, 6 Gratt. 509.....	27, 33, 43, 224, 225
Harden & als. and Goupy & al., 7 Taunt. 159, 2 Eng. C. L. 58.....	204	Hoane v. Graham, 3 Camp. 57.....	206
Hardesty and Wilson, 1 Maryl. ch. 66....	262	Hoboken Land Co. and Murray's lessee. 18 How. U. S. 272.....	134, 141
Harding and Prince of Wales Co., 96 Eng. C. L. 183.....	356	Hoffman v. Bechtel, 52 Penn. 190.....	770
Hare v. Groves, 6 Anst. 693.....	166	Holcombe and Moore's ex'or, 3 Leigh 597.....	65
Harger v. McCulloch, 2 Denio 119.....	303		
Harlan and State, 2 Doug. Mich. 207....	953		
Harris, ex parte, 8 Eng. L. & E. 537....	547		
Harris and Tabb, 4 Bibb. 29.....	224		
Harris and Tucker, 13 Georg. 1.....	246, 262		
Harrison and Cowman, 17 Eng. L. & E. 290.....	547		

Holgate and Martin, 1 Law Rep. H. L. 175, 44 Law Jour. 782.....	531, 537	Jackson v. Heiskell, 1 Leigh 257.....	226
Holland and Harrison, Justices, 3 Gratt. 247.....	604	Jackson v. Rose, 2 Va. Cas. 34. 938, 946, 965	
Hollingsworth v. City of Detroit, 3 McLean 472.....	776	Jameson's adm'r v. Dashields, 3 Gratt. 4. 82	
Holloway v. Sherman, 12 Iowa 282.....	249, 252, 263	Jane and Paradine, Allyn 27... 165, 171, 176	
Holman and Watkins, 11 B. Monr. 96....	646	Janesen and Fleetwood, 2 Atk. 467.....	424
Holmes v. Tutton, 88 Eng. C. L. 65.....	229	Janssen and Chesterfield, 2 Ves. 147.....	880
Holt and Moore, 10 Gratt. 284.. 208, 220, 221		Jaquish and Allen, 21 Wend. 628.	11
Holtzaffel and Baker, 4 Taunt. 45.....	165	Jarrett and Crawford, 2 Leigh 630.....	207
Home and Buxton, 1 Show. 174.....	18	Jebb and Johnson, 3 Burr. 1772.....	242
Hoomes and Dickinson, 1 Gratt. 302.....	531, 532	Jett and Humphrey's adm'rs, 4 Rand. 104. 30	
Hooper and Woodfin, 4 Humph. 173.....	262	Jewett ex-parte, 16 Alab. 409.....	663, 664
Hooser and Cheaney, 9 B. Monr. 330.....	622	Johnes and Lloyd, 9 Ves. 37.....	685
Hopson and The People, 1 Denio 574....	46	Johnson v. Jebb, 3 Burr. 1772.....	242
Hort and Giffard, 1 Sch. & Lef. 386.....	80, 686, 690	Johnson and Polling, 2 Rob. 285.	242
Houghton v. Kendall, 7 Allen 72.....	530	Jolly and Foster, 1 Crompt. Mees. & Ros. 703	206
Houston v. Moore, 5 Wheat. 1.....	939, 950, 952, 961	Jones and Boswell, 1 Wash. 322.....	978
Howard and Bugbee, 24 How. U. S. 471.....	251, 288	Jones v. Carter, 15 Mees. & Welsh. 818..	8
Howell, &c., v. City of Buffalo, 15 New York 519.....	520	Jones and Clark, 1 Denio 516.....	8
Howell v. Cowles, 6 Gratt. 393.....	191	Jones v. Crittenden, 1 Car. Law Rep. 385. 288	
Howe & al. and Freeman, 24 How. U. S. 450.....	959	Jones and Pugh's ex'ors, 6 Leigh 299....	74
Howe v. Merrill, 5 Cush. 80.....	211	Jones and Simpson, 2 Russ. & Myl. 365. 663	
Howe v. Van Duzer, 21 New York 531..	903	Jones v. Smith, 1 Hare 55, 1 Phil. 244.....	347
Howes v. Baker, 3 John. 506.....	197	Jones v. Torrin, 6 Sim. 255.....	532
Howland and Platt, 10 Leigh 507... 67,	71	Jones and Turner, 1 Hurl. & Nor. 878....	228
Hubbell's adm'r and Rockwood, 2 Dough. Mich. 197.....	250	Judd and Heyward, 4 Minnes. 483....	250, 263
Hudson v. Revett, 5 Bing. 368, 15 Eng. C. L. 467.....	806	Judson v. Corcoran, 17 How. U. S. 612... 65	
Huger v. Huger, 3 Dess. 18.....	663	Julian and O'Grady, 34 Alab. 88.....	856
Hughes and Commercial Bank, 17 Wend. 94.....	512	Kates' Case, 17 Gratt. 561.....	977
Hughes and Smith, 24 Illinois 270.....	22	Keeling and Wilson & McRae, 1 Wash. 194	465
Hughes v. Stickney, 13 Wend. 280.....	242	Keene v. Beard, 98 Eng. C. L. 371.....	759
Hulme v. Turner, 4 Esp. N. P. Cas. 11..	912	Kellet and Governor, 11 Georg. 286	810
Humphrey v. Dale, 7 El. & Bl. 266, 90 Eng. C. L.....	208	Kelley v. Lank, &c., 7 B. Monr. 220.....	737
Humphrey v. Hitt, 6 Gratt. 509.....	27, 33, 43, 224, 225	Kemper v. Kemper, 3 Rand. 8.....	424
Hunter's adm'r v. Jett, 4 Rand. 104.....	30	Kemp v. Squire, 1 Ves. Sr. 205.....	375
Hunter's lessee and Martin, 1 Wheat. 304.	961	Kendall and Houghton, 7 Allen 72.....	430
Hunter's ex'or v. Noble, 4 J. J. Marsh. 130.....	440	Kerr & als. and Quarles & als., 14 Gratt. 48.....	396
Hunt v. Rousmanier, 8 Wheat. 174.....	24	Ketcham and Thompson, 8 John. 190....	212
Hunt and Stocking, 3 Denio 274.....	246, 262	Kevan v. Branch, 1 Gratt. 274.....	395, 396, 398, 403
Hyre and Bryan, 1 Rob. 94.....	647	Key v. Knott & wife, 9 Gill. & John. 342. 781	
Inhabitants of Plymouth and Taylor, &c., 8 Metc. 462.....	519	Kilby v. Haggin, 3 J. J. Marsh. 208.....	224
In re Blakely & Co., 3 Law Rep. ch. Ap. 154.....	769	Kingly v. Cousins, 47 Maine 91.....	262
In re Brown, 2 Story 502.....	773, 774	King and Mann, 6 Munf. 428.....	363
Irwin v. Bank United States, 1 Barr. 349. 835		King v. Mawbray, 6 T. T. R. 619....	977, 980
Isaac and Meyer, 6 Mees. & Welsh. 605..	721	Kinney v. Beverly, 2 Hen. & Mun. 518..	138
Ithaca and Conrad, 16 New York 158....	346	Kinney v. City of Syracuse, 30 Barb. 349	590, 595, 599
Iverson v. Shorter, 9 Alab. 713.....	249, 263	Kinzie and Bronson, 1 How. U. S. 311... ..	247, 248, 249, 250, 251, 257, 258, 286, 289
Ives v. Farmers' Bank, 2 Allen 236. 896, 898		Kirby, adm'r, &c., and Martin, adm'r, &c., 11 Gratt. 67.....	529, 532, 534
Ivy and Hightower, 2 Port. 308.....	213	Kirkpatrick and United States, 9 Wheat. 735.....	28
Izon v. Gorton, 5 Bing. 501, 35 Eng. C. L. 198.....	165	Knight's case, 2 Lord Ray. 1044, 1 Salk. 329....	242
Jackson v. Cornell, 1 Sanf. ch. 348.....	415	Knoop and State Bank of Ohio, 16 How. U. S. 369.....	115
Jackson and Doe, 1 Barn. & Crea. 448, 8 Eng. C. L. 126.....	505	Knott & wife and Key, 9 Gill. & John. 342.....	781
Jackson and Foster, Hobart 52a, 59a....	23	Krampt's ex'x v. Hatz's ex'ors, 52 Penn. 525.....	770
		Lackland's heirs v. Downing's ex'ors, 11 B. Monr. 32.....	57
		Lacky and Fisher, 6 Blackf. 373.....	262
		Ladd v. Blunt, 4 Mass. 402.....	19
		La Farge v. Rickert, 5 Wend. 187.....	212
		Laing and Bowden, 14 Sim. 113.....	549
		Laird and Union Bank, 2 Wheat. 390....	351
		Lambert v. Nanny, 2 Munf. 196.....	66

Lamphear v. Buck, 5 Amer. Law Reg. N. S. 224.....	537	Lynch and Gilliatt, 2 Leigh 535.....	163
Lane and Harrison, 5 Leigh 514.....	32	Maclean v. Dunn, 4 Bing. 722, 15 Eng. C. L. 129.....	791
Lane v. Titball, Gilm. 130.....	662	Maddox v. Graham & al., 2 Metc. Ky. 56.....	772
Langstaffe and Russell, Doug. 514.....	896	Malivever v. Spike, 1 Dyer 36b.....	519
Langstaff and Stapleton, 3 Dess. 22.....	663	Manley v. Boycot, 2 El. & Bl. 46, 75 Eng. C. L.....	207
Lank, &c., and Kelley, 7 B. Monr. 220.....	737	Mann and Crutchly, 5 Taunt. 519... 881, 889	
Lansing and Beeckman, 3 Wend. 446....	27	Mann v. King, 6 Munf. 428.....	363
Lapsley v. Brashear, 4 Litt. 34.....	275, 281, 282, 288	Manns v. Flinn's adm'r, 10 Leigh 93....	745
Lardner and Murray, 2 Wall. U. S. 110		Mantz v. Henley, 2 Hen. & Mun. 308. .862, 863	
Larne and Shepherd, 6 Munf. 196.....	66	Marchant and United States, 2 Va. Cas. 475.....	986
Lathrop and United States, 17 John. 4..	946, 947	Marigold and United States, 9 How. U. S. 560.....	942, 943, 946, 954, 956
Lawrence and American Print Works, 3 Zab. 603.....	520	Marine Bank v. Fulton Bank, 2 Wall. U. S. 252.....	512
Lawrence County and Woods, 1 Black. 386.....	765, 772	Marks & als. v. Hill & als., 15 Gratt. 400. 400	
Lawrence's ex'or and Michie, 5 Rand. 571.....	157, 178	Marquis of Camden and Walker, 16 Sim. 329.....	535
Lawson and Cumberlege, 1 Com. Bench N. S. 709, 87 Eng. C. L.....	808	Marsh v. Martindale, 3 Bos. & Pul. 153..	886
Law's ex'ors v. Sutherland & als., 5 Gratt. 357.....	913	Marshall and Overstreet, 3 Call 192... 69, 74	
Leake v. Ferguson, 2 Gratt. 419.....	28	Marsteller and Few, 2 Cranch 10.....	450
Lea's ex'or v. Eidson, 9 Gratt. 277.....	77	Martin v. Commonwealth, 1 Mass. 347... 28	
Lee County and Thomson, 3 Wall. U. S. 327.....	754, 766, 772	Martindale and Marsh, 3 Bos. & Pul. 153. 886	
Leeds v. Cheatham, 1 Sim. 146, 2 Eng. Ch. 74.....	169	Martin and Doe, 4 T. R. 39, 65.....	547
Levisay, &c., and Steele, 11 Gratt. 454... 550		Martin v. Holgate, 1 Law Rep. H. L. 175, 24 Law Jour. Eq. 789.....	531, 537
Levy v. Bank U. S., 1 Binn. 27.....	359	Martin v. Hunter's lessee, 1 Wheat. 304. 961	
Lewellin and Ayres, 3 Leigh 609.....	242	Martin, adm'r, &c., v. Kirby, adm'r, &c., 11 Gratt. 67.....	529, 532, 534
Lewis & als. v. Caperton's ex'or & als., 8 Gratt. 148.....	398	Mason v. Fearson, 9 How. U. S. 248.....	836
Lewis and Tassell & Lee, 1 Ld. Ray. 743. 761		Mason v. Haile, 12 Wheat. 370.....	262
Lightfoot v. Cole, 1 Wisc. 26.....	262	Mason v. Moyers, 2 Rob. 606.... 155, 156, 170	
Lilly and Grayson, 7 B. Monr. 6.... 252, 253		Massey Thomas' case, 2 Va. Cas. 479....	986
Lipscomb's adm'r v. Davis' adm'r, 4 Leigh 326.....	734	Matter of Salsbury, 3 John. ch. 347.....	663
Littell and Wallis, 11 Com. Bench 369, 103 Eng. C. L.....	207	Mattison v. Missouri, 3 Missouri 421. .946, 953	
Lively and Anderson, 6 Leigh 77.....	70, 75	Mawbry and The King, 6 T. R. 619.....	977, 980, 982
Livingston and The People, 6 Wend. 527. 246		May v. Boisseau, 8 Leigh 164.....	775
Lloyd v. Johns, 9 Ves. 37.....	685	May v. Proby, 3 Bulst. 200.....	20
Lloyd v. Wyckoff, 6 Halst. 218.....	27	May & als. and Whitely, McConkey & Co., 1 Liv. Law Mag. N. S. 442.....	415
Locke v. Postmaster General, 3 Mason 446.....	28	Maynard and Blow, 2 Leigh 29.....	745
Lockhart v. Lockhart, 3 Jones Eq. 205 .. 579		Mayo v. Murchie, 3 Munf. 358.....	66
London, Chatham & Dover R. R. Co. v. Gardiner, 2 Law Rep. ch. Ap. 201.....	828	Mayor and Aldermen of Charleston and Warren & als., 2 Gray 81.....	601
Long and Bartlett, 2 Alab. 401.....	262	Mayor and Ald. of New York and State of New York, 3 Duer. 120.....	520
Long's adm'r and City of Richmond, 17 Gratt. 375.....	344	Mayor, &c., and Bateman, 3 Hurl. & Nor. 323.....	362
Long and Clark, 4 Rand. 451.....	82, 84	Mayor, &c., of New York and Bailey, 3 Hill 531.....	346
Longmore v. Elcum, 2 Young & Col. N. R. 363.....	547	Mayor, &c., of New York v. Lord, 12 Wend. 289, 18 Id. 126.....	519
Lord Egmont and Ware, 31 Eng. L. & E. 89.....	347	Mayor, &c., of New York and Stone, &c., 25 Wend. 157.....	519
Lord Ingestre and Bell, 12 Queen's Bench 317, 64 Eng. C. L.....	20	Mayor, &c., of Washington and Clark, 12 Wheat. 40.....	346
Lord and Mayor, &c., of New York, 17 Wend. 280, 18 Id. 126.....	519	McBride and State, 1 Rice S. C. 400.....	946
Lorillard and Baker, 4 Comst. 257.....	663	McCaul's case, 1 Va. Cas. 271.....	972, 973
Lovett v. Adams, 3 Wend. 386.....	811	McClung v. Beirne, 10 Leigh 394.....	745
Loving and Garland, &c., 1 Rand. 396.....	669, 671, 696, 698, 700	McCord v. Ford, 3 Monr. 166.....	440
Loyd and Foreman, 2 Leigh 284.....	226	McCormick v. Rousck, 3 Amer. Law Reg. N. S. 93.....	288
Loyal Company and French, 5 Leigh 627. 347		McCoy v. County of Washington, 7 Amer. Law Reg. 193.....	772
Lucas and Towner, 13 Gratt. 705. .197, 204, 205		McCracken v. Hayward, 1 How. U. S. 61.....	251, 265, 267, 269
Lynch and Garland, 1 Rob. 548.....	27	McCulloch v. State of Maryland, 4 Wheat. 316.....	146
		McCullough v. Harger, 2 Denio 119....	303

McCullough & als. v. Somerville, 8 Leigh 415.....	403, 404, 405, 407, 408, 409, 412, 414, 415, 417, 419, 420, 421, 422
McDowell's ex'or v. Crawford, 11 Gratt. 377.....	800
McEachon v. Randles, 34 Barb. 301.....	794
McFarland and Galbraith, 3 Cald. 267....	644
McGahey and Alston, 2 Mees. & Welsb. 206.....	637
McKenney's ex'or v. Waller, 1 Leigh 434.....	27, 43
McKey v. Garth, 2 Rob. 33.....	29
McLaughlin and Harvey, 1 Price 264.....	533
McLaurin v. Salmon, 11 B. Monr. 96.....	646
McMahon v. Fawcett, 2 Rand. 514.....	31
McMahon v. Tyson, 23 Georg. 43.....	728
McMasters v. McMasters' ex'ors, 10 Gratt. 275 ..	578
McMillan and Fireman's Ins. Co., 29 Alab. 147.....	706, 709
McNew v. Smith, 5 Gratt. 84.....	745
McPike and Henderson, 35 Missouri 225.	433
Mebin and Fitchburg Cotton Manufac. Co., 15 Mass. 268.....	161
Mechanics' Bank v. New York & New Haven R. R. Co., 3 Kern. 599.....	363
Mede v. Hand, 5 Amer. Law Reg. 82.....	288
Mee and Badham, 1 Rus. & Myl. 631....	547
Mehelin v. Barnet, Cox 86.....	205
Mendum's case, 6 Rand. 704.....	976
Mercer county v. Hacket, 1 Wall. U. S. 83.....	754, 765
Mercer and Dike, 2 Show. 394.....	27
Merrick's trusts in re, 1 Law Rep. Eq. 552.....	531, 537
Merrill and Howe, 5 Cush. 80.....	211
Merritt v. City Bank of New York, 1 Green 131.....	866
Merritt v. Todd, 23 New York 20.....	782
Messenger and Catskill Bank, 9 Cow. 37.	24
Meyer v. City of Muscatine, 1 Wall. U. S. 83.....	766
Meyer v. Isaac, 6 Mees. & Welsb. 605....	721
Michie v. Lawrence's ex'or, 5 Rand. 571.....	157, 178
Mich. E. & N. Ind. R. R. Co. and Bis-sell, 22 New York 258.....	362
Middleton and Harrison, 11 Gratt. 548....	6
Mildmay v. Smith, 2 Wms. Saund. 344....	21
Miller v. Argyle's ex'or, 5 Leigh 460.....	662
Miller and Davis, 14 Gratt. 1.....	758, 779
Miller & Mayhew and Fant, 17 Gratt. 187.	196
Miller & Mayhew and Fant, 17 Gratt. 47.	903
Miller v. Miller, 1 Hodges 187.....	637
Miller, &c., and Ralston, &c., 3 Rand. 44.	661
Millett and Parker, 2 Metc. Ky. 608....	811, 812, 813, 814
Milligan ex parte, 4 Wall. U. S. 120.....	142
Million v. Commonwealth, 1 B. Mon. 310.	224
Mills v. Central Savings Bank, 16 Gratt. 94.....	31
Mills v. Town of Jefferson, 20 Wisc. 50....	776
Minet and Gibson, 1 H. Bl. 569.....	880, 898
Minne and Gedge, 2 Bulst. 61.....	519
Missouri and Mattison, 3 Missouri 421....	946, 953
Mitchell v. Barratta, &c., 17 Gratt. 465....	871
Mitchell and Brooks, 9 Mees. & Welsb. 15.	762
Monk v. Cooper, 2 Str. 763, 2 Ld. Ray. 1477.....	165
Monroe and Gray, 1 McLean 528.....	262
Montague v. Perkins, 22 Eng. L. & E. 516.....	903
Monteith and Exchange Bank, 26 New York 505.....	363
Moadaly v. East India Company, 1 Bro. C. C. 469.....	345
Moody and Cunningham, 1 Ves. 174.....	547
Moore's ex'or v. Aylett's ex'or, 1 Hen. & Mun. 29.....	401
Moore and Barry, 3 New Hamp. 132.....	213
Moore and Chadwick, 3 Watts & Serg. 49.....	249, 250, 258, 289
Moore and Crooks, 1 Sandf. Supr. Ct. 297.....	793
Moore v. Gould, 1 Kent. 281.....	285
Moore's ex'or v. Holcombe, 3 Leigh 597.	65
Moore v. Holt, 10 Gratt. 284.....	208, 220, 221
Moore and Houston, 5 Wheat. 1.....	939, 950, 952, 261
Moore v. People of Illinois, 14 How. U. S. 13.....	954, 967
Moore and Taylor, 2 Rand. 563.....	77
Moran v. Commissioners of Miami County, 2 Black. U. S. 722.....	754
Morris and Crawford, 5 Gratt. 90.....	242
Morris and Gaskell, 7 Watts & Serg. 22..	794
Morris' adm'r v. Morris' adm'r, 4 Gratt. 293.....	412, 421
Morton and Rice, 19 Missouri 263.....	25
Moseley v. Cocke, 7 Leigh 224.....	81
Moses Taylor, 4 Wall. U. S. 411.....	949, 961
Moas v. Norvell, 3 Munf. 170.....	278
Motter v. Ward, 2 Rob. 536.....	24
Mouse's case, 12 Rep. 63.....	519
Moyer and Mason, 2 Rob. 606..	155, 156, 170
Muire v. Falconer, 10 Gratt. 12.....	243
Murchie and Mayo, 3 Munf. 358.....	366
Murray's case, 2 Va. Cas. 504.....	974
Murray and Chinn, 4 Gratt. 348.....	80
Murray v. Earl of Stair, 2 Barn. & Cres. 82, 9 Eng. C. L. 33.....	805
Murray's lessee v. Hoboken Land, &c., Company, 18 How. U. S. 272.....	134, 141
Murray v. Lardner, 2 Wall. U. S. 110.	766, 779
Murray, &c., v. Pennington, 3 Gratt. 91.	727
Murrill and Harrison, 5 Monr. 359..	156, 173
Murrill & al. v. Neill & al., 8 How. U. S. 414.....	421
Mussey v. Beecher, 3 Cush. 511.....	363
Nanny and Lambert, 2 Munf. 196.....	66
Nash v. Towne, 5 Wall. U. S. 689.....	207
National Bank and Pollock, 3 Seld. 274..	359
Neame and Hammond, 1 Swanst. 35..	562, 563
Neil & al. and Murrill & al., 8 How. U. S. 414.....	421
Nelson and Baugher, 9 Gill. 299....	246, 262
Nelson v. Cowing, 6 Hill 336.....	905
Newberry and Bronson, 2 Doug. Mich. 38.....	250, 262
Newcomb v. Drummond, 4 Leigh 57..	65, 639
Newell v. The Commonwealth, 2 Wash. 88	920
Newkirk v. Chapron, 17 Illinois 344.	249, 262
Newman v. Anderson, 2 New Rep. 224..	161
Newman v. Chapman, 2 Rand. 93....	66, 82
Newton v. Tibbats, 2 Engl. 190.....	250, 262
Newton v. Wilson, 3 Hen. & Mun. 470	134, 156, 158, 171
New York & New Haven R. R. Co. and Bridgeport Bank, 30 Conn. 231.....	359

18 GRATT.

CASES CITED.

- New York & New Haven R. R. Co. v. Schuyler & als., 34 New York 30..... 359, 362, 363
- Nicholas and Smith, 8 Leigh 330..... 719
- Nicholl and United States, 12 Wheat. 505. 28
- Nicholson v. Hancock, 4 Hen. & Mun. 491. 727
- Nicholson v. Revill, 4 Ad. & Ell. 675, 31 Eng. C. L. 166..... 24
- Noble and Huston's ex'or, 4 J. J. Marsh. 130..... 440
- Noble's adm'r and Robinson, 8 Pet. U. S. 181..... 441
- Norris v. Crumme, 2 Rand. 327..... 27, 33
- North Pa. R. R. Co. v. Adams, 54 Penn. 94..... 776
- North River Bank v. Aymar, 3 Hill N. Y. 262..... 353
- North v. Wakefield, 13 Queen's Bench 536, 66 Eng. C. L. 535..... 24
- Norvell and Moss, 3 Munf. 170..... 278
- Nutter, &c., v. Russell, &c., 3 Metc. 163..... 672, 673
- Ogden v. Saunders, 12 Wheat. 256..... 271, 272, 274, 280, 291
- O'Grady v. Julian, 34 Alab. 88..... 856
- Old Colony & Fall River R. R. Co. and Durfee, 5 Allen 230..... 299
- Olinger v. Shepherd, 12 Gratt. 462..... 6
- Opie and Brewer & ux., 1 Call 212..... 578
- Ostrander v. Walter, 2 Hill N. Y. 320.... 46
- Overman and Parker, 18 How. U. S. 137..... 836, 837
- Overstreet v. Marshall, 3 Call 192..... 69, 74
- Overton and Ross, 3 Call 268..... 157, 166
- Owen and Thorpe, 2 Hare 607... 548, 549, 561
- Owings v. Speed, 5 Wheat. 440..... 251
- Packham v. Gregory, 4 Hare 396..... 529
- Palmer and Butler, 1 Hill N. Y. 324.. 246, 252
- Palmer v. Edwards, 1 Doug. 187 note... 157
- Palmer and Smith, 7 Hare 225..... 529, 531, 534, 535
- Paradine v. Jane, Alleyn 27.... 165, 171, 176
- Parker v. Bradley, 2 Hill N. Y. 584..... 808
- Parker and Millett, 2 Metc. Ky. 608..... 811, 812, 813, 814
- Parker v. Overman, 18 How. U. S. 137..... 836, 837
- Parker and Sheboygan County, 3 Wall U. S. 93..... 755
- Park v. Thomas, 13 Smeedes & Marsh. 11..... 213
- Parsons and Bushnell, Prec. ch. 218.... 563
- Partington and Andrews, 2 Cox 227.. 562, 563
- Patterson and Crawford's ex'or, 11 Gratt. 364..... 80
- Patton and Bank of the United States, 5 How. Miss. 200..... 737
- Pattons and Tennant's heirs, 6 Leigh 196..... 67, 745
- Pawling v. United States, 4 Cranch 218..... 811, 812
- Payne v. Drew, 4 East 523..... 224, 225, 228
- Pearpoint v. Graham, 4 Wash. C. C. 232. 404
- Peas and Commonwealth, 2 Gratt. 629... 925
- Peckham and Willis, 1 Brod. & Bing. 515. 23
- Peck and State, 53 Maine 284..... 812
- Peck v. Tiffany, 2 Comst. 451..... 46, 47
- Pelham v. Gregory, 1 Eden 520..... 685
- Pendell and Thompson, 12 Leigh 591.... 169
- Pendleton and Ricketts, 14 Maryl. 320... 207
- Pennington and Murray, &c., 3 Gratt. 91. 727
- Penrose and Reed, 2 Grant Pa. 472.. 259, 262
- People v. Bostwick, 32 New York 445..... 807, 811
- People and Carcemi, 18 New York 129... 977
- People v. Hopson, 1 Denio 574..... 46
- People v. Livingston, 6 Wend. 527..... 246
- People of Illinois and Moore, 14 How. U. S. 13..... 954, 967
- People and Wynehamer, 13 New York 384..... 520
- Perkins and Montague, 22 Eng. L. & E. 516..... 903
- Peshine v. Shepperson, 17 Gratt. 472. 800, 816
- Pettibone and Freeborn, 5 Minnes. 277... 263
- Peyton and Abrahams, 15 Gratt. 470.... 114
- Peyton and Burroughs, 15 Gratt. 470.... 114
- Phelps v. Cheason, 12 Ired. Law 194.... 8
- Phillips and Davis & als., 7 Monr. 632... 440
- Phillips and Doe, 2 Bing. 13, 9 Eng. C. L. 296..... 11
- Phillips and Taylor, 2 Ves. 23..... 663
- Phippen v. Durham & als., 8 Gratt. 457..... 395, 396, 402, 410, 420
- Phoenix Bank and Downes, 6 Hill 297... 512
- Phoenix Bank and Fulton, 1 Hall 362.... 781
- Pickard v. Sears, 6 Ad. & Ell. 469, 33 Eng. C. L. 115..... 360
- Pierce v. Trigg, 10 Leigh 406..... 163
- Pike v. Street, 1 Mood. & Malk. 276, 22 Eng. C. L. 299..... 206
- Pilkinton and Wilson, 11 Jurist 537..... 531
- Pindar v. Barlow, 31 Verm. 529..... 905
- Pinninger and Gundry, 14 Beav., 9 Eng. L. & E. 148..... 535
- Pitman's case, 1 Brev. 32..... 938
- Pitman v. Breckenridge, 3 Gratt. 127... 242
- Place v. City of Dayton, 4 Ohio N. S. 80. 346
- Planters' Bank v. Sharp & als., 6 How. U. S. 301..... 275, 288
- Platt v. Howland, 10 Leigh 507..... 67, 71
- Pleasants v. Bibb, 1 Wash. 8..... 465
- Pluck v. Digges, 5 Bligh. N. S. 31..... 157
- Pole and Wookey, 6 Eng. C. L. 323.. 898, 900
- Poling v. Johnson, 2 Rob. 285..... 242
- Pollock v. National Bank, 3 Seld. 274... 359
- Polly, Woods & Co. and Baltimore & Ohio R. R. Co., 14 Gratt. 448..... 799, 816
- Pool v. Young, 7 Monr. 588..... 281
- Pope v. Chafin, Amer. Law Reg. April 1868, 578..... 644
- Porter and Watts & wife, 77 Eng. C. L. 743..... 229
- Postmaster General and Locke, 3 Mason 446..... 28
- Powell v. Waters, 8 Cow. 669..... 890
- Prentis and Baker, 6 Mass. 430..... 205
- Prescott Bank v. Coverly, 7 Gray 217... 211
- Preston v. Harvey, 2 Hen. & Mun. 55... 242
- Preston v. Preston & als., 4 Gratt. 88.... 32
- Price v. Fooks, 2 Beav. 430..... 547
- Price v. Strange, 6 Madd. 159..... 530
- Pride and Usher's heirs, 15 Gratt. 190... 76
- Prigg v. Commonwealth of Pa., 16 Pet. U. S. 539..... 939
- Prince of Wales Co. v. Harding, 96 Eng. C. L. 183..... 356
- Proby and May, 3 Bulst. 200..... 20
- Pugh's ex'ors v. Jones, 6 Leigh 299..... 74
- Pulliam v. Aler, 15 Gratt. 54.... 243, 849, 866
- Puryear v. Taylor, 12 Gratt. 401.... 227, 229
- Putnam v. Sullivan & al., 4 Mass. 45.... 903
- Quarles & als. v. Kerr & als., 14 Gratt. 48..... 396

Queen v. Gomperty & als., 9 Queen's Bench 824, 58 Eng. C. L.....	980	Sabin v. Bank of Woodstock, 21 Verm. 353.....	354
Quilter and Brown, Amb. 621.....	165	Sadler v. Whittington, not reported.....	288
Rae v. Halbert, &c., 17 Illinois 572.....	728	Salmons and McLawrin, 11 B. Monr. 96.....	646
Raikes v. Ward, 1 Hare 445.....	563	Sands, &c., v. Taylor, &c., 5 John. 395.....	742, 743
Ralston, &c., v. Miller, &c., 3 Rand. 44.....	661	Sapsford v. Fletcher, 4 T. R. 511.....	726
Randall and Rex, Russ. & Ry. C. C. 195.....	898	Saltpetre case, 12 Rep. 12.....	519
Randolph's adm'r v. Randolph, 3 Rand. 490.....	27	Saunders and Ogden, 12 Wheat. 256.....	271, 272, 274, 280, 291
Ranney and Taylor, 4 Hill N. Y. 329.....	46, 48	Sawyer v. Corse, 17 Gratt. 230.....	346
Rasnick's case, 2 Va. Cas. 356.....	938	Schenck and Supervisors, 5 Wall. U. S. 772.....	358, 767
Rathbone v. Bradford, 1 Alab. 312.....	262	School Directors, &c., and Green, 51 Penn. 219.....	808
Read & Co. and Stainback, 11 Gratt. 281.....	363	School District and Waller, 22 Conn. 326.....	639
Redford v. Winston, 3 Rand. 148.....	870	Schuyler and Bruce, 4 Gilman 221.....	262
Reed and Penrose, 2 Grant. Pa. 472.....	259, 262	Schuyler & als. and New York and New Haven R. R. Co., 34 New York 30.....	362, 363
Rees v. Conogochague Bank, 5 Rand. 326.....	899	Schuylkill Bank and Bank of Kentucky, 1 Par. Sel. Cas. 180.....	354, 359
Regina v. Sewel alias Beans, 7 Mod. 118.....	912	Seaman & als. and Dance & als., 11 Gratt. 780.....	395, 411
Reid v. Bibb, 5 Alab. 281.....	811	Searles and Hatch, 31 Eng. L. & E. 219.....	903
Reigart v. White, 52 Penn. 438.....	770	Sears and Billups, 5 Gratt. 31.....	423
Renner v. Bank of Columbia, 9 Wheat. 591.....	213	Sears and Pickard, 4 Ad. & Ell. 469, 33 Eng. C. L. 115.....	360
Revett and Hudson, 5 Bing. 368, 15 Eng. C. L. 467.....	806	Sears v. Wingate, 3 Allen 303.....	363
Revill and Nicholson, 4 Ad. & Ell. 675, 31 Eng. C. L. 166.....	24	Seay v. Bank of Tennessee, 3 Sneed 358.....	881, 899
Rex v. Hart, 1 Mood. C. C. 486.....	902	Self and Turberville, 2 Wash. 71, 4 Call 580.....	727
Rex v. Mawbry, 6 T. R. 619.....	977, 980, 982	Serrell v. Derbyshire, &c., R. R. Co., 9 Com. Bench 811, 67 Eng. C. L.....	782
Rex v. Randall, Russ. & Ry. C. C. 195.....	898	Sewall v. Boston Water Power Co., 4 Allen 277.....	359
Reynolds v. Bank of Virginia, 6 Gratt. 174.....	540	Sewell alias Beans and Regina, 7 Mod. 118.....	912
Reynolds and Williams, 10 Maryl. 57.....	906	Sexton's lessee and Wheaton, 4 Wheat. 503.....	239
Rey v. Simpson, 22 How. U. S. 341.....	212	Sharp and Haney, 1 Dana 442.....	946
Rice and Baird, 1 Call 18.....	49	Sharp & al. and Planters Bank, 6 How. U. S. 301.....	275, 288
Rice v. Morton, 19 Missouri 263.....	25	Sheboygan county v. Barker, 3 Wall. U. S. 93.....	755
Richardson and Downes, 7 Eng. C. L. 227.....	890	Shepherd v. Larue, 6 Munf. 529.....	71
Rickert and La Farge, 5 Wend. 187.....	212	Shepherd and Olinger, 12 Gratt. 462.....	6
Ricketts v. Pendleton, 15 Maryl. 320.....	207	Shepperson and Peshine, 17 Gratt. 472.....	800, 816
Right v. Beard, 13 East 210.....	505	Sherman and Holloway, 12 Iowa 282.....	249, 259, 263
Rives and Garland, 4 Rand. 309.....	424	Sherman v. Smith, 1 Black. U. S. 587.....	300
Roberts v. Davey, 4 Barn. & Ad. 664, 24 Eng. C. L. 136.....	8	Shorter and Iverson, 9 Alab. 713.....	249, 263
Roberts v. Tremayne, Cro. Jac. 507.....	719	Shreeve and Black, 2 Beas. 455.....	811
Robertson v. Smith, 13 John. 459.....	24	Simmons and Bean & als., 9 Gratt. 389.....	836
Robinson and Watson, 4 Leigh 236.....	301	Simpson v. Jones, 2 Rus. & Myl. 365.....	663
Robinson and Noble's adm'r, 8 Pet. U. S. 181.....	441	Simpson and Rey, 22 How. U. S. 341.....	212
Rockwell v. Hubbell's adm'r, 2 Doug. Mich. 197.....	250	Sketoe v. Ellis, 14 Illinois 75.....	728
Rodes v. Bronson, 34 New York 649.....	445	Skipwith's ex'or v. Cunningham, 8 Leigh 271.....	395, 396
Rogers v. Dill, 6 Hill 415.....	663	Skipwith and Harvey, 10 Gratt. 410.....	191
Root v. Wagner, 3 Tiffany 1, 17.....	21	Skipwith v. Strother, 3 Rand. 214.....	424
Rose v. City of Bridgeport, 17 Conn. 243.....	772	Slater ex parte, 6 Ves. 146.....	24
Rose and Jackson, 2 Va. Cas. 34.....	938, 946, 965	Slate River Co. and Crenshaw, 6 Rand. 645.....	599
Rosenbaums v. Weeden, Johnson & Co., 18 Gratt. 785.....	814	Slee and Dunn, 1 J. B. Moore 2.....	31
Ross and Grimball, Charlt. 175.....	250, 263	Smith and Bank of Albion, 27 Barb. 489.....	213, 214
Ross v. Overton, 3 Call 309.....	157, 166	Smith v. Carter, 3 Rand. 167.....	639
Roth v. Wells, 29 New York 471.....	18, 27	Smith v. Hughes, 24 Illinois 270.....	22
Rousck and McCormick, 3 Amer. Law Reg. N. S. 93.....	288	Smith and Jones, 1 Hare 55, 1 Phil. 244.....	347
Rouse v. State, 4 Georg. 136.....	938, 953	Smith and McNew, 5 Gratt. 84.....	745
Rousmanier and Hunt, 8 Wheat. 174.....	24		
Rowlett v. Rowlett's ex'or, 5 Leigh 20.....	529		
Royal & British Bank v. Turquand, 85 Eng. C. L. 248, 88 Id. 327.....	355, 356, 385		
Rucker and Dearing's adm'x, 18 Gratt. 426.....	707		
Russell v. Langstaffe, Doug. 514.....	896		
Russell, &c., and Nutter, &c., 3 Metc. 163.....	672, 673		

18 GRATT.

CASES CITED.

Smith and Mildmay, 2 Wms. Saund. 344.	31	Stockholders of Cochituate Bank v. Colt & als., 1 Gray 382.	516
Smith v. Nicholas, 8 Leigh 330.	719	Stocking v. Hunt, 3 Denio 274.	246, 262
Smith v. Palmer, 7 Hare 225.		Stone v. Bassett, 4 Minnes. 298.	250, 262
	529, 531, 534, 535	Stone, &c., v. Mayor, &c., of New York, 25 Wend. 157.	519
Smith and Robertson, 18 John. 459.	24	Stone & Ware v. Smith, 6 Munf. 541.	912
Smith and Sherman, 1 Black. U. S. 587.	300	Stonington and Goshen, 4 Conn. 209.	246
Smith and Stone & Ware, 6 Munf. 541.	912	Strange and Price, 6 Madd. 159.	530
Smith & ux. v. South Royalton Bank, 32 Verm. 341.	811	Street and Pike, 1 Mood. & Malk. 226, 22 Eng. C. L. 299.	206
Smith v. Walker, 1 Call 39.	448, 705	Strother and Skipwith, 3 Rand. 214.	424
Snowden v. Dales, 6 Sim. 524.	547	Stubbs v. Goodall, 4 Georg. 106.	214
Snyder v. Van Ranslaer, 3 Kern. 299.	262	Sturges v. Crowningshield, 4 Wheat. 122.	262, 271, 272, 903, 939
Somerville and McCullough & als., 8 Leigh 415.	403, 404, 405, 407, 408, 409, 412, 414, 415, 417, 419, 420	Suadlin and Bower, 1 Atk. 294.	24
Somerville v. Wimbish, 7 Gratt. 205.	76	Sullivan & al. and Putnam, 4 Mass. 45.	903
Soome v. Gleen, Sid. 27.	720	Supervisors v. Schenck, 5 Wall. U. S. 772.	358, 767
South Royalton Bank and Smith & ux., 32 Verm. 341.	811	Supervisors v. United States, 4 Wall. U. S. 435.	838
Spangler v. Davy, 15 Gratt. 381.	850, 855	Sutherland's ex'or and Hite & als., 1 Wash. 133.	450
Speed and Owings, 5 Wheat. 420.	251	Sutherlands & als. and Law's ex'ors, 5 Gratt. 357.	913
Spencer's case, 5 Rep. 16.	161	Sutter and United States, 21 How. U. S. 170.	636
Spicer and Green, 1 Russ. & Myl. 397.	547	Tabb v. Harris, 4 Bibb 29.	224
Spier v. Gilmore, 1 Comst. 321.	213	Tally, &c., v. Starke's adm'r, &c., 6 Gratt. 339.	672
Spike and Maliverer, 1 Dyer 36b.	519	Tassell & Lee v. Lewis, 1 Ld. Ray. 743.	761
Spindle's adm'r and Brockenbrough's ex'ors, 17 Gratt. 21.	886	Tate v. Berry, 2 Bailey S. C.	920
Spindle and Taylor's adm'r, 2 Gratt. 44.	84	Tavernor's Case, 1 Dyer 5, 8b.	170, 171
Springs and Williams, 7 Ired. Law 384.	820	Taylor v. Beverly, 1 Call 108.	530
Squire and Kemp, 1 Ves. sr. 205.	375	Taylor v. Bruce, Gilm. 88.	885, 887, 888, 893, 894, 895
Stagg v. Elliott, 104 Eng. C. L. 373.	363	Taylor & al. v. Carryl, 20 How. U. S. 583.	959
Stainback v. Bank of Virginia, 11 Gratt. 260.	363	Taylor's adm'rs v. Chowning, 3 Leigh 654.	401
Stainback v. Read & Co., 11 Gratt. 281.	363	Taylor, &c., v. Inhabitants of Plymouth, 8 Metc. 462.	519
Staley and Erskine, 12 Leigh 406.	220	Taylor v. Moore, 2 Rand. 563.	77
Stanley v. Stanley, 26 Maine 191.	300	Taylor v. Phillips, 2 Ver. 23.	663
Stansberry and United States, 1 Pet. U. S. 573.	23, 28	Taylor and Puryear, 12 Gratt. 401.	227, 229
Stapleton v. Langstaff, 3 Dess. 22.	663	Taylor v. Ranney, 4 Hill N. Y. 619.	46
Starke's adm'r, &c., and Talley, &c., 6 Gratt. 339.	672	Taylor, &c., and Sands, &c., 5 John. 395.	792, 793
Starkweather v. Hawes, 10 Wisc. 125.	250	Taylor's adm'r v. Spindle, 2 Gratt. 44.	84
State Bank v. Evans, 3 Green 155.	811	Temple and Chandler, 4 Cush. 285.	808
State Bank of Ohio v. Knoop, 16 How. U. S. 369.	150	Tennent's heirs v. Pattons, 6 Leigh 196.	67, 745
State v. Carew, 13 Rich. 498.	288	Thayer v. Boston, 19 Pick. 511.	346
State v. Harlan, 1 Doug. Mich. 207.	953	Thomas' adm'r and Cox, 9 Gratt. 312.	809
State v. McBride, 1 Rice S. C. 400.	946	Thomas and Park, 13 Smeedes and Marsh. 244.	213
State of Arkansas and Curran, 15 How. U. S. 304.	271, 288	Thompson's Case, 8 Gratt. 637.	985
State of Maryland and McCulloch, 4 Wheat. 316.	146	Thompson v. Ketcham, 8 John. 190.	212
State of Missouri and Cummings, 4 Wall. U. S. 277.	119, 143, 144	Thompson v. Pendell, 12 Leigh 591.	168
State of New York v. Mayor & Ald. of New York, 3 Duer 110.	520	Thompson and United States, Gilp. 614.	23
State of Ohio and Fox, 5 How. U. S. 410.	940, 942, 943, 946, 953, 954, 956, 967	Thomson v. Lee County, 3 Wall. U. S. 327.	755, 765, 766, 772
State v. Peck, 53 Maine 284.	812	Thoroughgood's Case, 9 Rep. 137.	806
State and Rouse, 4 Georg. 136.	938, 953	Thorpe v. Owen, 2 Hare 607.	548, 549, 561
State v. Tuff, 2 Bailey S. C. 44.	968	Tibbats and Newton, 2 Eng. 150.	250, 262
State v. Wells, 2 Hill S. C. 687.	953	Tiffany and Peck, 2 Comst. 451.	46, 48
Steele v. Boyd, 6 Leigh 541.	26, 31, 49	Tinder and Guerrant, Gilm. 36.	978
Steele v. Levisay, &c., 11 Gratt. 454.	550	Titball and Lane, Gilm. 130.	662
Sterling and Boehm, 7 T. R. 423.	780, 781	Todd and Merritt, New York 28.	782
Sterne and Barker, 9 Exch. 684.	903	Torin and Jones, 6 Sim. 255.	532
Sterry and Harrison, 5 Cranch. 289.	404	Towne and Nash, 5 Wall. U. S. 689.	207
Stevenson v. Evans, 10 Ohio 307.	532	Towner v. Lucas, 13 Gratt. 705.	197, 204, 205
Stickney and Hughes, 13 Wend. 280.	242	Town of Jefferson and Mills, 20 Wisc. 50.	776
Stinson, &c., v. Day, &c., 1 Rob. 435.	550, 566		
Stirling v. Forrester, 3 Bligh. P. Cas. 575.	31		

<i>Townsend and Cowles</i> , 31 Alab. 133.....	206	<i>Wagner and Root</i> , 3 Tiffany 417.....	21
<i>Townsend v. Townsend</i> , Peck 1	288	<i>Wakefield and North</i> , 13 Queen's Bench	
<i>Tremayne and Roberts</i> , Cro. Jaa. 507.....	719	536, 66 Eng. C. L.....	25
<i>Trigg and Pierce</i> , 10 Leigh 406.....	663	<i>Wales v. Webb</i> , 5 Conn. 154.....	913
<i>Trimble v. Commonwealth</i> , 2 Va. Cas.		<i>Walker v. Bank of Washington</i> , 3 How.	
143.....	930	U. S. 62.....	910
<i>Tucker v. Billing</i> , 2 Jurist N. S. 483.....	533	<i>Walker v. Marquis of Camden</i> , 16 Sim.	
<i>Tucker v. Harris</i> , 13 Georg. 1.....	246, 262	329.....	535
<i>Tuff and State</i> , 2 Bailey S. C. 44.....	968	<i>Walker and Smith</i> , 1 Call 39.....	458, 705
<i>Turberville v. Self</i> , 2 Wash. 71, 4 Call		<i>Wallace & Wife v. Doid</i> , 3 Leigh 258	
580.....	727	.....	550, 566
<i>Turner and Hulme</i> , 4 Esp. Ni. pri. cas.		<i>Waller and McKenney</i> , 1 Leigh 434..	27, 43
11.....	912	<i>Waller and School District</i> , 22 Conn. 326.	639
<i>Turner in re</i> , 5 Amer. Law Reg. N. S.		<i>Wallis v. Littell</i> , 11 Com. Bench 369, 103	
235.....	536	Eng. C. L.....	207
<i>Turner v. Jones</i> , 1 Hurl. & Nor. 878	229	<i>Walter and Ostrander</i> , 2 Hill N. Y. 329..	46
<i>Turquand and Royal British Bank</i> , 85		<i>Ward and Archer</i> , 9 Gratt. 622.....	242
Eng. C. L. 248, 88 Idem 327.....	355, 356	<i>Ward and Cheetham</i> , 1 Bos. & Pul. 630..	24
<i>Tutt's Case</i> , 2 Bailey 44.....	938, 953	<i>Ward v. Motter</i> , 2 Rob. 536.....	24
<i>Tutton and Holmes</i> , 85 Eng. C. L. 65....	229	<i>Ward and Raikes</i> , 1 Hare 445	563
<i>Two good ex parte</i> , 19 Ves. 229.....	205	<i>Ward v. Van Bokkelen</i> , 2 Paige 289....	83
<i>Tyson and McMahon</i> , 23 Georg. 43.....	728	<i>Ward v. Vass</i> , 6 Leigh 135	22, 27, 30, 33, 49, 52
<i>Underwood and Gilliam</i> , 3 Jones Eq.		<i>Ware v. Lord Egmont</i> , 31 Eng. L. & E.	
100.....	579	89	347
<i>Union Bank v. Laird</i> , 2 Wheat. 390.....	351	<i>Warren & others v. Mayor & Aldermen</i>	
<i>United States Bank v. Bank of Georgia</i> ,		of Charleston, 2 Gray 84.	610
10 Wheat. 333.....	359	<i>Warren v. Wheeler</i> , 8 Metc. 97.....	211
<i>United States v. Amy</i> , Quar. Law Jour.		<i>Waters and Powell</i> , 8 Cow. 669.....	890
July 1859, 163.....	945, 956, 967	<i>Watkins v. Crouch & Co.</i> , 5 Leigh 522..	775
<i>United States v. Dashiell</i> , 3 Wall. U. S.		<i>Watkins v. Holman</i> , 16 Pet. U. S. 25....	646
688.....	46, 47	<i>Watkins and United States</i> , 4 Cranch C.	
<i>United States v. Freeman</i> , 3 How. U. S.		C. 270.	23
556.....	860	<i>Watson, ex'or v. Alexander</i> , 1 Wash. 353.	448
<i>United States v. Kirkpatrick</i> , 9 Wheat.		<i>Watson v. Hurt</i> , 6 Gratt. 633.....	205, 213
735.....	28	<i>Watson v. Robertson</i> , 4 Leigh 236.....	301
<i>United States v. Lathrop</i> , 17 John. 4..	946, 947	<i>Watts and Green</i> , 1 Ld. Ray. 274.....	242
<i>United States v. Marchant</i> , 12 Wheat.		<i>Watts & wife v. Porter</i> , 77 Eng. C. L. 743.	229
480	981	<i>Webb and Wales</i> , 5 Conn. 154.....	913
<i>United States v. Marigold</i> , 9 How. U. S.		<i>Webb v. Woods</i> , 13 Eng. L. & E. 63.	549
560.....	942, 943, 946, 954, 956	<i>Weeden, Johnson & Co. and Rosenbaums</i> ,	
<i>United States v. Nichol</i> , 12 Wheat. 505..	28	18 Gratt. 785.....	816
<i>United States and Pawling</i> , 4 Cranch		<i>Weightman v. Corporation of Washing-</i>	
218.....	811, 812	ton, 1 Black. U. S. 39.	346
<i>United States v. Stansberry</i> , 1 Pet. U.		<i>Wells and Roth</i> , 29 New York 471.....	18, 27
S. 573.....	23, 28	<i>Wells and State</i> , 2 Hill S. C. 687.....	953
<i>United States and Supervisors</i> , 4 Wall.		<i>West and Brashear</i> , 7 Pet. U. S. 608....	398
U. S. 435.	838	<i>Weston and Belfour</i> , 1 T. R. 310.....	165
<i>United States v. Sutter</i> , 21 How. U. S.		<i>Wetherell v. Wilson</i> , 1 Keen 80.....	563
170.....	636	<i>Wheaton v. Sexton's lessee</i> , 4 Wheat. 503.	239
<i>United States v. Thompson</i> , Gilp. 614...	23	<i>Wheeler v. Driscomb</i> , 3 Cush. 285.....	11
<i>United States v. Watkins</i> , 4 Cranch C.		<i>Wheeler and Warren</i> , 8 Metc. 97.....	211
C. 270.....	23	<i>White v. Atkinson</i> , 2 Wash. 94.....	468
<i>Usher's Heirs v. Pride</i> , 15 Gratt. 190....	76	<i>White and Barough</i> , 10 Eng. C. L. 345..	762
<i>Vaiden's Case</i> , 12 Gratt. 717	977	<i>White and Clark</i> , 12 Pet. U. S. 178	77
<i>Van Bokkelen and Ward</i> , 2 Paige 289....	83	<i>Whitely, McConkey & Co. v. May & als.</i> ,	
<i>Van Cott and Heath</i> , 9 Wisc. 516.....	213	1 Livings. Law Mag. N. S. 442	415
<i>Van Duzer v. Howe</i> , 21 New York 531....	903	<i>White and Reigart</i> , 52 Penn. 438.....	770
<i>Vanhook v. Barnett</i> , 4 Dess. 268.....	809	<i>White v. Verm. & Mass. R. R. Co.</i> , 21	
<i>Vanmeter and Fisher</i> , 9 Leigh 18.....	29, 50	How. U. S. 575.....	766, 897
<i>Van Ransalaer v. Snyder</i> , 3 Kern. 299....	262	<i>Whitlocke and Winston</i> , 5 Call 435.....	27
<i>Vardy and Bull</i> , 1 Ves. Jr. 271.....	547	<i>Whittam and Benson</i> , 5 Sim. 22.	562, 563
<i>Vass v. Ward</i> , 6 Leigh 135	22, 27, 30, 33, 49, 52	<i>Whittemore and Cutter</i> , 10 Mass. 442....	808
<i>Verm. & Mass. R. R. Co. and White</i> , 21		<i>Whitworth v. Adams</i> , 5 Rand. 333.....	
How. U. S. 575.....	766, 897	885, 887, 888, 894, 895, 905, 906,	907
<i>Vicars and Booth</i> , 1 Call 6.....	531	<i>Wiley & al. and Brown</i> , 20 How. U. S.	
<i>Vint and Erwin</i> , 6 Munf. 267.....	375, 381	442.....	210
<i>Vowles and Bogle & als.</i> , 1 Call 244....	448, 451	<i>Williams' case</i> , 3 Bland. ch. 186.....	663
<i>Wade and Bainbridge</i> , 16 Queen's Bench		<i>Williams and Blair, &c.</i> , 4 Litt. 34.....	
89, 71 Eng. C. L.....	208	.....	252, 253, 258, 281, 282, 288
<i>Waggener v. Dyer</i> , 11 Leigh 384.....	31	<i>Williams v. County Commissioners</i> , 35	
		Maine 345.....	245, 253

18 GRATT.

CASES CITED.

Williams <i>and</i> Haley, 1 Leigh 140.....	745	Winston <i>v.</i> Whitlocke, 5 Call 435	27
Williams <i>v.</i> Harrington, 11 Ired. 616.....	663	Withers <i>and</i> Clerk, 2 Ld. Ray. 1072.....	42
Williamson <i>v.</i> Gayle & als., 4 Gratt. 180		Wood <i>v.</i> Child, 20 Illinois 209.....	249, 262
..... 69, 74, 75		Woodfin <i>v.</i> Hooper, 4 Humph. 13	262
Williams <i>v.</i> Reynolds, 10 Maryl. 57.....	906	Woods <i>v.</i> Lawrence County, 1 Black. U.	
Williams <i>v.</i> Springs, 7 Ired. Law 384.....	810	S. 386.....	755, 772
Willis <i>v.</i> Peckham, 1 Brod. & Bing. 515..	27	Woods <i>and</i> Webb, 13 Eng. L. & E. 63....	549
Wilson <i>v.</i> Hardesty, 1 Maryl. Ch. 66.....	262	Woods <i>v.</i> Woods, 1 Myl. & Craig 401..	547, 563
Wilson & McRae <i>v.</i> Kneeling, 1 Wash.		Wookey <i>v.</i> Pole, 6 Eng. C. L. 323... ..	898, 900
194.....	465	Wordley <i>and</i> Adams, 1 Mees. & Welsb. 374	206
Wilson <i>and</i> Newton, 3 Hen. & Mun. 470		Wormley's Case, 8 Gratt. 712	988
..... 154, 156, 158, 171		Wyckoff <i>and</i> Lloyd, 6 Halst. 218	27
Wilson <i>v.</i> Pilkinton, 11 Jurist 537.....	531	Wyld <i>and</i> Ambler, 2 Wash. 36.....	466
Wilson <i>and</i> Wetherell, 1 Keen 80	563	Wynehamer <i>v.</i> The People, 13 New York	
Wimbish <i>and</i> Somerville, 7 Gratt. 205....	76	384	520
Windsor <i>and</i> Hart, 12 Mees. & Welsb. 68.	174	Young <i>and</i> Pool, 7 Monr. 588.....	281
Wingate <i>and</i> Sears, 3 Allen 103.....	363	Zabriskie <i>v.</i> C. C. & C. R. R. Co., 23 How.	
Winston <i>and</i> Bullitt's ex'ors, 1 Munf. 269		U. S. 381.....	361
..... 18, 22, 27, 49, 51		Zecharie & Co. <i>and</i> Black & Co., 3 How.	
Winston <i>and</i> Redford, 3 Rand. 148... ..		U. S. 483.....	351
..... 862, 863, 864, 870			

CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Millan v. Kephart.

October Term, 1867, Richmond.

Contract of Lease—Destruction of—Proof of Contents

—Case at Bar.—K leased to M a house and lot in the city of A. for four years; but there was a stipulation in the lease, that if K sold the property before the time ran out, upon a proper notice of such sale M should deliver up possession of the premises. The lease had been destroyed, and the contents were proved by parol evidence. K did sell the property before the four years expired, and gave a notice to M to deliver possession. HELD: 1. It was for the jury to ascertain from the evidence what were the terms of the contract, and to determine, under such instructions as the court might give for their information and guidance, what was their legal effect.

2. Same—Function of Jury.—The jury was to ascertain the true intention of the parties as embraced in the contract. For that purpose they were to consider the whole contract; not any one

2 provision only, but all its provisions; *not the words merely in which they were expressed, but their object and purpose, as disclosed by the language, by the subject matter, and the condition and relation of the parties: and thus to determine whether the stipulation for the surrender of the property upon a sale and notice, was a collateral limitation, or a covenant.

3. Same—Case at Bar.—If the stipulation was a collateral limitation, K was entitled to recover the premises; if it was a covenant, he was not entitled to recover.

4. Same—Sale of Property by Lessor—Notice.—The notice was not required to be for three months, or for any particular period.

This was a case of unlawful detainer, in the county court of the county of Alexandria, brought in August, 1858, by George Kephart against Walker R. Millan, to recover a house and lot in the said county, rented by Kephart to Millan for four years ending on the 1st of March, 1859. The case came on to be tried in January, 1859, when the defendant asked the court for several instructions to the jury; which were refused. And he thereupon excepted. The facts, as they appear from the bill of exceptions, so far as they are necessary to understand the questions involved in the decision of this court, are as follows:

There was a written contract between Kephart and Millan, for a lease of the premises in question, for a term of four years, at a rent of four hundred and fifty dollars, afterwards increased to five hundred dollars by a parol agreement, ending on the

1st of March, 1859, which was placed in the hands of a third party, by whom it was destroyed under the supposition by him, that it had been superseded by another lease of the premises between the same parties. Among other stipulations in this written lease, the contents of which were proved by parol testimony, there was a stipulation that upon a sale of the premises, and proper notice of such sale, Millan was to deliver *up possession of the premises.

3 On the 15th of January, 1858, Kephart wrote to Millan from Mobile in Alabama, requiring him to give up possession of the premises on the 1st of May following; saying it was for the purpose of occupying the property himself, either directly or indirectly: and this letter was received by Millan.

On the 1st day of May, 1858, Kephart sold the property to Price and Cook; and they entered into a written agreement of that date, under seal, which was admitted to record. This agreement is in its language very much in the form of a conveyance; he bargains and sells the property to Price and Cook; but in other respects it is as it describes itself, articles of agreement: and Kephart, in the conclusion of the agreement, binds himself to give peaceable and quiet possession of the premises within twenty days from the date, or in default of possession, to pay five hundred dollars as a forfeiture.

On the 5th of June, 1858, the parties seem to have been together, with others, about other matters; and after these were concluded, Millan presented to Kephart an account, in which, after charging Kephart with various items, amounting to \$314 15, he credits him with rent up to March, 1858, \$500, leaving a balance due Kephart of \$185 85: which account, at the time of its presentation, was not objected to by Kephart; but he told Millan to put no more repairs on the property, as it would absorb all the rent: and on the same day he refused to receive and receipt for the said sum of \$185 85.

On the 5th day of June, 1858, the following notice in writing was served on Millan: To Walker R. Millan, Esq.:

Sir,—I hereby notify you to give and deliver up possession of the house, jail, land and premises, with the appurtenances, situate on the north side of Duke street,

4 *between Fayette and West streets, in the city of Alexandria, Va., which you hold of me as tenant thereof, on the

7th day of July, 1858, as by the terms of your tenancy you are obliged to do; I having bona fide sold the said premises, with an agreement to deliver possession of the same. Witness my hand this 5th day of June, 1858.

George Kephart.

The first instruction asked, after referring to the facts as hereinbefore given, concluded as follows: Yet the plaintiff cannot recover in this suit, because the language of said lease in reference to said notice of sale, is wholly indefinite and uncertain in point of time, either in contemplation of law, or by the terms of the said lease.

The second instruction asked was as follows: If the jury shall believe from the evidence, that a written lease existed between the plaintiff and defendant, for a term of years, and that it contained a stipulation that the defendant was to surrender possession of the leased premises to the plaintiff in the event of a sale thereof by the plaintiff, then that the plaintiff cannot avail himself of a breach of this covenant in this action; and they must find for the defendant.

The third instruction asked was, that the proper notice referred to in the lease, was three months' notice next before the expiration of the current year. The fourth was that the plaintiff must have made such a sale of the premises as he could have sued on or enforced by an action at law. And the fifth was, that if at the time of the institution of this suit, Price and Cook were the owners of the property in question, under a bona fide purchase from Kephart, then Kephart was not entitled to the possession of the property, and could not maintain this suit against the defendant.

There was a verdict and judgment 5 for the plaintiff; and *the defendant obtained a supersedeas to the judgment from the Circuit court of the county of Alexandria; but when the cause came on to be heard in that court, the judgment was affirmed; and the defendant obtained an appeal to this court.

DANIEL, for the appellant, insisted, 1st. That the second instruction asked for should have been given. That this instruction rightly assumes that the stipulation in the lease was a covenant, and not a condition, for re-entry of the landlord upon his tenant, nor a limitation by which the lease became void, and the right of possession vested in him. This is clear for the reason that by the sale the landlord's interest, as landlord, ceased, having passed thereby to the purchaser. There was no estate left in the landlord after the sale, which he could recover in this or any other action. If the tenant had delivered possession to Kephart, it would have been merely as the agent to receive it for the purchaser. But the court evidently treated this covenant as one of re-entry by the landlord, on a breach of some condition in a lease.

There may be a right of re-entry for the breach of any condition in a lease; the

most common of which is the payment of rent; but it must be expressly provided for in the deed, and is always most strictly construed. Upon a breach ejectment will lie; and perhaps unlawful detainer also. So there may be in a lease for years, a condition that upon default the lease shall be ipso facto void. In that event also, the landlord's remedies for the possession arise. As to forfeiture and re-entry, the court is referred to *Bac. Abr. Rent A 4; 2 Tuck. Com. 91*.

It is further evident, that this was merely a covenant sounding in damages, and the subject of liquidation and arrangement; that nothing is expressed in it, as to the apportionment of the rent in case the 6 premises should be *sold, and thereupon possession given up, say in the middle or after the commencement of the year. There cannot be found a case in the books where a condition of re-entry, or that a lease shall be void, has been held to exist, when the lease did not plainly so provide.

2d. Upon the same reasoning the fifth instruction should have been given. Kephart no longer had any estate or right to the possession, after his absolute deed to his vendees. He covenants therein to give them possession within a time limited; but this he could only do by enforcing his covenant with the tenant, or by asserting remedies in their names. But surely he could not sue for the possession in his own name as landlord. And the fair construction of the tenant's covenant is to give possession to the purchaser. He could not, after his absolute sale and conveyance of the title, sue a stranger for trespass; and this is conclusive that he could not sue for the possession. *Olinger v. Shepherd*, 12 Gratt. 462. Had his contract been executory, resting in mere agreement, he might maintain this action; but not after his absolute executed conveyance. *Harrison v. Middleton*, 11 Gratt. 548.

There was no counsel for the appellee.

JOYNES, J. To entitle the plaintiff in the court below to recover in this case, it was incumbent on him to establish that, at the commencement of the suit, the right of the defendant, who had entered into possession as his tenant, had expired, and that he still detained the possession, without the consent of the plaintiff. Code, ch. 134, § 1. The lease was for a term of four years, which had not yet elapsed. But it appears from the evidence, that the written lease, which had been destroyed, contained a stipulation that upon a sale of the premises and proper notice of such sale, the defendant was to deliver up possession 7 *of the premises. The plaintiff had made a sale of the premises by executory contract, and given notice of it to the defendant, before the commencement of this action, which proceeds, of necessity, on the ground that the right of the defendant had, by reason of such sale and notice, absolutely ceased and determined.

A clause in a lease designed to abridge

the right of the tenant during the period limited for the duration of his estate, may operate in several ways.

1. It may operate as a collateral limitation, sometimes, but as I think, improperly called a conditional limitation, of the tenant's estate.

A limitation marks the bounds or limits of an estate, beyond which it cannot continue. A collateral limitation marks an event which may happen within the time described in the direct limitation, and in the happening of that event puts an end to the estate. Thus, a lease to A for twenty years, or until B shall return from Rome, may cease and determine, either by the expiration of twenty years, the time marked for its duration by the direct limitation, or by the happening, within that time, of the event described in the collateral limitation, to wit, the return of B from Rome. In either case, the estate of the tenant will have reached the utmost bounds marked for its continuance by the limitation by which its duration is governed; and so, in either case, the right of the tenant will be absolutely at an end, without entry or other act on the part of the landlord. 1 Prest. Est. 42-49.

2. It may operate as a condition. While a limitation marks the bounds or compass of an estate, and the utmost time of its continuance, the effect of a condition is to defeat the estate before it reaches the boundary, or has completed the full space of time described by the limitation. 1 Preston Est. 49. There does not appear, however, to be any ground for contending that the clause under consideration

8 *operated as a condition. There are no such words in it as of themselves import a condition, and there is no reservation of a right of entry, which is generally necessary to raise a condition, where words which of themselves import a condition are not employed. 1 Washburn Real Prop. 445. The effect of a condition, however, is only to make the lease void at the option of the lessor; and the modern authorities seem to establish that this is so, even where it is provided that the lease shall become void on breach of the condition. *Roberts v. Davey*, 4 Barn. & Ad. 664, (24 Eng. C. L. R. 136); *Jones v. Carter*, 15 Mees. & Welsb. R. 718; *Clark v. Jones*, 1 Denio R. 516; *Cartwright v. Gardner*, 5 Cush. R. 273; *Phelps v. Chesson*, 12 Ired. Law R. 194. An entry, therefore, would be necessary to put an end to the estate of the tenant. Without such entry the right of the tenant would not expire, and the remedy adopted in this case would not lie.

3. It may operate as a covenant only, having no effect upon the estate either to limit or to defeat it, but giving to the landlord a remedy by an action for damages, or by a suit in equity for a specific execution.

The question in this case, therefore, was, whether the clause which is the subject of discussion, operated as a covenant merely, or as a collateral limitation of the tenant's estate.

The books abound in nice and critical learning upon what Chancellor Kent justly denominates "the abstruse subject of limited and conditional estates." It is often difficult to say, upon the construction of the instrument, whether a particular provision is to be regarded as a limitation, a condition, or a covenant. It is a well settled rule, however, that conditions subsequent are not favored in law, and are to be taken stricti juris, because they tend to destroy estates. 4 Kent. Com. 129.

9 The same reason *applies to a collateral limitation, by which an estate is to be determined within the time marked for its continuance by the primary or direct limitation. And hence it is laid down, that neither conditions nor limitations will readily be raised by mere inference and argument. The intention to create either the one or the other must be clearly ascertained; but, when so ascertained, it will be allowed a controlling effect. 4 Kent. Com. 132. The same author also lays it down as a rule, that if it is doubtful whether a clause operates as a condition or as a covenant, the courts will incline to the latter construction as most favorable to the tenant. 4 Kent. Com. 132. And the Supreme Court of Massachusetts have held that the same rule must govern where it is doubtful whether the clause operates as a limitation or as a covenant. 3 Cush. R. 285. But, after laying down these rules, Chancellor Kent proceeds as follows: "The distinctions on this subject are extremely subtle and artificial, and the construction of a deed in its operation and effect will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in a given case."

The court below was not called upon, however, to put a construction upon the clause which is the subject of the present controversy; nor are we. The written contract had been destroyed, and the particular terms of it were not submitted to the court by special verdict or otherwise, in order that the court might determine their legal effect. The contents of the writing were proved to the jury by parol evidence. It was the province of the jury to ascertain from the evidence, as well as they could, what were the terms used in the contract, and to determine, under such instructions as the court might give for their information and guidance, what was their legal effect. Accordingly, the defendant asked

10 *the court to give certain instructions to the jury, some of which were intended to govern them in determining the legal effect and operation of the contract. All of the instructions asked for were refused, and we are now to say whether the refusal was proper.

The instruction, which has been mainly insisted upon in the argument here, and the one which seems to be of greatest importance, is the second. This declared, in substance, that if the written contract contained a stipulation that the defendant was

to surrender the possession of the leased premises to the plaintiff in the event of a sale thereof by the plaintiff, then the jury should regard the said provision as having the effect of a covenant merely, and not that of a collateral limitation, and should find for the defendant.

The province of the jury was to ascertain the true intention of the parties, as embodied in the contract. For that purpose, they were to consider the whole contract; not any one provision only, but all its provisions; not the words merely in which they were expressed, but their object and purpose, as disclosed by the language, by the subject matter, and the condition and relation of the parties. The effect of the instruction proposed, however, was to declare that such a provision as that supposed in it would necessarily control the construction of the whole contract, and to exclude everything else from the consideration of the jury.

The appropriate technical words to create a limitation are donec, durante, dum, usque, tamdiu, and the like, or their English equivalents. But the use of particular words would be an unsafe test of the nature of the estate. The same words may be taken sometimes as a condition, sometimes as a limitation, and sometimes as a covenant, according to the circumstances and the evident intent. And the only safe, general rule for determining whether words are

words of limitation or not, is to consider whether they were used to circumscribe the continuance of the estate, and to mark the period which is to determine it. 1 Washburn on Real Prop. 459, and books there cited; 4 Kent Com. 132, and note. Looking to the relations of the parties and the subject matter of the contract, the jury may well have thought that it was the intention of the parties to provide, by the clause in question, that, in the event of a sale, the estate of the tenant should cease and determine. Nothing could be more natural for a person making a lease of property which he wished to sell, than to require and provide that the lease should end upon a sale being made, for he could not otherwise carry the sale into effect. And a man not accustomed to the use of technical language might very naturally express that intention by a stipulation that the defendant should surrender the possession of the premises, in case a sale should be made.

The case of Doe v. Phillips, 2 Bingh. R. 13, (9 Eng. C. L. R. 296,) cited at the bar, and the case of Wheeler v. Driscumb, 3 Cush. R. 285, which approved it, are not inconsistent with the views I have expressed. The courts in these cases construed the provisions in question in them to be covenants. They did so upon the special circumstances and the established rules of construction. But the particular provisions and special circumstances, as might easily be shown, were very different from those of the present case. As I have said before, however, we are not called upon here to

give a construction to the contract on which this case depends, and I need not, therefore, say more in reference to those cases. See the view taken in Allen v. Jaquish, 21 Wend. R. 628. The second instruction was, therefore, properly refused.

The first instruction proposed, in effect declared that the clause in question did not operate as a limitation of the tenant's estate, because the provision as to 12 notice was "indefinite and uncertain in point of time. Neither the law nor the contract required any particular form or length of notice. Any notice which would distinctly inform the tenant that a sale had been made would be "proper" notice. The time at which notice was given could be ascertained by proof, and the maxim of law is, that that is certain which may be rendered certain. The first instruction was, therefore, properly refused.

The remaining instructions asked for were also properly refused, but I think it unnecessary to discuss them.

I am of opinion that the judgment should be affirmed.

The other judges concurred in the opinion of Joynes, J.

Judgment affirmed.

13 *Walker & als. v. The Commonwealth.

October Term, 1867, Richmond.

1. *Fieri Facias*—Levy—Effect upon Title—*Sheriff a Mere Baillee*.—The levy of an execution of *f. fa.* does not divest the defendant in the execution of the property, and transfer the title to the plaintiff or the sheriff. Only a special interest is vested in the sheriff as a mere baillee, to enable him to keep the property safely, and defend it against wrongdoers. It is in the custody of the law, and the sheriff has a naked power to sell it and pass the title of the owner to the purchaser.

2. *Same*—*Same*—Abandonment by Consent of Defendants—New Executions.—A plaintiff may always, with the consent of all the defendants, abandon a levy upon the property of all or any of them, and afterwards sue out a new execution.

3. *Same*—*Same*—*Same*—*Same*.—If the defendants in an execution be a principal and his sureties, and

**Fieri Facias*—Levy—Effect upon Title.—The principal case is cited and followed in *Rhea v. Preston*, 75 Va. 772.

†*Liability of Surety*—Effect of New Contract by Principal.—In *Knight v. Charter*, 32 W. Va. 429, it is said: "It is well settled that mere indulgence granted to the principal debtor will not release the surety. *Shannon v. McMullin*, 25 Gratt. 211; *Humphrey v. Hitt*, 6 Gratt. 509; *Walker v. Commonwealth*, 18 Gratt. 13; *Sneeds v. White*, 3 J. J. Mar. 525; *Alcock v. Hill*, 4 Leigh 422; *McKenny v. Waller*, 1 Leigh 494. But the authorities are equally clear that if the creditor, upon a sufficient consideration, enter into a valid and binding contract or agreement with the principal debtor whereby without the consent of the surety he 'ties his hands' so that he has suspended his right or disabled himself, for any definite period of time, however short, from proceeding to enforce

the property levied on be that of the sureties, the plaintiff may, with the consent of the sureties only, abandon the levy, and afterwards sue out executions against all the defendants.

4. **Same—Same—Abandonment without Consent of Plaintiff—New Execution.**—If the levy be abandoned by the sheriff, with the consent of the defendants, without the concurrence or authority of the plaintiff; or if the property is eligned or removed by the defendant out of the reach of the sheriff, without the consent of the sheriff or the plaintiff, the latter may sue out a new execution.

5. **Same—Same—Loss of Property by Neglect of Sheriff—Effect.**—But if the property levied on be lost to the defendant by the misconduct or neglect of the sheriff, the execution is thereby satisfied, to the extent of the value of the property; and the plaintiff can then only look to the sheriff for indemnity.

6. **Same—Same—Suspension of Proceedings—Case at Bar.**—A mere suspension of proceedings on a levied execution does not authorize a restoration of the property to the possession of the defendant, or release the levy. And if, by a misunderstanding of the directions of the plaintiff by the sheriff and the defendants, the property is released by the sheriff to them, the plaintiff may have a new execution.

14 *7. **Judgments—Entered at Different Times—One Execution.**—In a proceeding at law against several parties, judgments against one or more are entered at one time, and against others at another time, one execution may be issued against all.

8. **Execution—Return—Amendment by Sheriff.**—Upon the performance of the original contract, the surety will, in a court of equity, be thereby discharged. *Norris v. Crumney*, 2 Rand. 823; *Hunter v. Jett*, 4 Rand. 104; *McKenny v. Waller*, 1 Leigh 434; *Alcock v. Hill*, 4 Leigh 622; *Renick v. Ludington*, 14 W. Va. 367; *Sayre v. King*, 17 W. Va. 562."

See also, on the same subject, 2 Va. Law Reg. 770, where there is a collection of authorities, among others the principal case, also, *Shaunon v. McMullin*, 25 Gratt. 220, and *note*, citing the principal case.

§**Fieri Facias—Levy—Abandonment without Consent of Plaintiff—New Executions.**—The principal case is distinguished in *Sutton v. Marye*, 81 Va. 333.

§**Same—Same—Loss of Property by Neglect of Sheriff—Effect.**—For the proposition that, if the property levied on be lost to the defendant by the misconduct or neglect of the sheriff, the execution is thereby satisfied to the extent of the value of the property, and the plaintiff can then only look to the sheriff for indemnity, the principal case is cited and followed in the following authorities: *Patterson v. Crawford*, 97 Va. 662, 34 S. E. Rep. 458; *McKenzie v. Wiley*, 27 W. Va. 663. See, in accord, *Cranmer v. McSwords*, 26 W. Va. 412; *Campbell v. Wyant*, 26 W. Va. 702.

In *Com. v. Bryne*, 20 Gratt. 207, the rule laid down above is quoted, but the case at bar is distinguished from the principal case upon the facts.

§**Executions—Return—Amendment by Sheriff.**—In *Hopkins v. Baltimore & O R. R. Co.*, 42 W. Va. 537, 26 S. E. Rep. 188, the court said: "A court should allow amendment of a return upon a summons even at the hearing of a motion to reverse the judgment for that cause. *Anderson v. Doolittle*, 88 W. Va. 633, 18 S. E. Rep. 726; *Capehart v. Cunningham*, 12 W. Va.

a motion to quash a second execution in vacation, the judge may, in vacation, allow the sheriff to amend his return on the first execution.

These were motions in vacation before the Judge of the Circuit Court of the city of Richmond to quash three alias writs of fieri facias which issued from the clerk's office of that court in favor of the Commonwealth of Virginia; two of them against C. W. Watkins, sergeant of the town of Danville, and James M. Walker, W. W. Keen and Edward D. Withers, as his sureties, and the other against the said Watkins and William P. Graves, W. W. Keen and J. J. Hankins, as his sureties. The motions were, by consent, heard together as one motion.

It appears that, on the 16th of December, 1866, the Commonwealth recovered two judgments against Walker, Keen and Withers, as the sureties of Watkins, sergeant of the town of Danville—the first for \$1,388.47, the balance of the land, property and capitation taxes of 1865, and September license taxes of the same year, with interest thereon at the rate of twelve per cent. per annum from the 25th of March, 1866, till payment, and \$208.27 for damages thereon according to law, and the costs of the motion; the second for \$5,817.99, the May license taxes of 1866, with like interest from the 30th of May, 1866, till paid, and \$872.70 damages, and the costs of the motion. And on the 18th of December judgments for the same amounts and causes were recovered against Watkins, the principal. And one execution was issued upon each set of the judgments against Watkins and the sureties. These executions were placed in the hands of C. L. Powell, sheriff of Pittsylvania county, and he en-

15 dorsed the same return *on both of them, as follows: Property levied upon the 14th day of January, 1867, consisting of thirty thousand pounds of leaf tobacco belonging to W. W. Keen, a large lot of groceries, consisting of bacon, whiskey, sugar and coffee, the property of James M. Walker, and about seven thousand pounds of leaf tobacco, the property of E. D. Withers. And on the 16th January, 1867, I received orders from the Auditor of Public Accounts of Virginia to stay proceedings for sixty days. A short time thereafter an act was passed by the General Assembly of Virginia, giving the defendants until the

750. See *Stone v. Wilson*, 10 Gratt. 530, 533; *Walker v. Com.*, 18 Gratt. 13."

For the above proposition the principle is cited and followed in the following cases: *Commercial, etc.*, *Co. v. Everhart*, 83 Va. 964, 14 S. E. Rep. 836; *Goolsby v. St. John*, 25 Gratt. 100; *Shenandoah Valley R. R. Co. v. Ashby*, 86 Va. 236, 9 S. E. Rep. 1003. See, in accord, *Stotz v. Collins*, 83 Va. 423, 2 S. E. Rep. 737; *Bullitt v. Winstons*, 1 Munf. 209; *Smith v. Triplett*, 4 Leigh 500; *Wardsworth v. Miller*, 4 Gratt. 99; *Stone v. Wilson*, 10 Gratt. 529; *Lee v. Chilton*, 5 Munf. 407; *Rucker v. Harrison*, 6 Munf. 181, where the sheriff's return was allowed to be amended after a lapse of seven years.

1st of August, 1867, to make payment, and the property thereby taken out of my hands.

On the 14th of January, 1867, the third judgment was recovered against Watkins, Graves, Keen and Hankins for the sum of \$1,288.61, for three-fourths of the land, property, and capitation taxes of 1866, with interest thereon at twelve per cent. per annum from the 20th day of December, 1866, till payment, and \$193.29 for damages, and the costs of the motion. On the 19th of January, 1867, a fieri facias was issued on this judgment, which went into the hands of the sheriff of Pittsylvania county on the same day; on which he returned: Property levied upon February 14th, 1867, and proceedings stayed by special act of the Legislature of Virginia, dated 22d February, 1867. See page 664, Sess. Acts 1866-67.

On each of these judgments, it appears that another execution issued from the clerk's office on the 29th of July, 1867; and these are the executions which the plaintiffs in this motion sought to quash.

Whilst the motions were pending before the judge in vacation, and before the evidence in support of the motions had been concluded, C. Powell, the sheriff in whose hands the original as well as the said alias writs of fieri facias had been successively placed, moved the judge for leave to
16 amend his returns upon the original writs of fieri facias; the said writs and original returns thereon being set forth in the transcripts of the records offered in evidence by the plaintiffs. To this motion the plaintiffs objected; but the court overruled the objection, and permitted the sheriff to amend his return. The amended return on the first two executions is as follows:

Levied 14th January, 1867, on thirty thousand pounds of leaf tobacco, the property of W. W. Keen; on a lot of groceries, consisting of bacon, whiskey, sugar and coffee, the property of James M. Walker; and on about seven thousand pounds of leaf tobacco, the property of E. D. Withers. The property so levied upon of each of the defendants aforesaid, was sufficient to satisfy the share of each defendant. On the 16th of January, 1867, I received from Thos. R. Bowden, Attorney General of the commonwealth of Virginia, orders not to serve this execution, but to hold it for further orders. On the same day, namely, January 16th, 1867, I received orders from Wm. F. Taylor, Auditor of State of Virginia, to stay proceedings for sixty days. On the 22d of February, 1867, an act was passed by the General Assembly of Virginia, relieving defendants from payment of damages on condition that payment of debt and costs were paid by 1st of August, 1867. In consequence of the foregoing facts, I refrained from any further action in the premises.

The amended return on the third execution was: Levied 14th February, 1867, upon seven tobacco screws and all the household furniture of James J. Hankins; and on three head of horses and one wagon, and all the household furniture, consisting of

beds, &c., the property of Wm. P. Graves; and on ten thousand pounds of leaf tobacco, the property of W. W. Keen. On the 16th of February, 1867, I received from Wm. F. Taylor, the auditor of the State of Virginia, orders to stay proceedings for
17 sixty *days; and on the 22d of February, 1867, the act was passed, &c., as in the returns on the other executions.

There were several disputed questions of fact, which, though much discussed by counsel, were not considered by the court, and therefore, it is unnecessary to state the evidence bearing upon them. The only question of the kind considered by the court is, whether the sureties consented to the discharge of the property by the sheriff from the executions. On this question there could be no doubt as to Walker and Keen, the sureties in the first two executions, and of all the sureties in the second execution. All these parties were united in making the application for relief. Keen, with the concurrence of Walker, telegraphed to his brother, who was a member of the Senate; and Hankins, with the concurrence of his co-sureties, went himself to Richmond to endeavor to obtain relief for them. Watkins, the principal, was not consulted, and had no part in the application; he being insolvent, and having left Danville. The only question about which there could be any doubt is, whether Withers assented to the discharge of the property. On that question the evidence is stated by Judge Moncure in his opinion, and need not be repeated here.

The judge refused to quash the executions; and the plaintiffs excepted. This bill sets out all the facts proved, and is an exception to the permission to the sheriff to amend his return, as well as to the judgment of the court upon the merits: and upon their application, a writ of error was allowed.

Page & Maury, and C. E. Dabney, for the appellants.

1st. The motion to quash these executions was made, and heard by the judge, in vacation, under the authority of the act, Code of 1860, ch. 187, § 23, p. 776. But there is no act authorizing the court
18 to hear and act on a *motion, in vacation, by the sheriff to be permitted to amend his return; and as the executions and returns thereon, are among the records of the court in the clerk's office, and can not be taken from thence, the judge in vacation can not have them before him, so as to act upon them.

2d. But the great question in this case is, are the judgments discharged by the release of the property by the sheriff under the circumstances. That there was a valid levy upon property, much more than enough to satisfy the executions, cannot be questioned successfully. Bullitt's ex'ors v. Winstons, 1 Munf. 269; Roth v. Wells, 29 New York R. 471. And if there was a valid levy in each of the cases, we insist that it could not have been released by the sheriff.

He is a mere ministerial officer, and derives his authority from the writ, which is his warrant of attorney, and without which he is wholly unauthorized to act. The writ prescribes his duties, and confers a special, not a general, authority. Hence at common law the sheriff had no authority to receive money from a debtor charged in execution under a ca. sa.; for his business is only to execute the writ. Tidd's Prac. 1029. So if a sheriff levies under fi. fa. and pays the plaintiff with his own money, yet he cannot keep the goods to his own use; for the authority by which he acted was to sell the goods. And so the sheriff cannot deliver the goods seized under a fi. fa. to the plaintiff in satisfaction; for the authority is to sell.

So soon as the levy of a fi. fa. is consummate, the goods are in custodiam legis. The plaintiff's right to satisfaction out of the property levied on, cannot be defeated by the act of the sheriff. It was otherwise when the debtor was charged in execution under a ca. sa. There the least indulgence would sometimes put a prisoner out of the sheriff's power, even though he should voluntarily return, and *go into prison. But this exception grows out of the peculiar nature of the ca. sa.; and the reason of it was to deter the sheriff from alleviating the duress of debtors, and thereby defeating the object of the process; which was to compel satisfaction by holding the debtor's body in close custody.

After a levy on property sufficient to satisfy the execution, there can be no other execution upon that judgment, except by agreement of the parties. The property levied on is at the peril of the sheriff, and nothing will excuse him from properly applying it, but the act of God or the king's enemies. He may constitute the debtor his bailee or he may leave his bailiff in charge of the goods; but this is altogether at the sheriff's risk; and if the levy comes to naught, whether from the act of the debtor or not, the sheriff makes the debt his own: he becomes instantly debtor ex delicto; and there can be no new execution. In fact, there is no need for a new writ; for the sheriff can pursue the property wherever it may be; and if necessary, he may sue the defendant for it. If, therefore, the defendant is solvent, the sheriff will pay the money and go against him: if he is insolvent, then an alias writ would be worthless. In Ladd v. Blunt, 4 Mass. R. 402, Parsons, Ch. J., said: "When goods sufficient to satisfy the judgment are seized on fieri facias, the debtor is discharged, even if the sheriff wastes the goods or misapplies the money arising from the sale, or does not return the execution."

It is the spirit and policy of the law that the sheriff should execute writs of execution with dispatch, and have as little temptation as possible to grant indulgence to debtors. If it should be said that the sheriff and his sureties may be worthless, it is answered that the law tolerates no such presumption. Sir Bartholomew Shower

said arguendo, in *Burton v. Horne*, 1 Show. R. 174, "as to *the sheriff's being a poor man, that is never to be presumed, for the law has provided otherwise."

The law manifests wisdom in thus putting the creditor at the end of his suit, and compelling him to pursue the sheriff. In some cases it may work hardship; but whilst it seems hard to confine the plaintiff's redress to a proceeding against the sheriff, the real effect of the rule is to make the necessity of going against the sheriff, much less frequent than it would otherwise be, because the law makes it so very hazardous for the sheriff to grant indulgence to a debtor, and makes it so plainly his duty to go right on and make the money: for the office of the execution is to make the money at once; and to thwart that object is to run counter to public policy. Therefore, whilst it is not essential to a valid levy of an execution, that the sheriff shall take property out of the debtor's possession, yet the law does not commend any such practice. The law has provided only one way of indulging an execution debtor; and that is upon his giving a forthcoming bond.

For the creditor's safety and protection, the law has armed the sheriff with a power commensurate with his responsibility. The posse comitatus is at his command; and as was said by Doddridge, J., in *May v. Proby*, 3 Bulst. R. 200, "no power by intendment of law is able to resist the sheriff and his power, who hath posse comitatus at his command." Hence it is that "rescous" is no return. It is said by the same judge, in the same case: It is greatly in derogation of the king, that the sheriff should return that he could not have the body there propter resistentiam. And when a sheriff returned in *Replevin*, that he could not have the beasts, he was amerced. And hence, after the destruction of the gaols in the British metropolis by the rioters in 1780, it was found necessary to pass an act of Parliament to indemnify the gaolers from the consequences

*of the prisoners' escaping, though no actual negligence could be imputed to them; as it was impossible for them to prevent such escape. *Le Blanc and Runnington*, arguendo, in *Alsept v. Eyles*, 2 Hen. Bl. R. 111; *Comy. Dig. Rescous D. 7*; *Mildmay v. Smith*, 2 Wms. Saund. R. 344.

At common law, if a debtor died charged in execution under a ca. sa., the creditor could have no other execution. The statute 21 James 1, ch. 24, was passed to remedy this. By 8 & 9 William 3, ch. 26, the plaintiff was authorized to have a new execution when the debtor escaped by any ways or means howsoever; and by 41 George 3, ch. 64, the plaintiff might consent to the debtor's discharge without losing the benefit of his judgment, except that the body of the debtor could not be taken in execution again. This statute, however, expired by its own limitation in three years.

But while the legislature has thus innovated upon the law in relation to the ca. sa., the law in relation to the fi. fa. has remained unchanged. And the reason seems to be this: The ca. sa. is not of the class of valuable executions. 5 Rep. 87a, 87b. It is not in the strict sense final, but only quousque the defendant shall satisfy the plaintiff: but execution is final when the plaintiff is satisfied. The debtor's body was deemed but a pledge for the debt. But there is no law giving the plaintiff more than one sufficient fi. fa.

It seems to be clear, then, that no act of the sheriff could release a levy of an execution of fi. fa. But the act of the creditor could release the levy; for he has plenary power over his execution, and the sheriff must do his bidding. And when the creditor releases the levy the judgment is discharged, upon the principle that *volenti non fit injuria*. Root v. Wagner, 3 Tiff. R. I. 17. It is familiar law, that if a creditor consents to release his debtor from

22 *custody, it was in law a satisfaction.

The law conclusively presumed a satisfaction. Said a distinguished judge: "When a party voluntarily extinguishes his own judgment, he cannot afterwards complain of it. If indeed, after having levied the execution on the body, the creditor consents to release his debtor from custody, and agrees that he may go at large, then the law regards the execution, the levy and the discharge, as amounting to a satisfaction of the judgment. No new execution on the judgment ever can issue. 2 Tuck. Com. 355. And so it is where satisfaction is entered on the roll by the plaintiff. Ward v. Vass, 6 Leigh 135.

If a plaintiff gives up a levy without the consent of the defendant, his case is irremediable, and he has himself alone to blame. In the language of Judge Roane, in Bullitt's ex'ors v. Winstons, 1 Munf. 269, "The law does not permit our citizens to be harassed by repeated and unnecessary executions." In Green v. Burke, 23 Wend. R. 496, 501, the Court says: "The plaintiff may, by tampering with the levy himself, lose his debt: as if he release property from arrest which is sufficient to pay the debt." And it was held in Smith v. Hughes, 24 Illinois R. 270, that when a levy has been made, unless released by agreement of the defendant, it can only be removed by a sale, or by an order of the court issuing the execution.

If, notwithstanding the debtor's release from custody was in *favorem libertatis*, the law presumed from such release a satisfaction of the judgment, though the debtor's body was a mere pledge to enforce payment of the debt, it would seem to follow a *multo fortiori* that a creditor's release of a valuable satisfaction, such as a levy, would justify a conclusive presumption of satisfaction. It is, in fact, inconsistent with any other supposition. And such is the law of Virginia. Bullitt's ex'ors v. Winstons, 1 Munf. 269; 2 Tuck. Com. 364, 23 365. In the case of Bullitt *v. Win-

stons the creditor's hands were not tied, as there was, in fact, no consideration moving from Littlepage to induce the plaintiff to give time. It is no consideration for a party to perform what he was under a previous obligation to do. 1 Parsons' Cont. 437, *edi.* 1864. Hence, where a party promised a witness who was in attendance under a subpoena, that he would compensate him for his loss of time if he would stay and testify, it was held there was no consideration for the promise. Willis v. Peckham, 1 Brod. & Bingh. 515; Collins v. Godefroy, 1 Barn. & Ad. 950.

That the State is bound by the same rule as private parties, is well settled. United States v. Watkins, 4 Cr. Cir. Ct. R. 270; United States v. Stansberry, 1 Peter's U. S. R. 573; United States v. Thompson, Gilpin's R. 614.

It needs no argument to prove that the Commonwealth did release the levy made under her execution. We are here now asking this court to quash, not writs of venditioni exponas, directing the sheriff to sell property in his hands levied under former executions, but alias writs of fieri facias, commanding the sheriff to levy as well as to sell. And we insist that the Commonwealth, having released the levies, the judgments are discharged; for the defendants, Withers, Graves, Hankins and Watkins were not consenting to the release. And we insist, if any one did not assent, the judgment is released as to him and all his fellows.

A suspension of a right of action for an instant, as to one, extinguishes the right as to all; and the effect of a release to one is the same. In Foster v. Jackson, Hobart 52a, 59a, joint debtors are said to be one debtor when sued jointly; and, therefore, that you could not have a *capias* against one, and another kind of executions as to others; which you might have done if you had sued them severally. *And so a technical release to one is a bar to all others, because it is an admission by the creditor that his debt is paid. Savage, Ch. J., Catskill Bank v. Messenger, 9 Cow. R. 37; and it is tantamount to a receipt in full. Crane adm'r v. Alling, 3 Green C. L. R. 425. And so a discharge of one is the discharge of all. Cheetham v. Ward, 1 Bos. & Pul. R. 630; 1 Parsons Cont. p. 27. And a release by operation of law fulfills the whole requirement of the law; it amounts to a forgiving of the debt, and an extinguishment of the bond, so as to leave no debt remaining. It proves everything that could be proved by a technical release. Crane adm'r v. Alling, *supra*.

Upon the effect of releases, whether technical or by operation of law, we refer to Bower v. Suadlin, 1 Atk. R. 294; Slater ex parte, 6 Ves. R. 146; Ex parte Gifford, 6 Id. 805; Robertson v. Smith, 18 John. R. 459; Ward v. Motter, 2 Rob. R. 536; Clark v. Clement, 6 T. R. 525; Nicholson v. Revill, 4 Ad. & Ell. 675, 31 Eng. C. L. R. 166; North v. Wakefield, 13 Queen's Bench R. 536, 66 Eng. C. L. R. 535; 2 Tuck. Com.

356; Bac. Abr. Release G. (Bouvier's ed.); 8 Rep. 136a. And that equity follows the law. 1 Story's Equ. Jur. § 112; Hunt v. Rousmanier, 8 Wheat. R. 174.

The science of pleading knew nothing of the title or relation of suretyship. 2 Amer. Lead. Cas. 395. In a court of law the principal and surety are joint debtors, fixed in the same obligation; and what will discharge one will discharge all. Id. 396.

For the purpose of enforcing contribution among co-sureties, one surety who pays the debt is entitled to be substituted to all the rights and remedies of the creditor, as against his co-sureties, in precisely the same manner as against the principal debtor; and although payment of the debt may have discharged the other sureties at law, equity will keep it alive for this purpose. And this principle applies

25 *to bonds, judgments, decrees, mortgages and all other securities whatsoever. Amer. note to Dering v. Earl of Winchelsea, 1 White & Tud. Lead. Cas. in Equ. 117. And while the cases fully establish the creditor's right to remain quiescent; they treat him as a defaulter in every instance in which any hold is surrendered or lien is waived, which might have resulted in the discharge of the debt and the exoneration of the surety. 2 Amer. Lead. Cas. 343. And thus it is a well settled principle of equity, that a creditor who has the personal contract of his debtor with a surety, and has also, or afterwards takes, property from the principal as a pledge or security for his debt, is to hold the property fairly and impartially for the benefit of the surety as well as himself; and if he parts with it without the knowledge or against the consent of the surety, he shall lose his claim against the surety to the amount of the property so surrendered. Id. 345.

The release or relinquishment of a security which binds the estate of one co-surety injures the other, because he would have been entitled to subrogation on paying the debt. 2 Amer. Lead. Cas. 355, 356, citing Rice v. Morton, 19 Missouri R. 263. And the same acts are held to discharge the remaining sureties quoad the shares which such co-surety would otherwise have been required to contribute as would, if done to the principal debtor, discharge the surety. And when a co-surety has been released, the remaining co-sureties will be exonerated as to so much as the discharged co-surety would have been compellable to pay except for the release. In this case, each party had a right to satisfy the debt, and to be subrogated to all the creditors' rights under the executions. But the release of the levies defeated this right, and so discharged the defendants to the extent of the levies.

As to the remedy—The court is armed with plenary power over its own process; and to prevent the abuse of

26 *that process, the court will give effect to any defence that would be available in equity. Steele v. Boyd, 6 Leigh 541. The remedy by motion has supplanted the audita querela; which is

defined in 2 Sellon's Prac. 253, to be an action in the nature of a bill in equity to be relieved against oppression.

Robt. Johnston, for the Commonwealth.

1. The first question which we have to consider is, whether there was a levy by the sheriff upon the property of these debtors. And on this point, it is obvious that the sheriff was arrested before he finished the levy. He never took possession of the property, either personal or vicarious. He never designed to leave the property in the possession of these debtors as his bailees; but seeing that there would be an effort by them to obtain indulgence, he waited the result of that application. And so, clearly, the matter was understood by the parties; and they went on to use and sell the property, after what occurred, as they had done before. Walker sold his goods, and the others used whatever was in a condition to be used, without any regard to what the sheriff had done.

Whatever may be the rule adopted to define a levy of an execution, it must necessarily include the element, that possession must have been taken by the officer. The continuity of the debtor's possession, as debtor, must have been broken. That was the case in Bullitt's ex'or v. Winstons, 1 Munf. 269, so much relied on by the appellants' counsel. In that case the property was in the power of the officer, and he appointed a bailee to hold it. And if it is said that the debtor may be constituted the bailee, still if so, it must be done by some unequivocal act, such as will break the continuity of the debtor's possession; and the possession of the officer must be a continuing possession. Barnes v.

Billington, 1 Wash. C. C. R. 29; Lloyd 27 *v. Wyckoff, 6 Halst. R. 218; Beckman v. Lansing, 3 Wend. R. 446; Blades v. Arundale, 1 Mau. & Sel. R. 711. In the case of Roth v. Wells, 29 New York R. 471, cited on the other side, there was possession in the officer through the agency of the debtor.

If there was no valid possession, then the case comes clearly within the principle of McKenney's ex'or v. Waller, 1 Leigh 434; Alcock v. Hill, 4 Leigh 622; and Humphrey v. Hitt, 6 Gratt. 509. This last case refers to all the other cases, and they establish clearly that a creditor may withdraw his execution though it is about to be levied on the property of the principal debtor.

But if the levy was made in these cases, it was immediately released and abandoned by the sheriff. He did not remove the property, or provide for the care of it; and there is not the slightest evidence to show that he appointed the debtors his bailees to keep possession of it for him. Upon the assumption that there was a levy, the property was in the custody of the law. The creditor had no authority to control the sheriff; but the sheriff was a trustee of the debtor as well as the creditor; and he was also the trustee of the sureties. His was a public duty, and he was bound to act for all. If, then, he released and abandoned

the levy without the concurrence of the commonwealth, clearly his act did not discharge the judgments. *Ward v. Vass*, 7 Leigh 135; *Winston v. Whitlocke*, 5 Call 435; *Randolph's adm'r v. Randolph*, 3 Rand. 490; *Dyke v. Mercer*, 2 Show. R. 394; *Allen, J.*, in *Garland v. Lynch*, 1 Rob. R. 545, 560, 564; *Norris v. Crummy*, 2 Rand. 323; *Carr's adm'r's v. Glasscock's adm'r*, 3 Gratt. 343; 2 Tuck. Com. 365.

This case has been argued for the appellants as if the State had consented to the release. But the State could only consent through the General Assembly. The

auditor of accounts cannot receive a dollar for the commonwealth. *A debt can only be paid to or by the State in the mode prescribed by the statute. A payment to the auditor, and his receipt for it, would be worthless. Code of 1860, ch. 45, § 3, p. 267. The auditor cannot release an obligation to the State. He cannot dismiss a prosecution for a claim without the concurrence of the attorney-general. There is but one case in which he can release a claim, and that is, when it has been standing for more than twenty years he may, with the concurrence of the attorney-general, adjust and settle it upon equitable principles. Code of 1860, ch. 42, § 24, p. 255. A sheriff cannot pay money to the auditor or attorney-general collected upon execution, and though an agent to sell delinquent lands may receive the money from the purchaser, he must pay it into the treasury in the mode prescribed by the statute in all cases. Nay, an officer cannot even make a mistake against the commonwealth; not even a court of justice. *Id.* ch. 42, § 6, p. 252. And if these statutory provisions are not sufficient for the protection of the commonwealth, the prerogative of the crown, except so far as it is inconsistent with our institutions or has been changed by statute, and especially with reference to the revenue, is in force in favor of the government. *United States v. Kirkpatrick*, 9 Wheat. R. 735; *Leake v. Ferguson*, 2 Gratt. 419; *United States v. Stansberry*, 1 Peters R. 573; *Locke v. The Postmaster General*, 3 Mason's R. 446; *United States v. Nicholl*, 12 Wheat. R. 505; *Martin v. The Commonwealth*, 1 Mass. R. 347. These acts and authorities show that the auditor and attorney-general had no power to give up the debt or release it, or in any way to defeat a just claim of the commonwealth. And even if the acts done would have been binding between man and man, they are not binding upon the commonwealth.

But, in fact, there was no assent by these officers to the release of the property from the operation of the levy.

29 *There could be no such assent, for they knew nothing of a levy. The attorney-general directed the sheriff not to levy; and the auditor directed a stay of execution for sixty days; but neither directed a release of the property. The mere postponement of a sale will not affect the rights of a creditor. *Fisher v. Vanmeter*, 9 Leigh 18. These orders moreover were without

consideration, and might be recalled at any moment.

If the levy was released, and the commonwealth was entitled to her money, then new fi. fa.'s. were necessary. There is no doubt of the fact that the levy, if ever made, was released. The appellants held possession of the property, and have disposed of it; and no writ of venditioni exponas could enable the sheriff to get hold of it or sell it. And yet it is said the issue of the new writs of fi. fa. is an assent by the commonwealth to a release made months before. It is certain that the commonwealth can enforce her judgments by the issue of new writs of fi. fa., and yet it is insisted that the issue of these writs is the expression of her assent to that which, according to the views of the other side, discharges her judgments. But the clerk, in issuing a new writ, is not confined to the return on the first; but if satisfied the return is wrong, will issue another fi. fa. And if he refuses to do so, the plaintiff may apply to the court on the ground of the clerk's refusal; and the court will order the issue. Of course, if the execution is improperly issued, it may be quashed; but it is not so clear that where one fi. fa. has been levied you may not take out another, and sell under it. *McKey v. Garth*, 2 Rob. R. 33; *Eckhols v. Graham*, 1 Call 492.

The only act done by the General Assembly was the act passed at the instance of certainly some of these parties, whereby they were released from the damages recovered against them, provided that the whole amount of principal, interest and costs were paid into the public treasury on or

30 *before the 1st day of August, 1867.

This act was passed on the 22d of February. Here is a simple grant of indulgence, without any consideration, either of benefit to the commonwealth or injury to the other parties. Such acts of grace and favor, done by the king or his officers, or parliament, are presumed to be done at the instance of those so favored, and are to be taken most strongly against the grantee. And it was to avoid the operation of this rule of construction that the clause *ex mero motu* was introduced into the king's grants.

But we are not left to rely upon this rule, which would be sufficient, at least until the contrary appeared; and the evidence is abundant to show that all these sureties concurred in the abandonment or release of the levy by the sheriff, and in accepting the terms granted them by the General Assembly. (The counsel went into an examination of the testimony, and insisted that it showed that all the sureties except Withers were active in obtaining the release of the levy and the act of the General Assembly; that they assumed to act for him, and that he afterwards approved and ratified what was done, and took the benefit of it. And to show how far the courts would go in presuming the consent of the parties, he referred to *Hunter's adm'r's v. Jett*, 4 Rand. 104, and *Ward v. Vass*, 7 Leigh 135. And he said, that whether or not the act of as-

sembly released the levy, the sheriff and sureties so considered and treated it.)

But it is insisted that Withers is discharged, and that the release of one is the release of all.

We are not dealing with the question of the effect of a release of one by contract. There the contract is to be looked to with respect to its intention. Nor are we considering the effect of a release by contract without respect to intention. Nor are we considering the effect of a contract not to

sue. That, we are told, is a release
31 in equity *of the covenant. But we know that in such a case the covenant would release both technically; but only in equity. *Waggener v. Dyer*, 11 Leigh 384. We are here considering the effect of an act—the supposed act of the creditor releasing the levy on Withers' property. The motion here is in fact a motion for an exoneration, though in form a motion to quash the executions.

In *Steele v. Boyd*, 6 Leigh 547, a case similar to this, Judge Tucker says: "It is not conceived to be true that the exoneration of one party judicially pronounced, is a necessary release of all others, upon the principle that a release of one inures to all; for if this was so, then in all cases when the surety is discharged by the creditor's conduct, the principal would be discharged also; which can not be pretended." "When, as in the case of a forthcoming bond, which is always joint and several, one party is absolved by any other means than what the law deems a release, the right to recover is not impaired as to the rest." This position is approved, and a part of the language quoted by Judge Allen in delivering the opinion of the court in the case of *Mills v. The Central Savings Bank*, 16 Gratt. 94. And indeed, it seems to be well settled, that the release of one surety is not a release of a co-surety in equity. 1 Story's Equ. Jur. § 498a and note 3; *Pitman Prin. & Surety*, 192 marg.; 40 Law Libr. citing ex parte Gifford, 6 Ves. R. 805; *Stirling v. Forrester*, 3 Bligh. P. Cas. 575; *Dunn v. Slee*, 1 J. B. Moore 2.

The doctrine of subrogation is not applicable between principal co-sureties. This doctrine existed in the civil law, but has never been imported into the common law in this country: certainly not in Virginia. The case of *McMahon v. Fawcett*, 2 Rand. 514, does not sustain it. That case does not touch the question. There a security

given by the principal debtor to one
32 of the sureties was *held to inure to the benefit of all. In the English books there are cases of substitution by one surety for another; but they were in different ranks; as in the case of bail and a surety. And so in Virginia where there is a judgment and execution against a principal, who gives a forthcoming bond; there the first surety may go against the surety in the forthcoming bond. But where the sureties are on the same level, there is contribution between the sureties for the share of each, but no substitution. *Preston v.*

Preston & als., 4 Gratt. 88; *Buchanan v. Clark*, 10 Id. 154.

But let us consider this doctrine of substitution with reference to the case of the levy of a fi. fa. In *Carr's adm'r v. Glasscock's adm'r*, 3 Gratt. 343, *Baldwin, J.*, says: A lien by levy is temporary, and expires if there is no sale, when the right to sell ceases; and a surety who pays the debt has no right to be substituted to the lien. Suppose that, in this case, the whole debt had been made by the sale of the property of Withers. The levy upon the property of Walker and Keene would have still been in existence, but the right of the sheriff to sell would have ceased. He could not sell after the debt was paid. When Withers had paid the debt, how could the sheriff refuse to deliver up their property to them? What defence could the sheriff make to an action of trover or detinue by them for it? Must he retain the property until Withers should come for contribution? Shall he be required to determine that Withers is entitled to contribution; that the principal debtor is insolvent; for unless he is insolvent Withers would not be entitled to contribution from the sureties. This question of the insolvency of the principal may be one very difficult to solve; as was seen in the case of *Harrison v. Lane*, 5 Leigh 414.

What equity exists between these parties? Withers has not paid the debt, non constat he ever will pay; and non
33 *constat the principal will be insolvent when Withers pays. Non constat that either surety will be insolvent when called upon for contribution. There is no right or duty of contribution at present; not even an inchoate right. In cases like the present, when sureties are released, the law proceeds on the ground of injury; and the party asking relief must show the extent of his injury; and then he will have relief pro tanto. *Ward v. Vass*, 7 Leigh 135; *Norris v. Crummy*, 2 Rand. 323; *Carr's adm'r v. Glasscock's adm'r*, 3 Gratt. 343; *Baldwin, J.*, in *Humphrey v. Hitt*, 6 Gratt. 509; *Adams' Equ.* 268 marg. note 2; 2 Amer. Lead. Cas. 4th ed., *Hare & Wall*, notes 343, 344, 345, 348, 353, 355, 367, 368, 369.

What injury has been done to these parties? The release of the property to the debtors respectively was surely no injury to them. If Withers was injured by the release of the property to the other parties, he was injured as a surety. At least he is bound for his aliquot part of the debt. and he is only not bound as surety of Walker and Keen. He cannot have this remedy at law after execution sued out and levied. To quash the execution would produce irreparable injury to the plaintiff; and therefore equity is the remedy for the defendants in the executions.

MONCURE, P. This case has been argued with signal ability by the counsel on both sides. All the points discussed are interesting, but many of them are immaterial to the decision of the case, in my view of it, and will not, therefore, be considered. Without intending to decide, I will assume,

for the purposes of the case, that the first executions which issued on the judgments referred to in the proceedings were, in fact, levied, as stated in the returns on said executions; that the auditor had authority by law to control the said executions, and

34 to stay proceedings *thereon, even after they were levied; and that the effect of his act in staying such proceedings, either by itself or in connection with the act of the attorney-general, and the act of the General Assembly, passed February 22, 1867, entitled "an act for the relief of J. M. Walker and others, securities of C. W. Watkins, sergeant of Danville," (Sess. Acts, ch. 229, p. 664,) was to discharge the property levied on from the said executions. And upon that assumption I will proceed to consider—Whether the sureties, who were the owners of said property, did not, in fact, consent to the act or acts by which it was discharged as aforesaid, and to the discharge itself; and if so, whether the new executions issued upon said judgments were not lawfully and properly issued, notwithstanding there may have been no such consent on the part of the principal debtor.

First. Did the sureties consent? That all of them did, except Withers, seem to me to be very clear. All of them, at least with that exception only, as soon as the executions were levied, or about to be levied, on their property, earnestly appeal to the authorities at Richmond for indulgence, which was accordingly granted to them, without any other consideration or motive than pure benevolence. Such was the urgency of the pressure upon them; the sheriff having levied upon the goods of the first set of sureties—Walker, Keen and Withers—and being about to advertise them; that two of said sureties, Walker and Keen, made their first application for indulgence by telegraphic dispatch to a brother of one of them in Richmond, Colonel E. F. Keen, a member of the Legislature, then in session; and the answer came promptly back, in the same way, in a direction to the sheriff, first from the attorney-general, and then from the auditor, to stay proceedings on the executions then in the hands of said sheriff. A few days thereafter the sheriff

received the execution against Watkins
35 *and his second set of sureties—Hankins, Graves and Keen—and levied it on the property of said sureties, who thereupon had a meeting, and agreed that Hankins should apply in person to the auditor for indulgence on the said execution, which was accordingly done; and on the 16th of February, two days after the said levy, the sheriff received a dispatch from the auditor staying proceedings on said last mentioned execution. And six days thereafter, to-wit: on the 22d of February, an act of the Legislature was passed for the relief of all the sureties, releasing the damages recovered against them, amounting to twelve or fifteen hundred dollars, on condition of the payment of principal, interest and costs by the 1st of August, 1867. After the passage of the act, Walker informed the sheriff that he

had gotten indulgence to the 1st of August, and the first thing the sheriff knew of the passage of the act was that he saw a manuscript copy of it in the hands of Walker and Keen, sent to them by Colonel E. F. Keen. The sheriff expressly says that Walker and Keen approved of and ratified the said indulgence. But that all of the sureties approved of and ratified it is conclusively proved in the record. How, then, can it be said that they did not consent to it? It is argued, that they only asked for, and consented to, a stay of the proceedings, and not a discharge of the levy. But this is certainly not so. Their conduct and declarations, and the thing itself in its very nature, conclusively prove that this is not so. The sheriff expressly proves that Keen and Walker not only claimed that the act operated as an indulgence till the 1st of August, but sought a release of their property from the levy, and claimed that the proceedings did operate as a release of said levy, which effect was produced, as they contended, by the suspension of the auditor and attorney-general, and the act of assembly aforesaid. And the sheriff took the same view of the subject, and acted

36 accordingly. *All of the sureties knew that the sheriff took this view of the subject, and acted upon it; and all of them either expressly insisted on the same view, or acquiesced in it by continuing to use and enjoy their property which had been levied on, or dispose of it at pleasure, without regard to the levy, and inconsistently therewith. No surety made any objection to the delay of proceedings or consequential discharge of the levy, and none at any time required that the sheriff should proceed to sell under the executions any of the property that had been levied on. Each of them took the full benefit of the indulgence, and accorded it to his co-sureties. The nature of the most of the property levied on, and the business of some of the parties, was such as to require the property to be discharged from the levy as a consequence of the suspension of the proceedings. Walker was a merchant, in full and active operation, with a large stock of goods in his store, all of which were levied on. His business could not go on without a release of the levy. So important did he, and even the sheriff, consider it that his mercantile operations should not be suspended for a moment, that those operations continued to go on even while the parties were applying for indulgence by telegraphic dispatch. In asking for indulgence, therefore, Walker asked for a release of his merchandise from the levy as the chief object he had in view. The sheriff told Keen and Walker, after the indulgence was given by the auditor, that he would not do any thing further until the indulgence was at an end; and Walker told him he expected to have his part of the money ready: Have it ready, no doubt, by means of his mercantile operations. Keen and Withers were producers, and Keen a manufacturer of tobacco. Their tobacco had been levied on in the leaf; and it was nec-

essary, as well for the preservation of the subject as to provide the means of paying off the judgments, that the tobacco levied on should *be prepared for sale, and carried to market and sold. And this was accordingly done by the parties themselves. It surely cannot be necessary to say anything more to show the consent of all the sureties, except Withers, to the discharge of the levy.

And now as to Withers. A good deal has already been said incidentally, tending to show his consent also; but what remains to be said will, I think, make his consent almost as clear as that of his co-sureties. He was not in Danville when the executions were levied and the application for indulgence was made by his co-sureties; but was at his home in southwestern Virginia. He had a farm and crop of tobacco in Pittsylvania, on which tobacco the executions in which he was a defendant were levied. His overseer was informed of the levy at the time it was made, and no doubt promptly informed him of it. He knew that the judgments had been obtained, for he had been duly notified of the motions, and must have known that executions would soon be out against him. He knew that his principal Watkins was insolvent, and that the burden of the judgments would have to be shouldered by the sureties. It was natural that the sureties should confer together as to the best means of meeting the difficulty and bearing the burden, and they doubtless did so confer. That an appeal to the public authorities was spoken of and contemplated by them in their conferences is very probable. The executions came out and were promptly levied when he was far away; and of course he could not actively join in the measures, at once from necessity used, to prevent a forced sale and sacrifice of the property of the sureties. There can not be a doubt that he would have so joined had he been present. It was his manifest interest to do so, and his conduct and declarations afterwards prove that he would. Being absent, his associates applied for him and them, and obtained indulgence

38 for both. The appeal must *have been presented to the auditor, attorney-general and legislature in behalf of all the sureties, and relief was accordingly granted to all. The order given by the attorney-general and auditor was, generally, to stay the executions. And the act of the legislature was for the relief of the sureties generally. It is impossible to believe that this general indulgence would have been given had it been imagined by those who gave it that the boon was not desired by all who were intended to be benefited by it. Keen and Walker certainly intended to make the application on behalf of all. They did not expect or desire that their property should be discharged, and not that of their associate Withers. They, therefore, applied for the indulgence in general terms, believing it would be as acceptable to Withers as it certainly was to them. To grant the indulgence in the terms in which it was

asked would be to discharge the levy as to Withers as well as themselves. They surely did not mean, by asking the indulgence, to discharge Withers, and shoulder his part of the burden as well as their own. They must, therefore, have intended to act for Withers, either because he had authorized them, or because they knew or believed that he would sanction it. And now let us enquire whether it does not appear, by what he afterwards said and did, that he either authorized it beforehand, or at least afterwards sanctioned it. Withers, though not present when the executions were levied and the applications for indulgence were made, yet came to Pittsylvania very soon thereafter, and before the passage of the act of the legislature; having come over, as he said, for the purpose of meeting the executions like a man, and making some arrangement to pay them. On that occasion, he said to the sheriff that he was very glad the indulgence had been granted, and expressed the hope that something might be made out of the assets of Watkins (the principal) to alleviate the liability.

39 The sheriff judged *from Withers' conversation that he had been to Danville, and heard of the indulgence. Now where it will be remarked, that the proceedings to obtain the desired indulgence to all the sureties were not then completed, but were still in course of execution. The act of assembly, which was expected to give indulgence to the 1st of August, had not then been passed, but its probable passage was no doubt communicated to Withers by his associates. Did he object to what had been done, or protest against what was about to be done, either to his associates, or to the sheriff, or to the auditor, or to the legislature, or to any person whatever? Not a word of any such thing is to be found in the record, where it would certainly have been if it had existed. On the contrary, what he said to the sheriff shows that he approved and sanctioned what had been done and was doing in his behalf, and "was very glad the indulgence had been granted," not only because it was an indulgence to his associates, but especially because it was an indulgence to himself. And he "expressed the hope that something might be made out of the assets of Watkins to alleviate the liability"—that is, the liability of the sureties, himself in the number, thus admitting that their liability was to continue, and was only to be alleviated by means of the indulgence. We see, in this expression of Withers, a common object between him and his co-sureties, thus showing that they had conferred together and concurred in regard to one of the benefits to be expected from the indulgence. A similar expression was made by Keen and Walker, when they claimed to the sheriff that they had received an indulgence till the 1st of August, 1867, "by which time they hoped that Watkins would settle up his business, and that they would realize something from that source." And Withers accepted, and has enjoyed, the full benefit

of the indulgence thus granted to him and his associates. Instead of his tobacco being sold in the "leaf, in his barns in the country, at a forced sheriff's sale, he has had the advantage of preparing it for sale and carrying it to the best market, and selling it for the best price. And in May or June, 1867, we find him speaking to the sheriff of the fine price he had gotten for his crop of tobacco—the very crop on which the execution had been levied, by the discharge of which levy he had been enabled to obtain such a price. It thus appears, from all the circumstances of the case, that Withers either previously authorized his associates, Keen and Walker, to apply for the indulgence which was granted to him and them, or sanctioned the application after it had been made, and even before it had been fully granted, and accepted and has enjoyed the benefit of the indulgence. And in either view it may be said, that he as much consented as did the other sureties to the indulgence which was given, and the effect of it (if it had that effect) in discharging the levy of the first executions. And now I proceed to enquire,

Secondly. Were the new executions which were issued upon the judgments lawfully and properly issued, notwithstanding there may have been no such consent on the part of the principal debtor. If all the defendants, principal as well as sureties, had consented to the discharge of the first levy, it is abundantly proved by the authorities, and indeed admitted on all hands, that it would have been no bar to new executions. It is not pretended that there was any new contract which satisfied the judgments or tied the hands of the commonwealth, even for an instant; but there was simply a voluntary release of the levy, and if all the defendants had consented to such release, there would have been no question in the case. All the sureties did consent, and there is no evidence whether the principal, who is the only remaining defendant, consented or not. If he had been consulted, he would no doubt have *consented to that or any other courts which his sureties might have thought would be a benefit to them, or which they might have desired to pursue. He was insolvent, and really had no interest in the subject. The executions were not levied on his property, for he had none, but only on the property of the sureties. And they, and all others concerned, doubtless thought it wholly unnecessary to consult him as to whether his sureties should be indulged or not in the payment of his debt. His consent might fairly be presumed and inferred in the case, if it could be affected by such consent. He is not here complaining. He made no motion to quash the new executions, and of course did not join in this appeal from the judgment overruling the motion of the sureties.

We might, therefore, properly stop at this point. But let us proceed further, and treat him as not having given his consent. And then how does the matter stand?

The learned counsel for the plaintiffs in error contend, that though the sureties may have consented to the indulgence which released the levy upon their property; though such indulgence may have been granted only at their request and for their benefit; though they may have received and enjoyed the full benefit of the indulgence; and though they may be in no danger of sustaining any loss by reason of it; yet, because their insolvent principal did not also consent (though there is no evidence whatever of his dissent) they are, by reason of such indulgence and its effect, forever released from the debt! And not only so, but that the principal debtor himself is thereby released from the debt, and must go quit thereof forever! The counsel maintain that this strange effect is produced by a technical, unbending rule of law, that when the plaintiff in an execution against several defendants which has been levied on sufficient personal property, voluntarily discharges the levy without the consent of all the defendants *he thereby releases such of the defendants as do not consent to such discharge; and that a release of one or more of several joint, or joint and several debtors, is a release of all. They maintain that the rule applies to this case, and therefore, that the discharge of the levy on the property of the sureties, (though at their request,) without the consent of the insolvent principal, (supposing that he did not consent,) was a release of the principal, and that a release of the principal was, by operation of law, a release of the sureties also. Now if there be such a technical, unbending rule of law, and it applies to this case, we will have to be governed by it, unjust and unreasonable as its operation would certainly be. But surely a rule of law which would lead to such consequences ought to be well and firmly established by authority before we are required to follow it. Is there such a rule of law? I think not.

It has been often said by judges, in general terms, that a levy of an execution on personal property sufficient to discharge it is a satisfaction of the judgment; but this is certainly not so. *Clerk v. Withers*, 2 Ld. Raym. R. 1072, is the source from which the expression seems to have been derived; and though there may be dicta to that effect in the opinions of some of the judges who decided that case, there is certainly nothing in the decision itself which gives any warrant to the expression. Nobody can find any fault with that decision. A sheriff had levied an execution in favor of an administrator on the property of the defendant, and before the sale of the property the plaintiff died. The defendant then sued the sheriff for his property, upon the ground that the death of the plaintiff put an end to further proceedings on the execution. But the court held, that the sheriff was bound to go on and make the sale, and pay the money into court, according to the mandate of the writ. This case is fully reviewed and commented upon in the opinions of the judges in *Giles*

43 v. Grover, 6 Bligh's *R. 277, decided in 1832, in which the effect of a levy, and the nature of the lien thereby acquired, are subjects of much observation. All the cases show that the mere levy of the execution on property of the defendant is not satisfaction of the judgment, but only a step towards it. A levy on property is not the object of the execution, but payment of the money. The levy does not divest the defendant of the property and transfer the title to the plaintiff, or even to the sheriff. The property still remains in the defendant, notwithstanding the levy, and only a special interest is vested in the sheriff, as a mere bailee, to enable him to keep the property safely, and defend it against wrongdoers. While subject to the levy it is in the custody of the law, and the sheriff has a naked power to sell it and pass the title from the owner to the purchaser. Several successive steps are to be taken between the issuing of the execution and the satisfaction of the judgment. The first step is, to place the execution in the hands of the sheriff. The effect of this step is, to make it a lien on the property of the defendant to a certain extent and of a certain character. The nature of this lien is commented on and explained in *Humphrey v. Hitt*, 6 Gratt. 509, as well as elsewhere. It is of so imperfect a nature as that the plaintiff may abandon it at pleasure by withdrawing his execution from the hands of the sheriff, or directing him not to levy it, without discharging the judgment, or even affecting the liability of a surety who may be one of several defendants. *Id.* and the cases therein cited of *McKenney v. Waller*, 1 Leigh 434, and *Alcock v. Hill*, 4 Id. 622. The second step is, to levy the execution on specific property, by which such property is set apart from the general property of the defendant and placed in the custody of the law until it can be sold and applied to the payment of the execution. The third and last step is, the sale of the property.

44 Then, and not till then, the plaintiff *may be said to have gotten to the end of his suit, at least so far as the defendant is concerned, and to the extent of the value of the property, unless indeed the property be lost by the neglect or misconduct of the sheriff, without the defendant's consent; in which case also the plaintiff may be said to have gotten to the end of his suit. Now until this last step is taken, the thing remains in fieri, and may, in a certain manner and under certain circumstances, be so undone as that the plaintiff may be placed in the same situation in which he was before he sued out execution, and may therefore sue out a new execution. But by taking the second step, to wit: the levying of the execution, the plaintiff increases his responsibilities and makes it more difficult to withdraw the execution without endangering the debt. He has thereby acquired a specific and a better lien; still not perfect, but yet so nearly so, as that he cannot always safely release it of his own accord. He then becomes, as has

been said, a trustee of the execution for the benefit of all parties concerned. The defendant is interested; because a specific portion of his property having been seized and placed in the custody of the law for the payment of the execution, he has a right to be protected against another seizure under a new execution for the same debt, without his consent, or unless there be a necessity for it. The sureties, if there be any, of the defendant on whose property the levy is made, are also interested, in having the property of their principal, thus specifically bound for the payment of that debt, applied to that purpose, in their exoneration in whole or in part, according to the value of the property. They also, therefore, have a right to be consulted by the plaintiff in giving up the levy, and must consent thereto in order to make them liable to a new execution; at least without having credit for the amount of the first levy. Until the plaintiff "has gotten to the end of his suit;" in other words,

45 until *he has gotten satisfaction of his demand, or what is equivalent thereto, he may continue to prosecute his remedy to judgment and sue out execution after execution thereon; taking care not to oppress or injure the defendant or his sureties, if there be any. The court in which the judgment is rendered has ample power to superintend and control the execution of process thereon, and will take care to prevent its being perverted to purposes of injustice or oppression. A plaintiff, therefore, may always, with the consent of the defendants, abandon a levy upon the property of all or any of them, and sue out a new execution. If the defendants be a principal and his sureties, and the property levied on be that of the sureties, the plaintiff may, with the consent of the sureties only, abandon the levy and sue out a new execution against all the defendants. No injury is done to the principal by releasing the lien on the property of the sureties, for that lien cannot enure to his benefit in any possible event. If his sureties are satisfied, he, certainly, has no cause to complain. So also if the levy be abandoned by the sheriff with the consent of the defendant, without the concurrence or authority of the plaintiff; or, if the property be by the defendant eligned or removed out of the reach of the sheriff, without the consent either of him or the plaintiff, the latter may sue out a new execution. But if the property levied on be lost to the defendant by the misconduct or neglect of the sheriff, the execution is thereby satisfied to the extent of the value of the property, and the plaintiff can then look only to the sheriff for indemnity. The reason of this is plain. The plaintiff, by pursuing his remedy, has caused the defendant's property to be taken out of his hands and placed in the custody of the law for the satisfaction of the debt. If that property be lost by the default of the officer of the law, who in this respect may be said to be the agent of the plaintiff, and without the consent of the de-

46 fendant, *it is reasonable and proper that the loss should not fall on the defendant, and he be thus, to that extent, compelled to pay the debt twice. The plaintiff must incur the risk of ultimate loss in this respect, as the result of an inherent defect of his legal remedy.

These principles seem to be fully sustained by the cases, especially the most recent; among which are *Green v. Burke*, 23 Wend. R. 496; *Ostrander v. Walter*, 2 Hill's N. Y. R. 329; *Taylor v. Ranney*, 4 Id. 619; *The People v. Hopson*, 1 Denio's R. 574; *Peck v. Tiffany*, 2 Comst. R. 451; *United States v. Dashiell*, 3 Wall. U. S. R. 688. In *The People v. Hopson*, the court, Bronson, Ch. J., said: "If the broad ground has not yet been taken, it is time it should be asserted, that a mere levy upon sufficient personal property, without anything more, never amounts to a satisfaction of the judgment. So long as the property remains in legal custody, the other remedies of the creditor will be suspended. He cannot have a new execution," &c. "But without something more than a mere levy, the judgment is not extinguished. There is no foundation in reason for a different rule. The mere levy neither gives anything to the creditor, nor takes anything from the debtor. It does not divest a title: it only creates a lien on the property. It often happens that the levy is overreached by some other lien, is abandoned for the benefit of the debtor, or defeated by his misconduct. In such cases there is no color for saying that the judgment is gone; and yet they are included in the notion that a levy satisfies the debt." "The true rule I take to be this: the judgment is satisfied when the execution has been so used as to change the title, or in some other way deprive the debtor of his property. This includes the case of a levy and sale; and also the case of a loss or destruction of the goods after they have been taken out of the debtor's possession by virtue of the

47 process. When the property *is lost to the debtor in consequence of the legal measures which the creditor has pursued, the debt is gone, although the creditor may not have been paid. He must take his remedy against the officer, if he has been in fault; and if there be no such remedy, the creditor must bear the loss. But until the debt is paid, or the debtor has lost his property in consequence of his levy, the judgment remains in force." In *Peck v. Tiffany*, the court, Hoyt, J., clearly states in effect the same doctrine thus: "There are some old cases in which dicta are found that a levy upon sufficient property to satisfy an execution, is a satisfaction; but that doctrine has long since been exploded. When a sheriff levies upon sufficient property, and through his negligence or misconduct it is lost, destroyed, or otherwise disposed of, so that the defendant is deprived of the benefit of it, there is no doubt it should be regarded as a satisfaction of the execution, and the plaintiff must in such case seek his remedy against the

sheriff. But when the debtor has neither paid the debt, or been deprived of his property, the simple act of levying upon it is not satisfaction, whether the debtor has been permitted to retain the property either by his own misconduct or by his request, or the voluntary act of the officer; because neither works any wrong to him." In *the United States v. Dashiell*, decided in 1865, the last case we have on this subject, it was decided that the levy of an execution, even if made on personal property sufficient to satisfy the execution, is not a satisfaction of the judgment, and accordingly, therefore, does not extinguish it, if the levy have been abandoned at the request of the debtor, or for his advantage; as for example, the better to enable him to find purchasers for his property. In the opinion of the court delivered by Justice Clifford, the rule is laid down in the same words in which it is laid down by Ch. J. Bronson as before

48 mentioned, *which words were repeated by the latter in *Taylor v. Ranney*, referred to by the former.

There is nothing in any case decided by this court, so far as I am aware, at all in conflict with the principle before stated. The decisions of this court which were relied on in the argument as having a bearing upon this subject, are cases in which sureties sought relief, generally by motions to quash executions on account of some act of the creditor done, as they supposed, in derogation of their rights; as by making a new contract with the principal debtor which tied the hands of the creditor, or by releasing the lien of a levy on the property of the principal debtor, without the consent of the sureties. In this case there was no contract between the creditor and debtor, principal or sureties, which tied the hands of the creditor for an instant; indeed, no contract at all between them, except that on which the judgments were obtained. The orders given by the attorney-general and auditor were founded on no valuable consideration, and were recoverable at pleasure, though that of the auditor was for a stay of proceedings for sixty days. And the act of assembly, as was properly conceded in the argument, merely released the damages on condition of the payment of principal, interest and costs into the treasury on or before the 1st day of August, 1867, and did not give a moment's stay of proceedings on the executions, or in any manner affect the levy thereof. And in addition to all this, as I think I have shown, the sureties not only consented to the said orders and act, but solicited and obtained them for their special relief and accommodation; the executions having been levied alone on their property, and their principal being insolvent. What analogy there can be between this case and the decisions of this court above referred to, and

49 how any title to relief can be worked out by the sureties *or any of them on the authority of those decisions, or otherwise, upon the facts as I think I have conclusively shown them to be, I con-

fess I cannot comprehend. If I am right as to the facts, I think I am certainly right in my conclusion. If the facts were different, I would have some interesting questions yet to consider, but as they are not, it is unnecessary to notice them. I intended to have reviewed at some length the cases of *Baird v. Rice*, 1 Call 18; *Bullitt's ex'ors v. Winstons*, 1 Munf. 269; *Steele v. Boyd*, 6 Leigh 547; and *Ward v. Vass*, 7 Id. 135; but I do not think it necessary to do so, and the length of this opinion admonishes me of the propriety of drawing it to a close. Before I do so, however, I must notice one or two other matters.

I have thus far considered the case as if the Commonwealth, through her agents, had consented to and concurred with the sheriff and the sureties in the discharge of the levy. But such I think is not the fact. Evidently neither the attorney-general nor the auditor knew anything of the executions having been levied when they gave their orders of suspension. The question of levy or no levy was one of doubt upon the facts—at least as to some of the parties—and it does not appear that any of the facts were communicated to these officers of government. Indeed, it appears that even Keen and Walker were probably under the impression that no levy had been made when they applied by telegraphic dispatch to Richmond for indulgence; for the sheriff proves that they made no objection to the levy otherwise than they desired the levy delayed until they could hear the result of their application. But however that may be, the attorney-general and auditor, even if they knew when they gave their orders that the executions were levied, did not intend thereby to discharge the levy, but merely to suspend proceedings on the executions; and such is the true construction of their acts. They did

not direct the property to be restored to the possession of the defendants. A mere suspension of proceedings on a levied execution does not authorize a restoration of the property to the possession of the defendant, nor release the levy. *Fisher v. Vanmeter*, 9 Leigh 18. That the auditor did not intend to release the levy of the first execution is shown by the conversation which occurred between the sheriff and the auditor's clerk, when the first executions were returned, from which it is obvious that the auditor expected the money to be made on the first executions if not paid on or before the 1st of August. That the act of assembly did not operate a discharge of the levy has already been shown. So that if this view be, as it seems, correct, the release of the levy in this case has resulted, not from any act or consent of the Commonwealth or her agents, but solely from a misconception by the sheriff and the sureties, of the meaning and effect of the orders of the attorney-general and auditor and act of assembly aforesaid, and from the consequent abandonment of the property by the sheriff, and conversion of it by the sureties to their own use. In this view of

the case, the right of the Commonwealth to sue out the new executions, would, if possible, be still more manifest.

In regard to the last assignment of error, which was not relied on or noticed, if it was not in fact withdrawn, in the argument, to wit, that the judgments rendered against Walker, Keen and Withers at one time, and the judgments rendered against Watkins at another time, the first process not having been executed as to him, are not joint judgments against all the said parties, whereas the executions are against all the said parties jointly, and therefore do not pursue or correspond with the judgment. If that be any defect at all, it is only formal and not substantial, and has not injured, but rather benefited, the plaintiffs in error. I therefore think it is

not a good ground for reversing the judgment, especially as it does not appear that the objection was taken in the court below. The Commonwealth had a right to have her motion against the sureties continued until the notice was served on the principal, and then to take a joint judgment against all; or she had a right to take several judgments against the sureties and the principal, as they were respectively served with notice, as she did; and she might lawfully have sued out several executions on the judgments as they were obtained. But she chose to wait after getting judgments against the sureties until she had also gotten judgments against the principal in the joint proceedings against all, and then to sue out joint executions against all. I can see nothing objectionable in this, and certainly nothing of which the plaintiffs in error have any reason to complain.

In regard to the right of the Judge in vacation to give the sheriff leave to amend his returns; there can be no doubt, I think, but that he has that right, as incidental to the right expressly given him by the Code, chap. 187, § 23, to hear and decide on in vacation, a motion to quash an execution. A return on a former execution is generally very material evidence on the hearing of such a motion, and it is often important, in the course of the proceedings, to permit the sheriff to make or amend his return according to the truth of the case, and with a view to its effect upon the decision of the motion. Such permission has always been given by our courts. *Bullitt's ex'ors v. Winstons* is an instance of this kind. When, therefore, the statute gave to the judge in vacation power to quash an execution, it gave him also, by implication, power to permit the sheriff to make or amend his return, as the case may be, on the former execution, and I think the Judge did not err in permitting the amendments in this case. But whether we look to the original or the amended returns, the result will not be varied. In either case, we

*must look also to all the facts of the case as contained in the record, and decide accordingly. *Ward v. Vass*, 7 Leigh 135. There is, indeed, no material conflict

between either of these two sets of returns and the other facts of the case.

I am of opinion that there is no error in the judgment, and that it ought to be affirmed.

The other judges concurred in the opinion of Moncure, P.

Judgment affirmed.

53 *James River and Kanawha Company
v. Littlejohn.

Littlejohn v. Ferguson & als.

October Term, 1867, Richmond.

1. **Chancery Practice—Appeal—Petition for Rehearing.***—In a suit in which there is an absent defendant, there is a decree against the home defendant, from which he appeals. Pending the appeal, the absent defendant may file his petition in the court below to be permitted to appear and file his answer in the cause, and may have the decree reheard and set aside, if it is erroneous as to him.
2. **Same—Same—Same—Appeal Dismissed.**—If upon such re-hearing the decree, or so much of it as is the subject of appeal, is wholly set aside, the appeal will generally be dismissed. But if an appeal is taken from the decree on the re-hearing, before the dismissal of the first appeal, the appellate court may refuse to dismiss it.
3. **Same—Decree—Answer by Absent Defendant—Statute of Limitations.—**QUERRE: Whether the statute limiting the period in which an absent defendant may answer and have the decree corrected, applies to the time of presenting the petition, or of filing the answer, or of the decree upon the re-hearing.
4. **Same—Suit Pending—Laches.**—What laches of a party in a pending suit will not conclude him.
5. **Same—Assignment of Chose in Action—Proof of—Objections in Appellate Court.**†—A plaintiff in equity files with his bill, as the ground of his claim, an

***Chancery Practice—Appeal—Petition for Rehearing.**—The proposition laid down in the first headnote was approved in *Moran v. Johnston*, 26 Gratt. 108. See also, *foot-note* to the same case where the principal case is cited, and see *Beard v. Arbuckle*, 19 W. Va. 148.

In *Newman v. Mollohan*, 10 W. Va. 504, the court said: "The last position assumed by JUDGE PAULL, 'that the sixth section of chapter one hundred and thirty-four of the Code of West Virginia, which requires the party to apply to the court below in certain cases for the correction of errors before an appeal can be taken, can not be regarded as in conflict with the right of the appellate court to proceed to a final determination of the case, when once in rightful possession of it, and of jurisdiction over all the parties,' is fully sustained by the Virginia and West Virginia authorities, though perhaps on the authority of the *James River and Kanawha Canal Co. v. Littlejohn*, and *Littlejohn v. Ferguson*, 18 Gratt. 53, it may be that before the appellate court has decided the case, such petition or other proceeding for the correction of errors may be instituted in the court below, and the appellate court would suspend proceedings till the court below has decided whether any correction should be made."

†**Assignment of Chose in Action—Proof of—Objection in Appellate Court.**—In *Harnsberger v. Cochran*, 82

order on one of the defendants, which has not been excepted. No proof of the execution of the order is given; but its genuineness is not questioned in the court below, and it is made the basis of a decree in favor of the plaintiff. It is too late to make the objection in the appellate court, to the want of proof of the order.

6. **Same—Signature—Proof of.**†—The bill having alleged that the order was drawn by one of the defendants, the act Code ch. 171, § 38, applies, and no proof of the signature is necessary.

54 *7. **Bonds—Evidence of Facts Recited Thereon.**—The written opinion of an attorney of a party, or the recitals in a bond, though the papers are filed with the answer of a defendant, and are not excepted to as evidence, are not competent proof of the facts recited in them against other parties.

8. **Commissioner's Report—Errors Apparent on Record—Exceptions Unnecessary.**§—A commissioner's report is based upon the evidence of papers filed in the cause; and there is no exception to the report. The papers not being competent evidence of the facts recited in them, the court may disregard the report, and decide the case upon the competent testimony, and against the report.

9. **Assignment of Choses in Action—Priorities—Case at Bar.**—R gives to L an order on J, his debtor, for a sum certain; much less than the whole debt; and he gives to F an order on J for the whole balance due from J to R. F's order having been lost, in a controversy between L and F, in the absence of any evidence on the subject, the presumption is that the order in favor of L was first given.

10. **Same—Parties to Suit by Assignee.**—To a bill filed by an assignee of a chose in action, if the assignment purports to transfer the whole interest of the assignor, and there is nothing in the pleadings and proofs to induce the belief that it did not really do so, the assignor is not a necessary party.

Va. 731, 1 S. E. Rep. 120, the court said: "In the case of *James River and Kanawha Co. v. Littlejohn*, 18 Gratt. 75, this court says: 'The answer of *James River and Kanawha Company* disclaimed all knowledge as to the order of *Littlejohn*; but did not dispute its genuineness, or expressly call for proof of it. It was treated as genuine by the commissioner and the court; and the proof of it was not insisted on by the company. It was treated as genuine throughout the case. Under these circumstances it was too late to make the objection in this court.' See also, *Anderson v. De Soer*, 6 Gratt. 363."

‡**Same—Signature—Proof of.**—See principal case cited and approved in *Robinson v. Dix*, 18 W. Va. 542.

§**Commissioner's Report—Errors Apparent on Record—Exceptions Unnecessary.**—See monographic note on "Commissioners in Chancery" appended to *Whitehead v. Whitehead*, 23 Gratt. 376.

¶**Assignments—Parties to Suit by Assignee.**—See the principal case cited as authority in *Omohundro v. Henson*, 26 Gratt. 511, and *foot-note*, where there is a collection of cases in point, in each of which the principal case was cited. The principal case was distinguished, as to this point, in *Jameson v. Myles*, 7 W. Va. 322. See a discussion in the principal case (at page 82), as to whether the assignor of a chose in action is, in all cases, an indispensable party to a bill filed by his assignee.

51. **Appellate Practice—Absence of Formal Parties.**—If it appears affirmatively that a person, if made a party, would have been a mere formal party, against whom no decree would have been asked, and whose presence was not necessary for the protection of any of the defendants, the appellate court will not reverse a decree for his absence.

On the 14th of August, 1839, John Littlejohn sued out a subpoena in chancery from the clerk's office of the Circuit Superior Court of Law and Chancery for the county of Henrico and city of Richmond, against J. C. Robinett, William W. Ferguson and the James River and Kanawha Company, returnable to the first Monday in October; which was returned as served on the Company; and that Robinett and Ferguson were not found, and were no inhabitants. At the October rules, Littlejohn filed his bill, in which he alleged, that on the 8th day of February, 1839, J. C. Robinett was indebted to him in the sum of \$783.45,

55 *and on that day executed to the plaintiff his note for the amount, payable on demand; and at the same time drew an order on the James River and Kanawha Company, who were indebted to him as a contractor on their canal for the amount of the note, with interest from its date; which note and order are made exhibits with the bill. That the order was presented without delay to the Company, but the account of Robinett with the Company not having been finally settled so as to ascertain the precise sum due to him, before the money was paid to the plaintiff another order was presented to the Company from Robinett, in favor of William W. Ferguson, for the full amount of the balance due from the Company to Robinett, which purported to be drawn also on the 8th of February, 1839, and it is alleged was drawn before the order in favor of the plaintiff. And the Company, not denying that they have in their hands funds of Robinett sufficient to pay the order, yet decline to pay the plaintiff, because of the claim set up by Ferguson under the order in his favor.

The bill further charged, that the order in favor of Ferguson was fraudulent, was given at a date subsequent to that of the plaintiff, and as the plaintiff believed and charged, without consideration. And as he has no acceptance of his order by the Company, and has no proof without a discovery from them, of the amount in their hands, and Ferguson is not an inhabitant of the county, the plaintiff is compelled to ask the aid of a court of equity. And making the James River and Kanawha Company and Ferguson parties defendants to the bill, he calls for a full answer from them, and that Ferguson be required to produce his order; that the Company may be required to pay the plaintiff's claim out of the funds of Robinett in their hands; for all necessary accounts; and for general relief.

On the 4th of December, 1849, an
56 affidavit was made *before the clerk

of the court that Ferguson was not an inhabitant of this commonwealth; and an order of publication was made against him as an absent defendant; and the proof of the publication was filed in December, 1851. In June, 1850, a like order was made against Robinett; and the bill having been taken for confessed in February, 1840, against the James River and Kanawha Company, on the 28th of November, 1851, the cause came on to be heard upon the bill taken for confessed as to all the defendants, including Robinett as one, and the court decreed, that Robinett should pay to the plaintiff the sum of \$783.45, with interest from the 8th of February, 1839, until paid, and his costs. And it was further decreed, that the James River and Kanawha Company should render before one of the commissioners of the court an account of the amount which was due, or to become due, from the Company to Robinett on the 22d day of August, 1839, the day when the subpoena instituting this suit was served upon them, with a statement of the claims upon the said amount at that time, and the name or names of the claimants, and the grounds and evidence upon which such claims rested, with any matters specially stated, &c.

In February, 1852, the James River and Kanawha Company, by leave of the court, filed their answer, which is signed and sworn to by John Y. Mason, the then president of the Company. They say, that owing to the death of William B. Chittenden, late Secretary of the Company, in whose charge the papers relating to the matters referred to in the bill were placed, the Company was not able to make a full answer to all the allegations made in the bill. They admit that they were indebted to Robinett, on the 1st of August, 1839, in the sum of \$6,599.07; and that no part of that sum had been paid on the 22d of August, 1839. And they say, that the whole of that sum was afterwards, on the 19th of October,
57 1839, paid to William W. *Ferguson.

That it was paid on an assignment to him by Robinett of all the money due Robinett by the Company. That the assignment could not be found among the papers preserved in the office of the Company; and owing to the death of the then secretary, they cannot state what had become of it. But they believe it did exist, and for proof refer to four papers filed with the answer. That it may be true that the note and order exhibited with the bill were made by Robinett, but they know nothing, and therefore can form no belief concerning the same. If made by him, they deny that the said order was presented at the office of the Company, or any notice of it given to the Company, previous to the presentation of the order of Ferguson. They deny that the assignment to Ferguson was given without consideration, or that it was executed at a date posterior to the date of the order alleged to have been given to the plaintiff. They do not know the precise date of Ferguson's assignment, but believe it was prior in date to the plaintiff's; and

as strong proof thereof, they refer to two of the papers filed with the answer, in which it is referred to as bearing date the 1st of February, 1839, seven days before the date of the said order. And having paid the whole sum due to Robinett on an assignment bearing date prior to the order of the plaintiff, the Company ought not to be compelled to pay it over again.

The papers referred to and filed as exhibits with the foregoing answer are: First—the final estimate for the work done by Robinett, on section 66 of the canal, showing that there was due to him on the 1st of August, 1839, the sum of \$6,599.07; and a receipt attached, dated the 15th of October, 1839, of J. C. Robinett, by William W. Ferguson, acknowledging the payment to him of that sum in full of all demands against the Company on account of the work done on that section. Second—a power of attorney from Robinett to Ferguson,

58 dated the 3d of August, *1837, by which Ferguson was authorized to act for him in his absence, sickness or death; and to demand and receive from the James River and Kanawha Company all moneys that might from time to time become due to Robinett under his contract with the Company; and also to demand and receive the final estimate, together with the whole amount of the retained twenty per cent. when the said section should be completed. On this paper is the following endorsement: R. Josiah C. Robinett to William W. Ferguson, 1st February, 1839—power of attorney and assignment. Third—a bond of indemnity from Ferguson to the Company with two sureties. This bond is dated the 15th of October, 1839, and recites that Robinett did by an instrument in writing, dated on the 1st of February, 1839, transfer and assign the above mentioned moneys to Ferguson, and directed by his written order the said Company to pay said moneys to Ferguson, which order Ferguson had presented and demanded payment; that John Littlejohn claims a part of said money by an assignment from Robinett, and has instituted a suit in chancery against Ferguson, Robinett and the Company, and Ferguson had agreed to indemnify the Company against the claims of Littlejohn, if the money is paid to him. And he binds himself to defend the suit and save the Company harmless. Fourth—the opinion of S. S. Baxter, the attorney for the Company, dated September 13th, 1839, in which he says, he had seen the assignment of Robinett to W. W. Ferguson, and that Ferguson informs him that after this assignment Captain Littlejohn obtained another assignment of part of the same claim. He refers to the fact that Littlejohn had instituted a suit to enforce his claim; but as there is no restraining order, he expresses the opinion, that Ferguson is entitled to the money, and it may be paid to him; but recommends that the Company require indemnity. The Fifth—is a letter from Ferguson to Colonel Thomas

59 *M. Bondurant, then a director of

the Company. This letter is dated Bent creek, 25th July, 1839, and is directed to Colonel Bondurant, in Buckingham, where he resided. The writer says: I enclose the within paper, signed by J. C. Robinett, by which you will see he has given me a power of attorney to draw his final estimate on station 66 of the James River Canal; also his reserved twenty per cent. You will also find a transfer and assignment of the same; upon which two papers the president and directors will no doubt be safe against him by my receipt for the money due him at this time. He says: I am bound for him to a considerable amount. He requests Colonel Bondurant, if it is too much trouble for him to undertake, to let him know when the next meeting of the board takes place. He wishes the money retained by the board until it can be paid to him.

Commissioner Davis, in March, 1852, made his report. He had no evidence before him but that filed in the cause. He refers to the papers hereinbefore mentioned, and upon the evidence of Mr. Baxter's opinion, and the recitals in the bond, he reports that Ferguson did have an assignment from Robinett of the whole amount due to him by the James River and Kanawha Company; and that this assignment bore date the 1st of February, 1839. He reports that the only claims upon the fund is this assignment to Ferguson and the order in favor of Littlejohn, dated the 8th day of February, 1839, which order did not appear to have been accepted by the Company.

The cause came on to be heard on the 23d day of February, 1853, upon the papers formerly read, the answer of the James River and Kanawha Company, with the replication thereto, and the report of Commissioner Davis, to which there was no exception; when the court being of opinion, that the assignment to Ferguson not being produced, the reference to it in the 60 opinion of Mr. Baxter and *in the bond of indemnity, if admissible evidence, was not sufficient to establish the existence and date of the assignment. And being further of opinion, that the order in favor of Littlejohn operated as an assignment of that much due from the Company to Robinett, and that the payment by the Company to Ferguson after notice of that order was illegal and void, it was decreed, that the Company should pay to Littlejohn the principal money, interest and costs decreed against Robinett by the decree of the 28th of November, 1852, viz.: \$783.45, with interest thereon from the 8th of February, 1839, until paid, and his costs. From this decree the James River and Kanawha Company obtained an appeal to this court in May, 1853.

On the 12th of November, 1853, Ferguson applied by petition to the circuit court, in which the decree had been rendered, to be permitted to enter his appearance and file his answer, which he tendered. And the court made an order, that his said petition be granted, unless the plaintiff shows cause

to the contrary on or before the next term of the court, after being served, himself or his counsel, with a copy of this order. And on the 9th of May, 1859, James Lyons, Esq., as counsel for Littlejohn, acknowledged service of the order.

On the 9th of June, 1866, the court made another decree, that it appearing that the plaintiff, by counsel, has acknowledged service of the decree entered in this case on the 12th of November, 1853, and having failed to show sufficient cause to the contrary, leave is given the defendant, William W. Ferguson, to file the petition and answer mentioned in said decree; to which answer the plaintiff replied generally. And thereupon the cause came on to be heard, &c., and it was decreed, that it be referred to one of the commissioners of the court to ascertain and report whether there

was any such assignment as that
61 *mentioned in the letter to Colonel Bondurant; whether the letter of Ferguson of the 28th of July, 1839, to Colonel Bondurant, or the assignment referred to therein, was laid before said company, or its duly authorized officer, prior to the 22d day of August, 1839; whether between said dates any meeting of said Company was held, and if held, whether Colonel Bondurant was present; with any matter specially stated deemed pertinent by himself, or which might be required by the parties to be so stated.

On the 10th day of January, 1867, another decree was made, directing the commissioner to enquire and report: First.—Whether the assignment, if any, by Robinett to Ferguson was fair, and made for valuable consideration or not. Second.—If it was fair, and founded on valuable consideration, how far the rights of Ferguson were affected by his failure to give notice to the James River and Kanawha Company of the existence of his order, until after Littlejohn had given notice of the order under which he claims, if such was the fact.

Ferguson, in his petition, set out the grounds on which he asked that he might be admitted a defendant, and that the decree in favor of Littlejohn might be reversed. In his answer, he denied the allegations in the bill as to the date and consideration of the assignment to him. He averred that the assignment was dated on the 1st of February, 1839, and was made on the same day. That the consideration of the assignment was not fraudulent, but was valuable and bona fide. That Robinett was indebted to him at the time for money lent and advanced to him, or paid, laid out and expended for him, and also for certain liabilities which he had incurred for Robinett, as his security and for his benefit. That Robinett was a man of limited means; and to enable him to execute his contract on the canal, had obtained the defendant's aid in supplying him with money, and becoming his security, and in
62 *otherwise pledging his credit for his benefit. That from the first time Robinett

applied to him for aid as aforesaid, he pledged himself to reimburse the defendant, and make him safe out of the money he was to receive from the Company. That the defendant enclosed the assignment and power of attorney to Colonel Bondurant, filed, as defendant is informed, with the answer of the Company. That this was done to enable Colonel Bondurant to present the defendant's claims to the Company; and he believes it was done. That he believes his claim was not only prior in date to Littlejohn's, but was first presented to the Company.

The defendant insists, that he ought not to be prejudiced by the accidental loss of the assignment by the Company. He avers, that on receiving the money, he applied it to payments due to himself from Robinett, and to payments for which he was liable for him; and took in the bonds and other evidences of debts, and obtained receipts and vouchers for a settlement; and he afterwards had a settlement with Robinett, and considered the transaction entirely ended. The fact that no process had been served upon him, though he lived in Virginia until the year 1843, and the confidence in the superiority of his claim over that of Littlejohn, led him to suppose that the suit had been abandoned, and he was entirely taken by surprise when informed of the decree that had been made in the case.

The defendant further insists, that the laches of the plaintiff in prosecuting his suit should defeat him. That if process had been served upon the defendant during the lifetime of Chittenden, the secretary of the Company, he could have proved his assignment, and the notification of it to the Company. He could also have proved the due application of the money which he received from the Company to the payment of debts due to him from Robinett,
63 *or for which he was responsible for him; but that in November, 1844, his house was burnt, and his papers destroyed in the fire, so that he could not now produce his receipts and vouchers. That the negligence and laches in serving the defendant with process was the more reprehensible, as he was in Virginia when the suit was brought, and did not remove from the State until 1843.

Both the petition and the answer was sworn to before a justice of the county of St. Louis, in the State of Missouri. And the plaintiff objected to the answer, because the defendant has not appeared openly in Virginia, but is still a non-resident.

The commissioner returned his report dated February 22d, 1867. His report is based upon the papers in the cause, and a certificate of William P. Munford, the secretary of the James River and Kanawha Company, containing extracts from the record of the proceedings of the Board of Directors. From these it appeared that meetings of the board were held on the 7th, 8th, 9th and 10th of August, 1839, at all of which Colonel Bondurant was present; and

at the meeting on the 9th, the record says: Several liens upon the final estimate of J. C. Robinett, on section 66, being exhibited, and the said estimate not being returned, on consideration—ordered: That on the return of said final estimate, payment thereof be withheld by the secretary till further order of the board. On the 16th of September, the order was made directing the payment of the money to Ferguson. Mr. Munford further stated, that he had examined the records of the Company, and had found no reference to the assignment by Robinett to Ferguson of his estimates for work done on section 66. He presumed the endorsement by Mr. Chittenden on the power of attorney was the date at which he received notice of its execution. All the documents of so early a date as the paper in question were destroyed by fire.

64 *The commissioner reported: First.

—That there was such an assignment as that mentioned in the letter to Colonel Bondurant. Second.—That the assignment was laid before the Board of Directors of the Company prior to the 22d of August, 1839. Third.—That from the answer of the Company and Ferguson, the assignment was fair, and made for valuable consideration; and there is no affirmative evidence to sustain the charge of fraud. Fourth.—That there was no evidence or grounds to infer that Littlejohn's order was presented to the Company before that of Ferguson. And that the assignment to Ferguson bore date on the 1st of February, 1839. The commissioner further reports, that the receipt of Ferguson to the Company is as attorney for Robinett, under the power of attorney given to him, dated 3d of August, 1837, and purports to be in full of all demands against the Company under or growing out of Robinett's contract with them for the construction of section 66 of their canal, and is signed J. C. Robinett, by William W. Ferguson. And he submits the legal inference from and effect of this receipt to the court.

The plaintiff excepted to the report of the commissioner: First.—Because the report is not only not sustained by the evidence in the cause, but is in direct opposition to it. Second.—Because it is in opposition to the principles of law and practice, well settled in the court of chancery. Third.—That Ferguson having received the money from the Company, as attorney for Robinett, cannot claim to have received and to hold it as creditor.

The cause came on to be finally heard on the 13th of March, 1867, when the court overruled the plaintiff's exceptions to the commissioner's report, and confirmed the report, and decreed, that the decree of the 23d of February, 1853, be set aside; and that the plaintiff's bill be dismissed as to the James River and Kanawha Company and William W. Ferguson, with their costs. From this decree Littlejohn obtained an appeal to this court.

65 *Myers, for the James River and

Kanawha Company and Ferguson, insisted:

1st. That Robinett was a necessary party, the plaintiff claiming as his assignee; and though his name is in the subpoena, he was not made a party by the bill.

2d. That the evidence was sufficient, under the circumstances, to sustain Ferguson's claim under the assignment to him. Or, if it was not sufficient to satisfy the conscience of the chancellor, it was at least of such a character that the court should not have decided against it without ordering an issue before a jury; and this especially as both commissioners had, by their reports, given Ferguson priority over Littlejohn; and Davis' report had not been excepted to.

3d. That the court erred in its first decree in treating Littlejohn's claim as fully proved by the note and order which he filed. The James River and Kanawha Company make no admission that these papers were made by Robinett; but they put the plaintiff on strict proof. And the proceeding being against Robinett and Ferguson as absent defendants, the law requires that proof shall be taken of the plaintiff's demand. See Tate's Dig. p. 58, 59, § 2. It was moreover necessary that the plaintiff should prove that his order was the first presented or notified to the Company. 2 Story's Equ. Jur. § 1035a; § 1047, § 1057; Lewin on Trusts 604, 615; Judson v. Corcoran, 17 How. U. S. R. 612; Moore's ex'or v. Holcombe, 3 Leigh 597.

4th. The application by Ferguson to be permitted to file his answer and show error in the decree in favor of Littlejohn is under the act, Code ch. 171, § 13, p. 645. This act makes no reference to the case of an appeal, and there is no exception in the statute, whilst the reasons apply just as forcibly to a case where there has been an appeal by another party as where no appeal has been taken. He referred to Newcomb v. Drummond, 4 Leigh *57.

That was a case inter partes; and the reason is stronger in this case, in which Ferguson was no party in the appeal. The cases cited by the counsel on the other side have reference to the distinction between interlocutory and final decrees.

5th. Ferguson presented his petition to the court in the same year in which the decree was made, and the court then made the order allowing him to appear and answer, unless the plaintiff should show cause against it. This was the commencement of the proceeding, and therefore was not barred by the statute.

6th. The objection to the answer on the ground that Ferguson did not appear openly in the State is based upon the idea that the provision of the act in relation to foreign attachments applies to this case. The Code of 1860, p. 651, § 7, relates to attachments; but here the proceeding is not under that act, but under the act in relation to absent defendants.

7th. Ferguson is not estopped by the form of his receipt. He is shown to have been

using his utmost exertions to get the money for himself. And the Company and the plaintiff understood him to claim it as assignee.

Lyons, for Littlejohn, insisted:

1st. Robinett was not a necessary party. That in a suit by an assignee against the debtor, if the assignment is of the whole interest, and there is no controversy between the assignor and assignee, the assignor is not a necessary party, whether at law or in equity. *Lambert v. Nanny*, 2 Munf. 196; *Mayo v. Murchie*, 3 Id. 358; *Newman v. Chapman*, 2 Rand. 93. Robinett was named in the subpoena, though his name was omitted in the bill; and he was proceeded against by publication as a party, and was so treated throughout the case. But if Robinett was not a party, and the treating him as such was an error, it is not an error that Ferguson can object to. He comes in as an absent defendant to have any injustice done to him corrected; and he cannot be heard in this court upon the first appeal. *Heffernan v. Grymes*, 2 Leigh 512; *Platt v. Howland*, 10 Leigh 507.

2d. The act, Code p. 708, § 13, authorizes a petition by an absent defendant for a re-hearing. Is it the case in any nation or country that a foreigner may defend a suit without rendering his person or property amenable to the judgment of the court? And yet here is a party living in Missouri who, remaining abroad, sends his petition and answer, to be filed in his absence.

3d. The decree of 1853 cannot be questioned. The act says, if the party appears in five years, he may petition. This party comes in 1853, and gets leave to file his petition upon giving notice; and no step is taken until 1859, and no order made until 1866. The petition did not stop the running of the statute; that could only be done by the decree. *Erskine v. Henry*, 9 Leigh 188; 1 Greenl. Evi. p. 147, § 74; 1 Starkie's Evi. p. 34; 2 Cow. & Hill, notes p. 293, note 298.

4th. It was not competent to the Circuit Court to take cognizance of any matter affecting the decree of 1853, whilst the appeal from that decree was depending in this court. A final decree having been rendered in the cause, and an appeal taken from that decree, it was no longer a pending cause in the Circuit Court, and could never be placed again upon its docket, except by the decree of this court reversing the final decree. *Harvey v. Branson*, 1 Leigh 108; *Heffernan's adm'r v. Grymes*, 2 Leigh 512; *Tennent's heirs v. Pattons*, 6 Id. 196.

5th. The evidence upon which the commissioner reported in favour of Ferguson, and upon which the court below based its decree, is not competent evidence; and if competent, does not make out his case.

68 *RIVES, J. Concurring in the judgment of the court in these cases, I yet deem it proper to indicate my dissent from so much of the opinion as sustains the

jurisdiction upon Ferguson's petition for a re-hearing. When this petition was presented to the court on the 12th of November, 1853, it was not received, but the court made an order that the petitioner's application be granted, unless the plaintiff show to the contrary on or before the next term of this court, after being served himself or his counsel with a copy of this order. This service was not had till May 9th, 1859—more than five years after the date of the decree. The question therefore arises, whether this is a compliance with the requirement of the Code, ch. 170, § 13, p. 708.

It is material to enquire, in the first place, whether the condition imposed to the court upon the reception of the petition, and the grant of its prayer, was proper and regular. The case had been concluded in that court, and an appeal had been taken and was then pending in the Court of Appeals. The petitioner did not place himself personally in the jurisdiction of the court, but appeared by counsel through petition and answer qualified to and certified in another State; it was, therefore, eminently proper in my view, that the court, before receiving or entertaining the petition, should place the party under a rule to notify the plaintiff or his counsel of his proceedings, so that he should have notice of the attempt to re-open the case; and make such opposition thereto, or ask such conditions of the non-resident as to security for costs, as should comport with his views and interests. There was yet abundance of time for this step; and it was clearly in the discretion of the court to adopt this precaution, while the interest of no party could have been jeopardized by it; and the court might be better prepared upon the service of the order to take its course. This, of course, would have been different if there had been any danger of an efflux of time within which the statute required action of the absent defendant.

It, of course, devolved upon the petitioner or his counsel to execute this order; until he did so, he was not in court. His petition was not filed, received or entertained; nor any leave given for the filing of his answer, or the re-hearing of the cause. These papers were yet in the custody of counsel, and could not be the basis of the court's action until its condition was fulfilled. Under such circumstances, I cannot consider the terms of the statute complied with until the 9th day of June, 1866, when the petitioner acquainted the court with the service of its order, and had leave for the first time "to file his petition and answer." At that time he was precluded from this resort by the statutory bar.

I do not think this view at all in conflict with the cases of *Overstreet v. Marshall*, 3 Call 192, and *Williamson v. Gayle & als.*, 4 Gratt. 180. Both of these cases turn upon the terms of the acts of assembly for granting of writs of error and supersedeas in the one case, and of appeals in the other. In

the former it was held, that the superseas was granted at the date of the judge's order awarding it; and was not barred, though the writ did not issue until after five years; and in the latter, that the appeal dates from its allowance, and was not affected by a failure to give bond within five years. These decisions may well stand upon and be justified by the literal terms of the laws in question; but they are not authority to show that we are to consider a party as having petitioned for the re-hearing of a case when he was virtually told by the court that his petition could not be received nor his application granted, save upon a condition, (and that a most reasonable and proper one,) which he was therefore bound to observe and fulfill. I,

70 therefore, conclude that it was *too late under the statute to enter the said order of 9th of June, 1866; and the case of the defendant Ferguson is not aided by his answer in that cause; if, indeed, it shall be allowed to weigh as responsive; upon which I do not pass.

But if I be wrong in this position, I hold this defendant concluded by his laches in prosecuting his remedy under our statute, under the authority of *Anderson v. Lively*, 6 Leigh 77. True, the laches here is not so great or of such duration as in that case, but is under circumstances calculated to make it as inexcusable. His co-defendant, the James River and Kanawha Company was, by its appeal, here seeking to attain the same object that a re-hearing was designed to accomplish for him. Shall he then be permitted to avail of the two resorts? and is not the implication strong that he was by his delay abandoning his application below and relying on the contest waged here for him, in the name of this Company, which we have seen has no substantial interest in this controversy? But if this delay be not the more indefensible on this account, I think the statute of limitations always affords by analogy and legislative prescription what the court denounces as laches.

On these two grounds, I think, the court below erred in re-hearing this cause.

JOYNES, J. I shall first dispose of the case of *Littlejohn v. Ferguson & als.*

There is nothing in the objection that the Circuit Court could not entertain Ferguson's petition for re-hearing, while the appeal of the James River and Kanawha Company was depending. The statute (Code ch. 170, § 13) which authorizes an absent defendant who has not appeared, &c., to petition to have the case re-heard, makes no exception

71 of cases in which an appeal has been taken. It is *true the appeal was really prosecuted for Ferguson's benefit. But on the appeal advantage could be taken only of errors in the record as it stood at the time of the decree complained of, while Ferguson had the right, under the statute, to file his answer and introduce evidence so as to make, if he could, a different case. It is true, that after the appeal

there was no longer a case pending in the Circuit Court. But that was not for the reason that an appeal had been taken, but for the reason that the case had been ended in that court by a final decree. But the original papers remain in the Circuit Court after an appeal, and there is no difficulty in reinstating the case on the docket when a petition for re-hearing is filed.

The appeal, however, in such a case will not be dismissed upon the filing of the petition for re-hearing, as the decree complained of can only be altered or set aside on the re-hearing. *Platt v. Howland*, 10 Leigh 507. If on the re-hearing the decree, or so much of it as is the subject of appeal, is wholly set aside, a dismissal of the appeal will, as a general rule, follow as a matter of course. But if an appeal from the decree on the re-hearing should be taken before the appeal from the original decree has been dismissed, the appellate court may refuse to dismiss the appeal, inasmuch as the decree on the re-hearing may perhaps be reversed on the appeal taken from it. In this instance, there has been no motion to dismiss the appeal from the original decree, so that both appeals are now before us for decision.

It was essential to the jurisdiction of the court upon the proceedings for a re-hearing that they should appear to have been duly instituted within the time prescribed by law. And as was held by this court in the case of a bill of review, it was incumbent on Ferguson to show this affirmatively, though no objection were made that the proceedings were too late. *Shepherd v. Larue*, 6 Munf. 529.

72 *It was suggested at the bar that the language of the statute requires that the proceedings shall be concluded, as well as commenced, within the time limited. But such a construction would be inconvenient and harsh in its results, would be inconsistent with what is required in analogous cases, and is not demanded by the language. The language is, that the absent defendant may, within the time limited, "petition to have the case re-heard, and may plead or answer, and have any injustice in the proceedings corrected." This language is satisfied when the absent defendant, within the time limited, "petitions to have the case re-heard." But the question remains, and is important in this case, whether it is enough that he should present his petition to the court within the time limited, or must he go further within the time limited, and obtain leave of the court to file his petition, upon notice to the adverse party?

It seems to me that the absent defendant petitions to have the case re-heard "within the terms and within the meaning of the statute" when he presents his petition to the court. And, for this purpose, it matters not whether he is allowed to file his petition at once as matter of right, or whether he is required to obtain leave of the court to do so after notice to the adverse party. In either case he has begun the proceeding.

He ought not to lose the benefit of this diligence because he cannot obtain the sanction of the court within the time prescribed. He may fail to do this without any fault of his own—as, for example, from the failure of the court to sit. The language of the statute requires that the absent defendant shall do an act within the time; namely, that he shall “petition to have the case reheard;” it does not require anything more. If we say he must do more, we go beyond the statute, unless indeed, we can say, that a party does not petition the court until the court agrees to entertain his petition.

73 *Upon the view which I take, the degree of diligence required by this statute is certain and definite, and is the same in all cases. But if leave of the court must be obtained after notice to the adverse party, the diligence to be used to avoid the bar will be different in different cases, in proportion to the greater or less time requisite for giving the notice and getting the leave. If notice to the other party is necessary, the court has no discretion to dispense with it; and if it had, it surely ought not to depend on the discretion of the court whether the party shall be in time or not. Suppose the court, upon hearing the application, refuses to give the leave, and the party is obliged to appeal. The time may run out before he can obtain the leave by the judgment of the appellate court. Is he, in such a case, to be turned out of court because he has not obtained the leave of the court within the time, when he has been doing his utmost for years to obtain it? Or, suppose the party should fail to get the leave of the court in consequence of the failure of the court to sit. Is the delay in such a case to be imputed to him? This particular difficulty might be removed by holding that it is the notice to the adverse party, and not the leave of the court, which determines the application of the statutory bar. But this construction is not sustained by the language of the statute, or by the analogies of the law in like cases, and is liable to most of the objections which apply to the other.

The view which I have been urging makes the construction of this statute conform to the analogies in like cases. Thus, under a former law, it was provided that no supersedeas, &c., should be “granted” after five years. It was held, that the order allowing a supersedeas was the commencement of proceedings, so as to avoid the bar of the statute, though the supersedeas bond was not given, and of course the supersedeas was not issued within the five years.

74 *Overstreet v. Marshall & al., 3 Call 192. By the act of 1830-31, it was provided, that no petition preferred to the Court of Appeals, or to any judge thereof, should be received or allowed unless preferred within five years. It was held, that the bar of the statute was avoided by the presentation of the petition to the court or judge within five years, though the appeal, &c., should not be allowed within that time, or though it should be allowed on condition

that a bond should be given, which was not given in that time. *Williamson v. Gayle*, 4 Gratt. 180. And under the old law first alluded to, the court went further, and held, that although an order allowing a supersedeas had not been made within the five years, yet as a petition had been presented which, through inadvertence in the court, had not been acted on until after the time had elapsed, the limitation of the statute did not apply. *Pugh's ex'or v. Jones*, 6 Leigh 299.

The absent defendant is proceeded against without notice by service of process, and, it may be, without any actual knowledge of the suit. The court can make no personal decree against him that will be binding upon him. 3 Gratt. 98; 9 How. U. S. R. 336; 24 Id. 195. When he comes forward to controvert what has been done behind his back, as it were, and offers to submit himself to the jurisdiction of the court, his proceeding should not be treated with disfavor, but the contrary. Why, then, should we, by construction, exact conditions from him not plainly required by the language of the statute, and not conformable to what is required in analogous cases?

Ferguson, therefore, commenced his proceedings in time, and saved the bar of the statute. But after doing so he delayed for more than five years to give notice of them to Littlejohn, and then took no other step until seven years later. This would appear to have been great laches, and might, in

the absence of explanation, have authorized *the Circuit Court to dismiss the proceedings, if a motion had been made to that effect. *Anderson's adm'r v. Lively*, 6 Leigh 77. But the court, in that case, would have acted not on the ground that the proceedings were barred by the statute, but on the ground of laches in their prosecution, and the action of the court would have depended on its discretion, under all the circumstances. *Williamson v. Gayle*, 4 Gratt. 180. No motion to dismiss the proceedings on this ground was made in the Circuit Court, and there is nothing to show that this ground was shown for cause when Littlejohn showed cause in 1866 against filing the petition and answer. As Ferguson has not had an opportunity of explaining his delay, I do not think this court ought now to dismiss his proceedings on that ground. The delay was not so great but that the court can see that it might perhaps have been satisfactorily explained. The case must, therefore, be considered upon its merits.

Littlejohn and Ferguson each claimed to have an order drawn by Robinett on the James River and Kanawha Company: that of Littlejohn being for \$783, and that of Ferguson being for the whole balance due from the Company to Robinett. Littlejohn's order, which he filed with his bill, bears date the 8th day of February, 1839 while Ferguson alleged that his order bore date the first day of the same month. It did not appear which of these orders was first presented or made known to the Com-

pany, so that the question as to the priority of right between them depended on the priority of date alone.

The answer of the James River and Kanawha Company disclaimed all knowledge as to the order of Littlejohn, but did not dispute its genuineness, or expressly call for proof of it. It was treated as genuine by the commissioner and by the court, and proof of it was not insisted on by the Company. Ferguson did not dispute the genuineness of Littlejohn's order, or call

76 for proof of it, in his "answer or before the commissioner, and it was treated as genuine throughout the case. Under these circumstances, it was too late to make the objection in this court to the want of proof of Littlejohn's order. *Anderson & al. v. De Soer*, 6 Gratt. 363. Besides, the bill alleges that the order was "drawn" by Robinett, and this was sufficient under the Code (ch. 171, § 38) to dispense with proof of the signature to the order, in the absence of a denial of it under oath, even though proof had been expressly called for. This provision of the code furnishes a rule of evidence, and it applied to this case, though the bill was filed before the Code went into operation. *Somerville v. Wimbish*, 7 Gratt. 205; *Usher's heirs v. Pride*, 15 Gratt. 190. It must, therefore, be taken as a fact in the case, that Littlejohn held an order from Robinett bearing date the 8th day of February, 1839.

The bill, after alleging that the plaintiff held an order dated the 8th day of February, 1839, and that he had presented it to the Company, proceeded to allege, that another order was presented to the Company from Robinett, in favor of Ferguson, for the whole balance due from the Company to Robinett, and then uses these words, "which [that is, Ferguson's order] purports to have been drawn also on the 8th day of February, 1839, and it is pretended was drawn before the order in favor of your orator." The answer of the Company did not pretend to any actual knowledge as to Ferguson's order. Ferguson, in his answer, alleges that the statement of the bill in relation to the date of his assignment is untrue, and then proceeds thus: "The date of the said assignment to this respondent was the 1st of February, (not the 8th of February,) 1839, and the assignment was actually made on the said 1st day of February, when it bore date." It was alleged that this order had been left in the possession of the James River and Kanawha Company, and had been lost.

77 *The bill called for no discovery as to the date of Ferguson's order. The allegation of the answer in respect to the date of Ferguson's order was affirmative matter, not responsive to any allegation of the bill, and the burden, therefore, lay on Ferguson to prove it. 2 Rob. Pract. (old) 330, and cases cited; *Clarke v. White*, 12 Peters R. 178; opinion of Green, J., in *Taylor v. Moore*, 2 Rand. 563; *Leas' ex'or v. Eidson*, 9 Gratt. 277.

The case of Ferguson, therefore, derives

no support from his answer, and must depend upon the evidence. There is no direct evidence in the case as to the date of Ferguson's order, nor is there any direct evidence even of its existence. The commissioners to whom the case was referred, relied upon several facts and circumstances, which they considered sufficient to establish that Ferguson had an order from Robinett for the whole balance due him by the Company, and that it bore date on the 1st day of February, 1839. I shall not consider the question, whether Ferguson had an order at all, because it is immaterial whether he did or did not have one, unless it was of prior date to Littlejohn's. I shall confine myself to an examination of the grounds which are relied on to establish that the order of Ferguson bears date on the 1st of February, 1839, or before that of Littlejohn.

The first thing relied on is the opinion given by Mr. Baxter as counsel for the James River and Kanawha Company, in favor of Ferguson's priority over Littlejohn, and of the propriety of paying the money to him upon his giving a bond of indemnity. The production of this paper may prove that Mr. Baxter gave such an opinion, and that he founded his opinion on the hypothesis of a certain state of facts, but it can certainly prove no more. Even if the facts on which the opinion was based had been stated as being within the knowledge of Mr. Baxter, the statement of them

78 in this paper would not be evidence of them. *But it is evident from the opinion, that Mr. Baxter had never seen Littlejohn's order, (the bill had not then been filed,) and that he relied upon Ferguson's representation to him that his order was prior to Littlejohn's.

The next thing relied upon is, the recital in the bond which Ferguson gave to the Company on the 15th day of October, 1839, on receiving from them the balance due to Robinett, and by which he undertook to defend Littlejohn's suit, and to indemnify the Company against Littlejohn's claim. This bond recites as a fact, that Robinett made the transfer to Ferguson by an instrument of writing bearing date the 1st day of February, 1839.

The production of this bond may prove that the Company paid the money to Ferguson on the ground that his order was believed to be of prior date to Littlejohn's; or, if you please, on the ground that his order was believed to bear date on the 1st day of February, but it does not prove that in point of fact it did bear that date, or any date prior to that of Littlejohn's order. The recital is really nothing more than the declaration of the Company and of Ferguson affirming the existence of the facts recited as the motive and justification for what they then did. And now, when the propriety of what they then did is called in question, depending upon the truth of the facts recited, they produce their own declaration that these facts existed, to prove in their own favor that, in point of fact, they did really exist.

It is undoubtedly true, that upon reading the recital in this bond we feel that there is a certain degree of probability that the parties concerned took pains to ascertain the date of Ferguson's order and to recite it correctly, and in proportion to our confidence in the intelligence and integrity of these parties, we feel a greater or less degree of moral conviction that the facts really were as they recited them to be.

But if there had been no bond and
79 *no recital, and nothing but the payment of the money by the Company to Ferguson, we might have felt, in like manner, that there was a certain degree of probability, and perhaps a very high degree, that the order in favor of Ferguson was the oldest, from the fact that the Company, with the means of ascertaining the facts and a motive for doing so, paid the money upon it. But this would be neither more nor less than to make the mere payment of the money justify itself. And yet, in principle, it would be of a piece with what I am now considering.

There is but one other circumstance relied upon to prove the date of Ferguson's order. It is the endorsement on the power of attorney from Robinett to Ferguson. We have no explanation of this endorsement. We do not know when, why, or by whom it was made. We do not know to what the date "February 1st, 1839," refers. Mr. Munford, the present secretary of the Company, supposes it to refer to the time at which the power of attorney was first made known to the Company. It certainly did not represent the date of the power of attorney on which it was endorsed. What ground is there for saying that it had reference to an assignment on another paper which is not shown to have been with the power of attorney, and that it was intended to indicate the date of that assignment? What is there to show that the person who made that endorsement did not regard the power of attorney as in effect an assignment, and refer to it as a power of attorney and assignment?

It is evident, therefore, that this endorsement, even if it could be used at all as evidence of what is stated in it, proves nothing to the present purpose.

It seems to me, therefore, to be very clear, that Ferguson failed to establish that his order was dated on the 1st of February, 1839, or that it bore date prior to Littlejohn's.

In the absence of any evidence on
80 the subject, *the presumption must be that Littlejohn's order was given first. For it would have been an act of folly as well as a fraud in Robinett to give Littlejohn an order for the amount of his debt when he had already given Ferguson an order for the whole balance due him from the Company. The court will not presume this, in the absence of all evidence, but will presume the contrary.

After Littlejohn filed his bill in October, 1839, he took no other step in the case until 1849, when he obtained orders of publication against Robinett and Ferguson as absent defendants. In the absence of ex-

planation, this seems to have been great laches; but I do not think we are authorized to dismiss the bill on that ground. If we were to do so, we should go beyond any former decision of this court. In *Chinn v. Murray*, 4 Gratt. 348, this court sustained a suit where there had been a much greater interruption in its prosecution. In this case, the James River and Kanawha Company had been served with process, and Ferguson, though not served with process, was aware of the suit, and stipulated to defend the Company in it. He might, therefore, have taken steps in the name of the Company—if he did not choose to appear—to have the suit dismissed, if not duly prosecuted. It was his laches, therefore, as well as the plaintiff's. On this ground Lord Redesdale refused, in *Gifford v. Hort*, 1 Sch. & Lef. R. 386, to dismiss a bill which had been pending, without active proceedings, for forty years; the defendant insisting on the plaintiff's laches in proceedings as a bar to the relief asked for. In *Crawford's ex'or v. Patterson*, 11 Gratt. 364, where this court dismissed the bill on account of the laches of the plaintiff in the prosecution of his suit, the delay was twenty-three years; the defendants against whom the claim was made, and all the parties who were cognizant of the transactions, had died, and there was strong ground to hold that the plaintiff had acquiesced
81 in *a report made before proceedings in the suit were suspended.

In this case, Ferguson had full opportunity to make his defence. His defence rested on a single fact, the importance and conclusiveness of which he well knew, and which, if true, could be easily proved. The defence of the Company was the same. If he chose to neglect his own defence and that of the Company upon an assumption that Littlejohn had abandoned his claim, it was his own folly.

These views dispose fully of the case of *Littlejohn v. Ferguson & al.*, and render it unnecessary to consider any other question raised in that case. I will add, however, that if Ferguson had established the priority of his order, yet as it was admitted to have been given only as a security for debts and liabilities, an account should have been ordered to ascertain the amount due upon it, so that the residue of the fund, if any, might be applied to Littlejohn's claim.

These views likewise dispose of most of the questions in the case of *James River and Kanawha Company v. Littlejohn*. There was no exception to the report of the commissioner in that case; but none was necessary. The commissioner reported that he had heard no evidence, and that his conclusions were founded entirely upon exhibits in the case, to which he referred in detail. Whether these papers sustained the conclusions of the commissioner was a question arising on the face of the report. One other question, however, has been raised in that case which remains to be considered.

It is insisted that Robinett was an indispensable party to Littlejohn's bill, and

that although his name was included in the subpoena, and he was proceeded against by publication, he cannot be regarded as a party in the cause, according to the case of *Moseley v. Cocke*, 7 Leigh 82 *224, and other cases, and that the decree must be reversed on that ground.

It is sometimes laid down, that to a bill filed by the assignee of a chose in action, the assignor is in all cases an indispensable party. It was so said by Judge Scott, delivering the opinion of a special court in *Corbin v. Emerson*, 10 Leigh 663. But this language ought to be understood with reference to the case in which it was used. There was no proof of the assignment in that case; it was not before the court, and the court could not say, therefore, whether it was absolute and unconditional or otherwise. The want of proof of the assignment seems to have been the point mainly urged in the argument, and the authorities bearing on the necessity of making the assignor a party were not cited. That there are cases in which the assignor is not a necessary party to a bill filed by an assignee, appears from *Newman v. Chapman*, 2 Rand. 93, which was not cited in *Corbin v. Emerson*. I do not think, therefore, that *Corbin v. Emerson* can be regarded as settling, that in all cases whatsoever the assignor is an indispensable party.

It is a general rule, that all persons interested in the subject matter of the suit must be made parties; and this rule is founded on the reason, that courts of equity aim "to do complete justice, by deciding upon and settling the rights of all persons interested in the subject matter of the suit, so that the performance of the decree of the court may be perfectly safe to those who are compelled to obey it, and also that future litigation may be prevented." Story Eq. Pl. § 72; *Clark v. Long*, 4 Rand. 451; *Jameson's adm'r v. Dashields*, 3 Gratt. 4. There are exceptions to this general rule which, in the language of Judge Story, "will be found to be governed by the same principle, which is, that as the object of the general rule is to accomplish the purposes of justice between all the parties *in interest, and it is a rule founded, in some sort, upon public convenience and policy, rather than upon positive principles of municipal or general jurisprudence, courts of equity will not suffer it to be applied so as to defeat the very purposes of justice, if they can dispose of the merits of the case before them without prejudice to the rights or interests of other persons who are not parties." Story Eq. Pl. § 77. Consistently with these general principles, Judge Story, upon the authority of numerous cases which he cites, lays down the true doctrine as to assignors to be this, that where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignee, and the extent and validity of the assignment are not doubted or denied, and there is no remaining liability in the assignor

to be affected by the decree, it is not necessary to make the assignor a party. And Chancellor Walworth, in a case not cited by Judge Story, held, after an examination of the authorities, that where the assignment purports to transfer the whole interest of the assignor, and there is nothing in the pleadings or proof to induce a belief that it did not really do so, it is not necessary to make the assignor a party. *Ward v. Van Bokkelen*, 2 Paige's R. 289.

In this case no decree was sought against Robinett. Ferguson and the James River and Kanawha Company claimed that Robinett had parted with his whole interest, and they both treated the controversy as one between Littlejohn and Ferguson alone. Hence, when the Company paid the money to Ferguson, it took from him indemnity against Littlejohn, but none against Robinett. And accordingly neither of them objected in the court below to the failure to make Robinett a party. If it appeared that Robinett was a necessary party, this court would reverse the decree on that ground, although the objection was not taken by demurrer or otherwise in the Circuit

84 Court. **Clark v. Long*, 4 Rand. 457, and cases cited; *Taylor's adm'r v. Spindle*, 2 Gratt. 44. But this court will not reverse a decree for the failure to make a party where it appears affirmatively that the party, if he had been brought before the court, would have been merely a formal party, against whom no decree was asked, and whose presence was not necessary for the protection of any of the defendants.

I am of opinion, therefore, that the decree in *Littlejohn v. Ferguson & al.* should be reversed, and that in *James River and Kanawha Company v. Littlejohn* affirmed.

MONCURE, P., concurred in the opinion of Judge Joynes, except upon the question whether Ferguson's petition was barred by the statute. Upon that point he expressed no opinion, saying that he had not examined it.

All the judges concurred in affirming the decree in the *James River and Kanawha Company* against Littlejohn, concurring in the opinion of Joynes, J., except that Judge Rives said he expressed no opinion on the weight that was to be given to Ferguson's answer.

The *James River and Kanawha Company v. Littlejohn*, affirmed.

Littlejohn v. Ferguson & als., reversed.

85

*Lawhorne, Ex Parte.

January Term, 1868. Richmond.

Constitution—Act 6, § 22—Applies to All State Officers.*

—The 22d section of article VI. of the constitution of Virginia applies to all State officers; and the Governor, whose term has expired, holds over until his successor is qualified.

*See principal case cited in *Carr v. Wilson*, 22 W. Va. 429, 432, 9 S. E. Rep. 35, 36.

This was a petition to this court by James Lawhorne for a writ of habeas corpus. The petitioner stated in his petition, that he was confined in the penitentiary under a sentence of the county court of Nelson county, for grand larceny. That on the 13th of January, 1868, Francis Peirpoint, Governor of the State of Virginia, granted to him a full and immediate pardon; but that James F. Pendleton, Esq., the superintendent of the penitentiary, refused to release him, on the ground that the term for which Governor Peirpoint had been elected Governor had expired on the 1st day of January, 1868, or the day previous, and that therefore he had no authority to pardon the petitioner.

At the foot of the petition there was a statement by Mr. Pendleton that the facts stated in the petition were true; and that he only held the petitioner that the question, whether Governor Peirpoint continued in office after his official term had expired, no successor to him having been elected or qualified, might be judicially determined.

Neeson, for the petitioner.

86 *MONCURE, P., delivered the opinion of the court:

This case depends upon the question, whether the Governor is an officer within the meaning of the twenty-second section of the sixth article of the constitution of the State, which declares, that "judges and all other officers, whether elected or appointed, shall continue to discharge the duties of their respective offices, after their terms of service have expired, until their successors are qualified."

If this section stood alone, and unaffected by the context, there could not be two opinions as to its meaning. It uses the plainest possible language to embrace all officers, except that it does not mention them all by name. "Judges" alone are specifically named, no doubt because the provision was made in that part of the constitution which relates, generally, to the "Judiciary Department." Had it been made in that part which relates to the "Executive Department," the "Governor" would no doubt have been named instead of the "Judges," and the language would then have been, "the Governor and all other officers, whether elected or appointed," &c. The Governor is certainly an officer in the proper and ordinary acceptation of the word; and he is expressly called an officer, and described as holding an office, in the constitution itself. Article V, §§ 1, 3, 4 and 9. There is at least as much reason for including the Governor in the provision in question as any other officer of the government. If it be important that there should always be some person in existence to perform the duties of every office of government, and especially every constitutional office, surely this reason applies with the greatest possible force to that office to which belongs "the chief executive power of the commonwealth. That this was the view of the framers of the constitution is shown by the fact that

they took special care to provide for the performance of the duties of the office of

Governor in case of his death or failure or inability *to discharge his duties during the term for which he was elected. Art. V, § 9. They made no such provision in regard to any other office (except for the appointment of a clerk pro tempore), leaving that to be done by the Legislature. But in regard to the performance of the duties of all officers, including the Governor, after their terms of service have expired, and until their successors are qualified, ample provision is made by the twenty-second section of the sixth article. This was a natural and proper provision for the case. It is important, as before stated, that there should be some person always ready to perform the duties of very office; and when an incumbent has served out the term for which he was elected or appointed, who can be more suitable than he, as a general rule, to continue to discharge the duties of his office until his successor is qualified? He has been once elected or appointed to the office, and is therefore presumed to be fit for it. He has served out his term, and is therefore presumed to be familiar with its duties.

Now can it be supposed that the framers of the constitution would have used the broad and plain terms used in the section in question without expressly excepting the office of Governor, if they had intended to except it? They were not like an unlearned testator making his will, in extremis and inops concilii, and whose words, therefore, will be indulgently expounded to effectuate his intention. They were selected for their wisdom to do the important work of framing a constitution of government for the State. They had time to do their work with deliberation, and the presumption is that they weighed with care and well understood every word which they used, and felt the importance of expressing their meaning plainly. When, therefore, they declared that "Judges and all other officers, whether elected or appointed, shall continue to discharge the duties of their respective offices," &c., they must have

88 *known that this plain and comprehensive language, standing alone, embraced the office of Governor, and would be so understood; and they must have seen the necessity of expressly excepting that office, if they did not intend to embrace it in the language used. That they did not expressly make the exception, shows very strongly, if not conclusively, that they intended to embrace the office of Governor.

Such being the plain meaning of the section in question, taken by itself, if there can be anything in the context (short of express words) sufficient to change or restrict this meaning so as to exclude therefrom the office of Governor, surely the evidence of intention ought to be very strong to have that effect. Let us now see what is relied on in the argument to sustain the restricted construction contended for.

It is argued that article V, which relates

to the "Executive Department" makes all the provision which was intended to be made in the constitution in regard to the office of Governor, and shows that he was not intended to be embraced in the twenty-second section of the sixth article. The only sections of the fifth article which have a material bearing on the subject are the 1st, 8th and 9th, which are as follows:

"1. The chief executive power of this commonwealth shall be vested in a Governor. He shall hold the office for the term of four years, to commence on the first day of January next succeeding his election, and be ineligible to the same office for the term next succeeding that for which he was elected, and to any other office during his term of service."

"8. A Lieutenant-Governor shall be elected at the same time, and for the same term as the Governor, and his qualification and the manner of his election in all respects shall be the same."

89 "9. In case of the removal of the Governor from office, or of his death, failure to qualify, resignation, removal from the State, or inability to discharge the powers and duties of the office, the said office, with its compensation, shall devolve upon the Lieutenant-Governor; and the General Assembly shall provide by law for the discharge of the executive functions in other necessary cases."

Much stress is laid on the first of these sections, which declares the Governor, after holding the office for the term of four years, to "be ineligible to the same office for the term next succeeding that for which he was elected," &c., from which an intention is inferred to make him incapable of continuing to discharge the duties of his office after the expiration of his term of service. But this is not a well founded inference. The policy of making him ineligible to the same office for the next succeeding term was to avoid exposing him to the temptation of using means afforded him by his office to secure his re-election to the same office, or his election to another office during his term of service. There was no reason whatever for rendering him incompetent to continue to discharge the duties of his office after the expiration of his term of service and until the qualification of his successors. No policy of the law requires it. He cannot be supposed to have any agency, official or otherwise, in bringing about the occasion for such continuance. There is not a word in the constitution which either expresses or implies an intention to render him incompetent to continue to discharge the duties of his office on such an emergency. The words, "and be ineligible to the same office for the term next succeeding that for which he was elected," refer solely to a popular re-election for a full term of service, and not to his continuing, *ex officio*, when the occasion requires it, to discharge the duties of his office after his term of service has expired, and until his successor is qualified—an occasion which is not likely

90 *often to arise, nor to be of long continuance; but however often it may arise, or however long it may continue, or whatever may have produced it, the same principle applies to the case. There are other occasions on which a person who may have been Governor may have to perform duties of the office during the term succeeding that for which he was elected, and which he would certainly not be incompetent to perform. He might be Lieutenant-Governor, or Secretary of the Commonwealth, or President *pro tempore* of the Senate, or Speaker of the House of Delegates, in either of which characters he might have to perform such duties in a certain contingency. Const. art. V, § 9; Acts 1857-8, p. 20, ch. 20, § 17.

But this question has already, in effect, been adjudicated by this court. The constitution declares, that "no person elected for two successive terms to the office of sheriff shall be re-eligible to the same office for the next succeeding term; nor shall he during his term of service, or within one year thereafter, be eligible to any political office." Art. VI, § 31. Now here it will be observed, that the same principle of ineligibility is applied to the sheriff as to the Governor, the only difference being, that the former may be elected for two successive terms, while the latter cannot. But that difference does not affect the principle or the question we are now considering. If the ineligibility of a person to the office of sheriff for the next succeeding term, after having been elected for two successive terms to the same office, does not take him out of the operation of the twenty-second section of the sixth article, and render him incompetent to continue to discharge the duties of his office, after his two successive terms of office have expired until his successor is qualified, then *pari ratione*, the ineligibility aforesaid of the Governor will not have that effect, *mutatis mutandis*, as to him. The question as to the sheriff has been expressly decided by this court.

91 *Commonwealth v. Drewry, &c., 15 Gratt. 1. In that case Drewry was elected for two successive terms to the office of sheriff of Norfolk county, and served accordingly, to wit: from the 1st of July, 1852, to 1st July, 1856. By the act of March 15, 1856, Sess. Acts p. 8, the term of the sheriff was extended from July 1, 1856 to January 1, 1857, which latter was made the day for the commencement of the succeeding term. The incumbent whose term was thus extended was required to give a new official bond. Drewry continued to act as sheriff until January, 1857, although he did not execute the bond required as aforesaid, and although his successor was elected in May, 1856, and executed his official bond and qualified in June following, but did not enter upon his office until January, 1857. This court decided that Drewry held over, after the 1st of July 1856, under the constitution, art. 6, § 23, which was the same with § 22 of the present constitution,) and that having collected the State taxes of

1856, his sureties in the bond of 1854 were liable for them. This is certainly a strong case, and goes very far to show the force and effect and general operation of the constitutional provision in question. There had been an unbroken connection between the terms of the office of sheriff, the one ending and the other commencing on the 1st of July. The Legislature interposed by the act of March, 1856, and broke the connection by fixing on the 1st day of January for the commencement of the official term; thus creating a chasm of six months between Drewry's second term and the term of his successor. Notwithstanding this, and although his successor actually qualified as early as June, 1856, but did not enter upon the duties of the office until January, 1857, it was decided by this court that he held over after the 1st of July until the 1st of January, under the constitution and that the sureties for his second term were bound for his defaults during the period of his holding over;

92 *and that, too, when the act prolonging his term required him to give a new bond, with which requisition he failed to comply. "The constitution" (said Judge Samuels, in whose opinion all the judges but one concurred, and it does not appear that he disagreed to what is here said) "of itself required Drewry to continue in the discharge of his duties until his successor was qualified. It directs such continuance without reference to any particular cause of delay in the successor, but upon the fact that the delay has occurred; it fixes no limit of time beyond which the delay shall not have its effect to prolong the term of the incumbent." This case seems to be a conclusive answer to the argument founded on the ineligibility of the Governor to the same office for the next succeeding term to that for which he was elected.

It is contended that the first section, having confined the powers of the Governor to the duration of his term, and made him incapable of continuing thereafter to discharge the duties of his office, the 9th section makes full provision for the discharge of the duties of the office, not only in case it should become vacant during his term, but after its expiration, and until his successor is qualified. It is supposed that the concluding words of the section, which direct the Legislature to provide by law for the discharge of the executive functions in other necessary cases, refer to all necessary cases not provided for by the preceding part of the section; and that the act of May 29, 1852, entitled "An act providing for the discharge of the executive functions in certain cases," Sess. Acts p. 28, and the act of March 30, 1858, ch. 20, § 17, Sess. Acts p. 20, make full provision accordingly.

Now the constitution ought to be so construed, if it can reasonably be done, as to give effect to every word which it contains, and especially words of plain and unambiguous import. The construction

93 contended for, as just stated, *is inconsistent with the plain words of the

twenty-second section of the sixth article, and restricts them in a most important particular. Those words are universal in expression—"Judges and all other officers." The construction contended for excepts from their operation the chief executive officer of the Commonwealth. If this construction were unavoidable, there would of course be no help for it. But is it unavoidable? We think not. On the contrary, we think the opposite construction is at least as reasonable, looking alone to the fifth article; but looking to the whole constitution, it is infinitely more reasonable, and therefore to be preferred, because it makes the constitution consistent in all its parts, and gives effect to every word.

Our construction of the constitution on this subject then is this: That under the first section of the fifth article the Governor is to hold his office for the term of four years, for which he was elected; and under the twenty-second section of the sixth article, he is to continue to discharge the duties of his office, after his term of service has expired, until his successor is qualified; and that the ninth section of the fifth article provides only for the case (not provided for by the other two sections) of the removal of the Governor from office, or of his death, failure to qualify, resignation, removal from the State, or inability to discharge the powers and duties of the office, devolving said powers and duties in that case upon the Lieutenant-Governor, and directing the General Assembly to provide by law for the discharge of the executive functions in other necessary cases; that is, cases in which there should be no Lieutenant-Governor in being to discharge the powers and duties of the office. That this was the only necessity for legislative provision in the contemplation of the framers of the constitution is manifest, not only from its terms and whole framework, but also from

94 the action of the Legislature *at its first session after the adoption of the constitution of 1851, of which the present constitution is almost a literal copy. That Legislature, as was truly said in the argument, was composed generally of able men, and in part of some of the members of the convention which framed the constitution, and must be presumed to have understood its meaning. Upon them devolved the important duty of organizing the government under the constitution. The act of May 29, 1852, before referred to, is the only act which they passed in obedience to the requirement of the ninth section of the fifth article before mentioned, and provides for all the cases which they considered necessary under that section. Those cases are only such as may arise in the event that the Lieutenant-Governor, upon whom the office of Governor may devolve as aforesaid, shall be removed from office, or shall die, fail to qualify, resign, remove from the State, or be unable to discharge the powers and duties of the office; in which event, it was enacted that the Attorney-General, elected by the voters of the Commonwealth;

or if there be no such Attorney-General, then the President of the Senate pro tempore; or if there be no such President, then the Speaker of the House of Delegates shall discharge the executive functions until there is a Governor or Lieutenant-Governor who can act. By the act of March 30, 1858, before referred to, the Secretary of the Commonwealth is substituted to the place of the Attorney-General under the act of May 29, 1852. No provision has ever been made by law for the important case in which the Governor has served to the end of his term, and his successor is not then qualified. Why? simply and plainly because the case is provided for by that section of the constitution which declares that judges and all other officers, whether elected or appointed, shall continue to discharge the duties of their respective offices, after their

95 *terms of service have expired, until their successors are qualified.

Again, it is argued, that the position in the constitution which is occupied by the section in question—being in that article which relates to the "Judiciary Department"—shows that it was intended to confine the section to officers connected with that department, and therefore to exclude the office of Governor.

If the words of the section be plain and unmistakable, we must give full effect to them, whatever fault we may find with the taste displayed in their location in the instrument. But really they do not seem to be obnoxious even to this criticism. Where else in the constitution could the provision better have been placed? It is, as we contend, a general provision, relating to all officers, legislative, executive and judicial, for whose election or appointment the constitution provides. The constitution, in the main, is distributed under the three heads of the legislative, executive and judiciary departments, to which all the powers and duties of government belong. The 1st article relates to the "bill of rights," and contains only two lines. The 2d relates to the "division of power," and contains but five lines. The 3d relates to the qualification of voters, and contains but four sections. The remaining articles, to wit, the 4th, 5th, and 6th, relate to the legislative, executive and judiciary departments respectively, and in that order. The 4th article, relating to the "legislative department," contains 38 sections, of which the last seven are under the head of "general provisions." The 5th article, relating to the "executive department," contains 19 sections, but no "general provisions." The 6th and last article relating to the judiciary department, contains 34 sections, of which eleven are under the head of "general provisions," one of

96 the eleven being the 22d section in question. This article *certainly embraces subjects which do not belong to the judiciary department more than any other, if as much. It embraces the subject of county officers, including a surveyor, commissioners of the revenue, overseers of the poor, and also all officers appertaining

to the cities and other municipal corporations. These subjects were arranged under the head of the "judiciary department," no doubt because that is the last department treated of in the frame of the constitution, and was as convenient a location as any other; it not being considered necessary to multiply the number of articles for the purpose of placing these subjects under independent heads. In regard to the subject of the 22d section, that (in our view,) related to all three of these departments, and instead of having a separate section under the head of each of them, referring to the officers belonging to that department only, a single section was embodied in the last article applying to "judges and all other officers," naming "judges" only because the section was under the head of the "judiciary department."

If the argument founded on the location of the section in question be a sound one, then not only is the governor excluded from its operation, but also all the officers named under the head of the "executive department," including the lieutenant-governor, secretary of the commonwealth, treasurer, auditor of public accounts, and members of the board of public works. Can it be possible that the framers of the constitution intended to include none of these important officers of government in the broad terms used in the section? and that, too, when not only those terms literally included them, but there was as much reason for including them as judges or any other officers.

We believe we have noticed, and we think answered, in the foregoing opinion, all the objections taken in the argument to the construction which we have adopted

97 of the *section of the constitution in question in this case. Our opinion has perhaps been extended to too great length, considering that we have had no doubt or difficulty in the decision of the question involved; but that question being a constitutional one, and of importance to the public, we considered it proper to express our opinions fully on the grounds relied on in the argument. The result of the opinion is, that we think it devolves on Governor Peirpoint, under the constitution of the State, to discharge the duties of the office of Governor thereof until his successor is qualified; that the pardon granted by him to the petitioner is a valid pardon, and that the said petitioner is illegally detained in the custody of the superintendent of the penitentiary. It is therefore ordered that he be discharged therefrom.

The following is the entry made by the court:

The petition of James Lawhorne, which was presented to the court on yesterday and continued until to-day for further consideration, complaining that he is unlawfully detained in the penitentiary, in the custody of James F. Pendleton, the superintendent thereof, and praying for a writ of habeas corpus, came on this day for further consideration accordingly. The petitioner

state that he is confined in the penitentiary for a term yet unexpired, under a conviction for grand larceny in the county court of Nelson county; that on the 13th day of the present month, January, 1868, he was pardoned by Francis H. Peirpoint, Esq., Governor of the Commonwealth, by letters patent bearing date on that day, and filed with the petition; and that the said superintendent refused to admit the validity of said pardon and discharge the petitioner, because, and only because, the term of office of Governor Peirpoint expired on the 1st day of January, 1868, or the day before, and the said pardon was dated

98 *and issued after that day as aforesaid. The said Pendleton superintendent as aforesaid, by a memorandum annexed to said petition and signed by him, admits that for the reason stated in said petition, and no other, he detained the said petitioner; and he states that as the pardon granted by Governor Peirpoint bears date after his official term had expired, though when no successor to him had qualified, a question had arisen as to the validity of the said pardon, which he the superintendent desired to submit to the determination of this court. Wherefore, it appearing to the court from said petition and memorandum, that there is probable cause to believe that the petitioner is detained as aforesaid without lawful authority, a writ of habeas corpus is awarded him, to the said superintendent to be directed, commanding him forthwith to have the body of the petitioner before this court, together with the day and cause of his capture and detention. And thereupon the petitioner by counsel, and the said superintendent in proper person, agreed in open court to dispense with the actual issuing of the writ and the personal presence of the petitioner in court; that the said memorandum should be regarded as a return to the writ; and that the court should proceed to decide the case upon the said petition and return, in which it is fully presented. And the court, after hearing and considering the arguments of counsel, as well in behalf of the said petitioner upon his petition as in opposition thereto, is of opinion that the Governor is an officer within the true intent and meaning, as well as the literal terms of the 22d section of the sixth article of the constitution of the State, which declares that "Judges and all other officers, whether elected or appointed, shall continue to discharge the duties of their respective offices after their terms of service have expired, until their successors are qualified;" that although Governor Peirpoint's term of

99 office has expired, it devolves on *him, under the said provision of the constitution, to continue to discharge the duties of his office until his successor is qualified; that as no successor to him has yet qualified, the pardon granted by him to the petitioner as aforesaid is a valid pardon; and that the said petitioner is illegally detained in the penitentiary and in the

custody of the said superintendent. It is therefore ordered that he be discharged therefrom.

100

*Martin v. Snowden, Trustee.

Bennett v. Hunter.

Portner & Recker v. Cazenove.

January Term, 1868, Richmond.

1. **Taxes—Collection of—Act of Congress—Construction.**—The fourth section of the act of Congress of June 7, 1862, entitled "an act for the collection of taxes in the insurrectionary districts," 12 Stat. at Large 422, does not, and is not intended to, create such a forfeiture of the land to the United States as that it *ipso facto* ceases to be the property of the former owner, and becomes the absolute property of the United States.

2. **Same—Power of Congress to Forfeit Lands.**—Congress has not the constitutional power to impose the penalty of forfeiture of lands for the non-payment of taxes assessed thereon.

3. **Same—Power of Congress to Enforce Collection.**—Congress has all the powers for enforcing the collection of its taxes that were in use by the Crown in England, or were in use by the States at the time of the adoption of the constitution of the United States; but forfeiture of the land assessed with the tax was not then in use, either in England or the States, as a mode of collecting the tax.

4. **Same—Act of Congress—Provision of Absolute Forfeiture—Unconstitutional.**—If the forfeiture provided by this act is to be regarded as absolute and as a penalty upon persons engaged in rebellion against the United States; then it is a legislative conviction and punishment without trial of all who fail to pay the tax, and is a violation of the provision of the constitution which forbids Congress to pass a bill of attainder.

5. **Same—Same—Sale of Whole Tract in All Cases—Constitutional.**—The power of Congress to provide for the sale of land for the payment of the tax is limited to that object, and a law which acquires that the whole land shall be sold in all cases, without regard to the fact that it may be divided without injury to it, and the tax may be paid by a sale of a part of it, is unconstitutional.

101 *6. **Same—Payment of Tax before Sale—Effect upon Sale.**—If the tax is paid or tendered by any person before the land is sold, the sale is void

***Taxes—Collection of—Act of Congress—Construction.**—In *Downey v. Nutt*, 19 Gratt. 59, it is said: "The principles decided in the cases of *Martin v. Snowden*, *Trustee*, *Bennett v. Hunter*, and *Portner & Recker v. Cazenove*, 18 Gratt. 100, and in *Turner v. Smith*, etc., *Id.* 830, reaffirmed and acted on."

+**Same—Payment of Taxes before Sale—Effect upon Sale.**—In *Cecil v. Clark*, 44 W. Va. 681, 30 S. E. Rep. 224, the court said: "No matter who makes a redemption under a particular title, whether party to the title or stranger, it is a redemption. When the party from whom the redemption is to be made, state or tax purchaser, receives the money necessary to effect a redemption, the state or tax purchaser is bound, notwithstanding the party redeeming may be one not authorized to redeem. *Cooley, Tax'n*, 346, 382, 383; *Martin v. Snowden*, 1

and of no effect; thought the act may provide that unless the owner shall appear in person and pay the tax, the commissioners shall proceed to sell the land.

7. *Same—Act of Congress—Suit by Owner against Purchaser—Removal to Federal Courts.*—Suits at law, brought by the original owners of land against purchasers at a sale for taxes under the act of Congress, to recover the land, are not within the act of Congress of March 8, 1863, authorizing the removal of certain suits from the State courts to the courts of the United States.

These three cases were heard together in this court. The questions involved in them are the same.

The cases of *Martin v. Snowden* and *Bennett v. Hunter* are cases of unlawful detainer, brought by Snowden, as trustee of Mrs. Eliza T. Fowle, against Martin, and by Hunter against Bennett, and the case of *Portner & Recker v. Cazenove*, is an action of ejectment brought by Cazenove against the appellants; all of them in the Circuit Court of the county of Alexandria. All the defendants claimed under tax sales made by commissioners of the United States government, for taxes due upon the property sold, imposed by the act of Congress of August 5th, 1861, 12 Stat. at Large 292, imposing a direct tax; and was made under the act of June 7th, 1862, which provides for the collection of this direct tax in insurrectionary districts; and there was no question made as to the regularity of the proceedings of the commissioners, except as to their sales after the tender of the tax; and the selling the whole of the property, which was susceptible of division, and the sale of a part of which would have been sufficient to pay the tax assessed upon it.

In the first two cases, the defendants appeared and moved the court to remove them to the Circuit Court of the United States, stating that they claimed title under said tax sales. But the court overruled the motion, and they excepted.

- 102 *The jury found a special verdict in the first two cases; in the third case the facts were agreed. It appears that Mrs. Fowle and her husband, Hunter and Cazenove left Alexandria in 1861, and went

within the Confederate lines, where they remained until after the surrender of General Lee, in 1865. Mrs. Fowle was a married woman, and went with her husband; Hunter was a minor in 1861, and did not come of age until 1864; and by the will under which he claimed the property, it was given to his father until he arrived to the age of twenty-one years, and then to himself in fee. His father went with him into the Confederate lines. After his return, in 1865, Hunter took the oath to support the constitution of the United States, and tendered to the commissioners the amount of the tax, &c., for the purpose of redeeming his property; but he refused to take the oath that he had not taken part with insurgents in the late rebellion, or in any way given them aid and comfort, as required by the seventh section of the act of Congress approved March 3d, 1865, amendatory of the act for the collection of direct taxes in the insurrectionary districts. He afterwards received a pardon from the president. And this was done also by Mrs. Fowle in May, 1865; but she refused to take the last mentioned oath. In all the cases the property sold was assessed with a certain part of the direct tax, and was advertised for sale, as directed by Congress; and in each case it was susceptible of division, and a part might have been sold sufficient to realize the full amount of tax, interest, penalty and costs imposed upon it. Before the sale in the first case, but after the advertisement of sale, Wm. J. Boothe, a friend of Mrs. Fowle, went to the office of the tax commissioners prepared to pay the tax, interest, penalty and costs upon the property, but made no tender of the money, being informed by the commissioners that they would not receive the money except from the owner in person. In

103 *Hunter's case, before the sale, but after the advertisement, a tenant of about one-half of the tract of land applied to the commissioners to pay the tax, &c., but the commissioners refused to accept the same, except from the owner in person. In the case of Cazenove, John P. Agnew then being in possession of the property, but not under any agreement with the owner for such possession, in order to secure the property from sale, and upon his own motion, having no authority from the owner, unless subsequently conferred, tendered to the commissioners the full amount of the tax, &c. In January, 1864, the whole property in each case was sold; and the parties in possession held under these sales.

The Circuit Court rendered a judgment in each case for the plaintiff, and the defendants obtained writs of error to the District Court of Appeals at Fredericksburg. In that court the judgments were affirmed pro forma, and then writs of error were obtained to this court.

The cases were argued by Willoughby, for the appellants, and Beach, for the appellees; but it is impossible to do justice to the arguments without giving more space

Gratt. 100. The forfeiture in the one case and the purchase under the tax sale in the other is at an end, and the title reverts to those from whom it was forfeited or sold."

Same—Collection of—Power of State to Forfeit Lands for Failure to List.—In 4 Va. Law Reg. 194. it is said that there are several Virginia decisions which uphold the forfeiture statute, holding that it is self-executing without the necessity of an inquisition or judicial proceeding of any kind, all of which are reviewed by the court in *King v. Mullins*, 171 U. S. 404, 18 Sup. Ct. Rep. 925. The cases are: *Staats v. Board*, 10 Gratt. 400; *Wild v. Serpell*, 10 Gratt. 405; *Smith v. Chapman*, 10 Gratt. 445; *Ushers v. Pride*, 15 Gratt. 190; *Martin v. Snowden*, 18 Gratt. 100.

But the court in *King v. Mullins*, 171 U. S. 404, 18 Sup. Ct. Rep. 925, did not find it necessary to decide that point because there was a West Virginia statute providing for a sale under a decree of court. 4 Va. Law Reg. 194.

to them than is allowable, especially as the questions are fully discussed by the judges.

RIVES, J. The appellants in these cases are asserting tax titles as against the original owners of the lands and lots, forfeited and sold for the non-payment of taxes. The principles involved are, for the most part, common to all, and therefore they may now be considered, as they were argued, together.

It is conceded to be necessary, to uphold these titles, that all the provisions of the acts of Congress under which they have arisen should be strictly complied with.

They have been created by these enactments, and can have no existence or validity save under and by their authority. It is proper, therefore, to commence the investigation of them by ascertaining the character, the object, the meaning and the effects of these laws of Congress.

At the commencement of the late civil war, Congress addressed itself with promptness and energy to the task of providing extraordinary means to meet the emergencies of the occasion. Among these was a resort to a direct tax of \$20,000,000, and its apportionment among all the States and Territories, with a curious disregard of the armed revolt of many of them, and a singular reliance on the usual civil processes of collection. It is reasonable, therefore, to presume that the application of this act of August 6, 1861, to such States was merely nominal, and that it was not expected that it would operate except where the authority of the United States was acknowledged and maintained. But a brief statement of the leading provisions of this act will assist us in determining the true intent and purpose of the succeeding act of June 7, 1862. This first act abounded in wise and just precautions to secure proper notification of every step in the assessment and collection, to guard against surprise and sacrifice, and ensure the restoration of the property upon the payment of the Government dues. In the first place, personal chattels were to be distrained; and if not sufficient, then the lands were to be subject to sale; but only "so much thereof as might be necessary to satisfy the taxes due thereon, together with an addition of twenty per cent. to the said taxes;" and it was only where the lands were not divisible that the whole were to be sold, and the surplus of proceeds paid to the owner or deposited in the treasury for the use of the owner, with a saving to the owner, his heirs or personal representative, or "any person in their behalf," of the right to redeem within two years, &c. In case of non-residents, a year was allowed them after publication *by the collector that the tax had become due, and at its expiration their lands were not subject to sale except upon sixty days' advertisement, and then only "so much as might be necessary to satisfy the taxes," &c. This was usual and normal legislation for collection of taxes; and no one can im-

pute to it the neglect of just precautions to protect the citizen from imposition. It may be accepted, therefore, as indubitable evidence that Congress was not ignorant of the rights of their constituents, nor derelict in their protection.

This law, however, proved a dead letter in the States where the Federal authority was successfully defied and resisted. It, therefore, gave rise to a new and distinct act, framed for the special purpose of following the army in its advances into the hostile States with tax commissioners, to assess and collect taxes; and for that purpose, to sell the lands upon which they were charged. It is very clear that Congress must have foreseen, that in cases of such military occupation, none of the adherents of the Confederacy would have remained on their lands; but, on the contrary, would have fled with their movable property before this hostile advance—thus, in a great measure, leaving the country to be used and settled as the laws of Congress might appoint. It seems that the appellees here all fled upon the breaking out of the rebellion, and left their houses, lots and lands to abide the ordinary incidents of military occupation. It was then in the province of Congress not only to collect taxes from these lands, but so to frame their laws to that end as to invite the refugee back to his allegiance, or provide for the settlement of his lands—if wholly abandoned by him—by other more loyal taxpayers, or appropriating them to the service of the government. Our State policy of forfeiture of lands for non-payment of taxes has been defended by this court on the distinct ground that it was designed and calculated to *promote settlement, and thus remove "a serious check to population and the improvement of the country, and the development of its resources." The object of Congress was not merely to raise its direct tax from the "insurrectionary districts," but it went further, and aimed at a settlement of them by a loyal population. Accordingly, this act is not simply entitled "an act for the collection of direct taxes in insurrectionary districts," but its title bears the significant addition, "and for other purposes." Among these latter is the palpable and unmistakable design of rendering the collection of these taxes auxiliary to the policy of transferring the title and possession of these lands either to the government, or to persons amenable to its laws and acknowledging its authority. How else can we account for the hasty and summary character of these proceedings; for dispensing with all the notices, indulgences and savings given by the act of August 6, 1861; for no longer distraining the goods in the first instance; for no longer limiting the sale to "so much of the land as might be needed," &c., and taking away redemption from "any person in owner's behalf," and restricting it in terms to "the owner in person?" These provisions can, in my view, be only predicated of a design by Congress

to accomplish by this act a two-fold purpose: first, to raise money from taxes; and secondly, as an incident thereto, either to entice the recusant tax-payers back within its jurisdiction and power, or else transfer his forfeited lands to loyal citizens. The various provisions of this act for the redemption within sixty days after sale, by the owner in proper person or any loyal person having a lien, &c., upon taking the oath to support the constitution; for the extension of the time to redeem to those not implicated in the rebellion; for leasing and selling to loyal persons, officers, musicians and privates of the army and navy; and conferring upon some of these a right of pre-emption, &c.

107 *All these satisfy me that these collections in "insurrectionary districts" were subsidiary to the policy of procuring loyal settlers upon these abandoned and forfeited lands, the taxes upon which the owner would not return in person to pay.

But it is said that this construction imputes to this law a culpable and discreditable indirection; and converts it into a disguised scheme of confiscation. I do not perceive the justice of this criticism or animadversion. I have sought to show that there is nothing covert or indirect in the act; but, on the contrary, that its meaning is plain and avowed, and its aim identical with all similar schemes of forfeiture. It is very properly stated by the counsel for the appellees, that forfeiture in such cases cannot be likened to the somewhat analogous result in the proceedings in rem for forfeiture. Here, it is a precedent denouncement of a penalty for default—a warning—a means of coercion legitimately employed to induce a prompt payment of taxes. It may be avoided in this way; and in those exceptional cases, where it cannot be thus avoided, there is usually such a saving, as consists with the indulgence or the severity of the Legislature in its scheme of public policy. Whenever, however, such laws of forfeiture have worked out their results, it is not usual for the Government to retreat from its position or abandon its declared policy, for the plain reason that it contemplated beforehand these results, as consequences incidentally, though not primarily, of its legislation. And applications for relief, when not embraced by the terms of the law, are matters of favor, rather than of right. It is a source, doubtless, of regret, that under the circumstances of our late civil troubles, Congress had not been more lenient in this regard to the landed proprietors who fled before its armies, and were thus voluntarily out of the reach of its laws, in ignorance of

108 their provisions, and *debarred by the war from any compliance with them. But that assuredly is not a consideration with this court to prevail against the rights and titles of purchasers from and under the government at these tax sales.

It is argued, however, that it is for the States alone, who are said to hold "the

eminent domain" over the lands within their borders, to inflict such forfeitures; and that it is not competent for Congress to exercise such powers. It is a sufficient reply to say that the people of the States have, by the federal constitution, expressly delegated to Congress "the power to lay and collect taxes" in such comprehensive terms as to comprise all modes of taxation, and among these, taxes on lands. Under the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing power," Congress possesses, by delegation from the States, a right to all the means habitually exercised by them for the collection of taxes. I do not believe the concurrent powers of the Federal and State governments to impose taxes, and employ the usual agencies and coercion for their collection within the limits of the United States constitution, have been at any time called into question. Pending the adoption of the constitution, there was a great deal of earnest and able debate as to the expediency of this grant of unlimited taxation, and the danger of collision between the governments, State and Federal, from the exercise of such a concurrent power in both over the same subjects. Judge Story, in his Commentaries, remarks upon this subject with equal force and felicity: "The triumph of the friends of the constitution, in securing this great fundamental source of all real effective national sovereignty was most signal; and it is the noblest monument of their wisdom, patriotism and independence. Popular feelings and popular prejudices, and local interests and the pride of State authority, and the jealousy of State sovereignty,

109 were all *against them. Yet they were not dismayed; and by steadfast appeals to reason, to the calm sense of the people and to the lessons of history, they subdued opposition and won confidence. Without this power, the constitution would long since, like the confederation, have dwindled down to an empty pageant. It would have become an unreal mockery, deluding our hopes and exciting our fears. It would have flitted before us for a moment with a pale and ineffectual light, and then have departed forever to the land of shadows." 1 Stor. Comm. § 948.

The elder Judge Tucker, in his notes on Blackstone, says in the same connexion, that "a candid review of this part of the federal constitution cannot fail to excite our just applause of the principles upon which it is founded." 1 Tucker's Blacks. App. 246. It is the just effect of such commanding authority to warn us against any judicial construction tending to weaken the force and efficiency of this vital and active principle of the constitution. Our late history and experience attest the straits to which the nation can be reduced, and the responsibilities it must assume in defending its existence against domestic violence. In view of past emergencies, and the future exigencies of the country, arising from wars foreign or domestic, it seems to me

extremely hazardous and impolitic to deny to Congress any of those incidental powers which are exerted by the States in the coercion of taxes, and in subjecting delinquent lands to forfeitures. To dilate upon the abuses, actual or fancied, of such powers, and the harshness of such measures, falls far short in my view of demonstrating any constitutional inhibition against the exercise of the former, or the adoption of the latter. It will be conceded that the powers of Congress and the States in the laying and collecting of direct taxes, are co-extensive and alike unlimited; but the effort is now made in these cases to

110 *establish an exception in this—that the States can exact forfeiture upon default in non-payment of taxes; but Congress cannot, because such forfeiture is not necessary to the collection. Is not the principle, however, in both cases, precisely the same? Is not the forfeiture alike conditioned upon the default? And is it anything more or less than a begging of the question to assume, as this reasoning purports, that this forfeiture, when imposed by Congress, does not promote the same end and designs which the State seeks to accomplish? Surely the forfeiture, in both instances, brings into the treasury the taxes, at least, and as to the surplus, puts it in trust for claimants; and incidentally removes future obstruction to the collection of the taxes, by securing settlers acknowledging the authority, and answerable to the process of the government.

By this reasoning, and by these considerations, I am led to the conclusion that these acts of Congress are constitutional, and that this court is bound by them. The next step in our enquiry is to ascertain and fix their proper meaning. It is a mistake to say, as it was said in the argument, that the act of June 7, 1862, was amendatory of the preceding general act of August 6, 1861. Such is not the fact. A recital only is made of the apportionment of the direct taxes by this first act, and of the obstruction of the civil authority in its execution, by reason of the rebellion. So far from being amendatory, this second act is a total departure from the first, and framed so as to meet a wholly different state of facts. It must be remembered that it was passed *flagrante bello*, and is remarkable as founded on a claim of allegiance from the insurgents, and their liability to payment of taxes as soon as the army could get military occupation of their lands or persons, and afford a footing for the operations of the tax-gatherer. Hence, this act sets out with charging the lands in "the insurrectionary districts" with their propor-

111 tion *of the direct taxes according to the assessment and valuation previous to 1st January, 1861, and besides with a penalty of fifty per cent. of the tax, and proceeds to constitute these taxes and penalty a lien upon the lands, without any other or further proceeding. Then, the owner is allowed sixty days after the award of his tax is fixed by the tax commission-

ers, to pay it and procure a certificate thereof, whereby his lands are discharged from said tax. But if this is not done, "the title of, in and to each and every piece or parcel of land upon which said tax has not been paid, as thus provided, thereupon becomes forfeited to the United States, and upon the sale hereinafter provided for, shall vest in the United States or in the purchasers at such sale in fee simple, free and discharged from all prior liens, incumbrances, right, title and claim." Sect. 7 Act June 7, 1862, 37th Cong., Sess. II, ch. 98, p. 422. This section is the most material to the consideration and decision of these causes. There are two branches of it: first, the forfeiture of title, and secondly, the ultimate vesting of that title. To declare the title, in the particular event, to be forfeited to the United States, clearly means that the title is divested out of the defaulting owner, and devolved upon the United States. It does not say that the delinquent lands shall be forfeited; but the title of the owner of them shall be lost to him, and forfeited to the United States. But how and for what purpose forfeited? The law itself gives the reply—not to be held by the United States for its own use, but to be sold for payment of taxes, penalty and costs; and that sale, under the scheme of the law, becomes the appointed mode in which the title ultimately vests. Now the condition of this sale is to the highest bidder, but in case no one bids to the amount of the penalty and costs, then it may be struck off to the United States at that sum.

By the subsequent amendatory act 112 of February 6, 1863, *the privilege of bidding by the commissioners for and on behalf of the United States was enlarged to the extent of two-thirds of the assessed value; and in cases of lands selected under the direction of the President for government use, for war, military, naval, revenue, charitable, educational or police purposes, the commissioners, under the President, were at liberty to bid for them and have them struck off to the United States. In this way, the law appointed and designated two classes of purchasers at the sale—first the highest bidders, and secondly the United States, acting through the commissioners, and subject to the restrictions of these acts. The United States, as well as the highest bidders, might be purchasers at these tax sales. Sections 9th, 10th and 11th of the act of June 7, 1862, provide for the leasing and selling the lands thus bought by the United States. It is specially noticeable that the 11th section employs in this connexion the significant phrases, "said lands vested in the United States," "such lands as may be unimproved and vested in the United States." When, therefore, the latter clause of this 4th section declares that "the title, upon the sale hereinafter provided for, shall vest in the United States or the purchasers at such sale," it has exclusive reference to the United States as a purchaser, and not as the sovereign, to

whom the forfeiture had been declared in the preceding clause. To my mind, it does not admit of a doubt, that the forfeiture is absolute and unqualified, and is not in any wise modified or restricted by this latter provision for the vesting of the forfeited title. The question is asked, why postpone the vesting of title to the date of the sale, if it was already in the United States by reason of the forfeiture? I answer, because the forfeiture puts it in the United States as the Lord paramount, and for the purpose of a sale to raise the taxes whose non-payment was the only justification of the forfeiture; and the vesting of *the title in the United States pertains to its other character as a purchaser at its own sale. This interpretation arises naturally out of the whole scheme and policy of the law, reconciles the two clauses, which are supposed to conflict, and removes from this important section the charge of tautology, or else contradiction. I conclude, therefore, that this section simply means, that upon the specified default, the land becomes forfeited to the United States, as a sovereignty, whose rightful and necessary demands had been defeated by this default; and is thenceforth held by the Government for the purpose of a sale to raise those dues; and that whenever, at such sale, the United States shall be authorized to bid and buy, the title shall thereafter be vested in the United States, as such purchaser. I need scarcely add, that in my view the land is sold not as the property of the delinquent taxpayer, but as the property of the government.

We have now, in the natural course of this enquiry, reached another important point in this controversy; and it is as to the principle that underlies and regulates redemption. That we may have a clearer view of the question here made, let us first state the successive provisions of the different acts upon this particular point. I will not go further back than the act of June 7, 1862; for as I have already stated, that was a new and remarkable precedent growing out of the severed ties of the Union and the anomalous condition of the citizens of the revolted States. By this act of 1862, the right of redemption within the prescribed limit of sixty days after sale, was not restricted to the owner, but was extended in terms to "any loyal person having lien or interest;" and in the case of "minors, insane, non-resident aliens or loyal citizens beyond seas," a further period was allowed of two years from the sale. This term of sixty days was enlarged to one year, for the production of proof before the commissioners *that the applicant for redemption had taken no part in the rebellion, and had been thereby prevented from the payment of taxes; whereupon he, being the owner, was to be allowed by the commissioners further time to redeem, not exceeding two years from the day of sale. The amendatory act of February 6, 1863, merely enlarged the capacity of the Government to acquire these delinquent

lands at its own sales. But by the act of March 3, 1865, another condition was imposed upon redemption, namely, that the applicant shall swear that he had taken no part in the rebellion, nor given aid or comfort thereto, and shall satisfy the commissioners of the truth of such oath.

Here, then, the question arises upon these successive enactments, whether it was competent to Congress, after the right of redemption was once defined and prescribed, to change or alter it so as to divest or effect rights that had once attached. And this depends upon the legal effect of such laws, as impairing contracts, or destroying vested rights. If this right of redemption is to be regarded in the nature of a vested right held upon valuable consideration by contract or otherwise, under and by virtue of the laws of Congress, there would be reason to doubt its power to superadd new conditions thereto, by subsequent laws; but if, on the contrary, this is to be deemed a mere legislative boon, there would seem to be no valid or reasonable objection to the power of Congress, by a retroactive law, to lay new conditions on its bounty or to withdraw it altogether. An analogous question was decided by this court under the Confederacy, touching the competency of the Confederate Congress to alter its substitute law so as to affect the rights of the principals and make conscripts of them, notwithstanding their purchased exemption under previous laws. *Burroughs v. Peyton*, and *Abrahams v. Same*, 16 Gratt. 470. Judge Robertson, who delivered the opinion of the court, held that "substitution *was permitted as an act of grace and favor on the part of the government, and not as a matter of contract." He went into a review of authorities to show that "rights and interests growing out of legislative measures of public policy, did not partake of the nature of contracts; and although acquired under them, were not to be considered as violated by subsequent legislative changes which might destroy them." He quoted with especial favor the language of Justice Campbell in the case of *The State Bank of Ohio v. Knoop*, 16 How. U. S. R. 369; and applied it to the cases before him: "A plain distinction exists between statutes which create hopes and expectations, and those which form contracts." To which of these categories these acts of Congress belong, is manifest upon their own perusal, and cannot be made plainer by argument or statement.

Having thus given my views on the constitutionality of these laws, and the interpretation to be placed on them, I have only now to dispose of the several points submitted to us for decision in these causes. After the advertisement of, but previous to, these sales, which all occurred in the month of January, 1864, applications and offers were made to the commissioners for the payment of taxes and charges, but rejected because not made by the owner in person, as required by the acts of Congress. In the case of *Hunter*, the offer was made

by a tenant of part of the premises; in the case of Cazenove, by one in possession, but not under any agreement with the owner; and in the case of Mrs. Fowle's trustees, by a friend of hers. If we are to be governed by these laws, we must look to them for the description of those entitled to this privilege of redemption. If these laws had been applicable to a normal state of society and the prevalence of civil rule; if the stringent nature of these provisions did not contemplate the accomplishment

116 of other incidental objects of "public policy, to which the collection of the tax was legitimately accessory, I should be disposed to conform to the liberal rule laid down in the case of *Dubois v. Hepburn*, 10 Peters 1, "that it was not necessary for the purpose of justice, or to effectuate the object of such tax laws, that the right to redeem should be narrowed down by a strict construction, and that any person who has an interest in the lands sold for taxes should be considered as the owner thereof for the purposes of redemption." The original act of August 6, 1861, was framed in this spirit, and gave this right to "the owners, their heirs, executors or administrators, or any person in their behalf. But when Congress came to legislate for a different state of things, and to send its tax-gatherers after its advancing armies in order to make the lands in military occupation tributary to the public fisc, and to recall the insurgent proprietors as rightful subjects of future as well as present taxation, Congress perceived the necessity of abandoning, so far as the insurrectionary districts were concerned, its enactments for the districts where its authority was acknowledged and could be enforced by civil processes, and of substituting therefor in such "insurrectionary districts" a different system, which, while it contemplated the raising of the direct taxes as its primary object, combined therewith the secondary and legitimate design of encouraging the return or promoting the settlement of a loyal population. We cannot deny that these lands were part and parcel of the public domain; as such, liable to taxes, and so to be treated in the financial policy of the Government as to subserve the needs, both future and present, of the treasury. To deny to Congress all but the simple function of resting these taxes from delinquent lands (and that, too, in the gentlest and most indulgent manner) during the lucky moments of a precarious

117 military occupation, and to deprive that body of the incidental power *of fostering this source of income for future as well as present exigencies, would, in my view, weaken the government, and render it an easy prey to disaffected and rebellious subjects. While, therefore, entertaining no doubt of the rightful authority of Congress so to legislate, I am constrained to believe that, on this particular point as to the person entitled to redeem, the act of June 7, 1862, as contrasted with that of August 6, 1861, is perfectly plain and unambiguous. I do not see how any

one can misunderstand or cavil about its terms. They are: "The owner, or some loyal person having lien or interest, &c., who upon appearing in person before the commissioners, taking oath to support the constitution of the United States, and paying tax, penalty, interest and costs, may redeem said lands from said sale." It is no longer "the owner or any one in his behalf," according to the terms of the act of August 5, 1861; but "the owner, &c., who appears in person." I do not think the tenant, in the first case, the squatter in the second, and the friend in the third, are within the terms or design of this description.

The appellee Hunter and Mrs. Fowle allege that they were improperly denied the right of redemption within the two years allowed them, because of the minority of the one and the coverture of the other. It is contended by the appellants' counsel that the application did not pertain to them personally, but to the guardian and the trustees. This objection seems to me too technical. I concede their capacity to apply for redemption; but when they applied, Congress had laid them (as I have endeavored to show Congress had a right to do) under new conditions by the act of March 3d, 1865. With these conditions they declined to comply, as I presume they could not, and thus lost the privilege which they were led "to hope and expect" by the previous acts. Whatever relief, therefore, they may think

proper to seek, it must be sought 118 from the legislative *dispensers of such favors, and not from the courts, who expound and execute the laws such as they are.

But it is objected, that there was no necessity, nor, indeed, excuse for selling the entirety of these lands; that they admitted of division for sale, and a small portion of each would have brought the amount of the government dues. There are two sufficient replies to this objection. First—It is precluded by the effect which the act of Congress gives to the certificate of sale. In one part of the seventh section of this act it is declared, that "this certificate shall be received in all courts and places as prima facie evidence of the regularity and validity of said sale and of the title of the purchaser;" and in the concluding proviso of that section it is further said of this certificate, it shall only be affected as evidence of the regularity and validity of the sale by three particulars, namely: 1. That the lands were not subject to tax. 2. That the tax was paid previous to the sale; or, 3. That the property had been redeemed conformably with this act. The purchaser, therefore, is entitled to rest upon this certificate, as determining the validity of the sale, and of his title under it, unless it is impugned by proofs falling under one or the other of the heads already indicated. The complaint here affects the question of the regularity and validity of the sale, and is expressly precluded by this clause of the law. But if this were out of the way, or

we could go behind it for purposes of enquiry into the legality of the sale, is it true that it was against law to sell the whole instead of so much as was needed for taxes and charges? Of course this must be decided by the language of the law. It is not for us to usurp the place of the lawgiver, and determine what in our opinions should have been the penalties, if any, to be affixed, under the circumstances, to this default in the payment of taxes. We have to abide the will of Congress, if constitutionally expressed, however it

119 *may conflict with our own notions of justice or liberality. When we revert to the first law, and contrast its direction to sell "so much of the real estate as may be necessary," &c., with the total omission of such language in the act applicable to "the insurrectionary districts," and the substitution thereof of the broad and peremptory order for the sale of "the said lots and parcels of land," without any limitation whatsoever of quantity, it seems to me impossible to resist the conclusion that this difference was designedly made by Congress with the views and policy clearly attested by all the distinguishing and remarkable features of this law. The commissioners were left no discretion, as in the first act, touching the quantity to be sold; but were required by Congress to sell all that was assessed to the delinquents. The sales were just such as were required by the act, and if excessive and unnecessary according to our views, must be deemed to have received the deliberate approval of Congress. I cannot, therefore, acquiesce in the propriety of vacating these sales, though conformable to the will of Congress, because of the practicability of reconciling the enforcement of taxes with a more indulgent mode of proceeding.

An immunity is claimed for the appellee Hunter on account of his pardon on the 4th September, 1865, by the President, which is set forth in the special verdict of the jury in his case. This is based on the idea that he had a vested right of redemption under the act of June 7, 1862, which was taken away by the act of March 3, 1865; and that this subsequent pardon avoided this latter act, and restored to him his rights under the former. The authority of the late cases of *Ex parte Garland*, 4 Wall. U. S. R. 333, and *Cummings v. State of Missouri*, Id. 277, is invoked to sustain this position. These cases were held to be embraced by the constitutional prohibition against bills of attainder and ex post facto laws; and Mr. Justice *Field, who delivered the opinion of the court, rested it on the principle that "the attorney does not hold his office as a matter of grace or favor," and accordingly "his right to it is something more than a mere indulgence, revocable at the pleasure of the court or at the command of the legislature." 4 Wallace 379. What, therefore, I have already said to fix the character of these acts, and to free them from anything in the nature of ex post facto penalties, contracts or

vested rights, must suffice to indicate the proper discrimination between the cases, and the grounds of my dissent from the pretensions thus advanced for this appellee on the score of his pardon.

The construction which I have placed on these acts has been assailed with much ingenuity because of an imputed inequality or want of uniformity in their operation under the theory I have advanced. The reasoning I have pursued would incidentally furnish to the thoughtful enquirer the answer I would make to this argument. But to prevent misapprehension, I deem it proper to take a more direct notice of it. The precise allegation is, that these laws operate unequally upon the loyal and disloyal subjects of the government. If by this it is meant to assert that there is a different mode of enforcing these taxes as between these two classes, it is not true nor consistent with any theory of their operation. The taxes are exacted, and the forfeiture declared alike of the proprietor, whether he be in the Federal or the Confederate service; the same means of collection from him or his lands are adopted, whether he be an adherent of the United States, or in arms, or conspiring against it; so far as the great primary object is concerned of raising taxes, the lands are impartially and uniformly proceeded against, no matter where or who the delinquent proprietor may be; and the same terms and opportunities of paying before forfeiture are offered to all, whether

121 loyal or disloyal. It is very true that the same chances of relief were not enjoyed by all; that those who were in arms against the government could not be notified of their assessments or prepared to meet them with equal facility with those who were loyal. And it would be sheer folly to suppose that this was not clearly foreseen and contemplated by Congress, and advantage taken thereof to carry out a decisive policy for the fostering of its revenues from direct taxes, and the occupation and settlement of abandoned and forfeited lands in "the insurrectionary districts" with a loyal and tax-paying people. But surely it would not be becoming in those who abjured the government and left their homes to aid the rebellion, to plead in their own behalf disabilities voluntarily incurred by them, and from which the government would willingly have saved them.

But if it is meant to say that after forfeiture was incurred and the government was dealing with its own property, it dealt out its "acts of grace and favor" in the privilege of redeeming, unequally and not uniformly, as between the loyal and the disloyal, I cannot gainsay it. But it seems to me, with entire deference to others, to be an abuse of language to characterize such treatment as punishment or confiscation in disguise.

I have thus considered, with care, and, I trust, fairness, all the material points raised in this case by the able counsel of the appellees on their behalf. I have not

thought proper to comment on the authorities that were cited. These cases are eminently *sui generis*, depending on the construction of the acts of Congress, and can derive little, if any, elucidation from other cases or the apposite treatise of Blackwell.

I now turn briefly to an exception of the appellants to the refusal of the court to allow a removal of these causes to the United States Circuit Court. It is contended that these cases are embraced by the act of 122 Congress of March *3, 1863, commonly known as the Habeas Corpus Act. I do not concur in that view. The language of that act will not apply to cases like those at bar, to try the title to and the possession of lands; and in nowise partake of the nature of those suits for "arrest, imprisonment, trespass, wrongs or omissions," &c., specially and alone contemplated by that act. The motion for removal was, therefore, properly overruled.

I cannot conclude my investigation of these cases without expressing my sensibility to the sacrifices which the appellees have sustained. The amount of taxes was paltry as compared with the value of the forfeitures for non-payment. While under State laws it may be that the magnitude of these penalties have been approximated, if not equalled, yet it cannot be said that the impediments in the way of complying with the demands of the government, or the excuses for non-compliance, were at all equal. No one who considers the peculiar character of our late struggle, the nature of our two-fold allegiance, the conflict of theories co-equal with the origin of our national government, and the magnitude of the war waged by the revolted States under such a complete organization of an actual government as to exact from the United States, as well as foreign nations, the recognition and the rights of a belligerent power, can fail to extend to the private citizens of such States the consideration and indulgence with which their participation in the revolt should be extenuated. But this is a matter not cognizable by this court; and whatever relief is due to such considerations must proceed from the august will of the nation, whose disposition, at the proper time, to redress its citizens for unreasonable forfeitures, ought not to be doubted.

These views, of course, conduct me to the conclusion, that upon the facts agreed in one case, and found by special verdict in the two others, the law was for the 123 defendants; *and that the judgment below should be reversed in all the cases.

JOYNES, J. These are suits instituted by the several defendants in error against the several plaintiffs in error, for the recovery of lands sold by the commissioners of the direct tax, under the act of Congress passed June 7, 1862, and purchased by the plaintiffs in error. The validity of these titles is the main question in the cases, the facts of which, so far as it is necessary to consider them, are substantially the same.

By the act of Congress of August 5, 1861, (12 Stat. at Large, 292), a direct tax of twenty millions of dollars per annum was laid upon the United States, of which the sum of \$937,550.66½ was apportioned to the State of Virginia. This act contained minute and elaborate provisions for the valuation and assessment of the lands upon which the tax was laid, and provided for the collection of the tax by distress of the goods and chattels of the tax-payer, and in case goods and chattels sufficient to satisfy the tax could not be found, by a sale of so much of the land assessed with the tax as should be sufficient to satisfy it, with an addition of twenty per cent. This act also provided that if, at the time of its going into operation, the people of any State should be in rebellion against the authority of the United States, so that the laws of the United States could not be executed therein, it should be the duty of the President to execute the provisions of the act in such State as soon as the authority of the United States should be re-established. The owner or superintendent of any property charged with tax and advertised for sale was allowed to prevent a sale by payment of the tax, with an addition of ten per cent., at any time before sale; and the owner, or his representatives, or any other person on his or their behalf, was allowed, at any time *within two years 124 after sale, to redeem any land sold, by payment to the collector, for the use of the purchaser, or his heirs or assigns, of the amount paid by the purchaser, with interest thereon at the rate of twenty per cent.

There are many other provisions in the act of August 5, 1861, but those which have been mentioned are sufficient to indicate the general character of the system established by it.

On the 7th day of June, 1862, Congress passed an act entitled "an act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes." (12 Stat. at Large, 422.) The 7th section of that act was amended by an act passed on the 6th day of February, 1863. (12 Stat. at Large 640.)

By the first section of the act of June 7, 1862, it was enacted, that when in any State, or portion of a State, by reason of insurrection or rebellion, the civil authority of the United States is obstructed, so that the act of August 5, 1861, cannot be peaceably executed, the direct taxes by said act apportioned among the several States respectively shall be apportioned and charged in each State or part thereof, in which the civil authority is so obstructed, upon all the lands and lots of ground therein not exempted, as the same were enumerated and valued under the last assessment and valuation thereof under the authority of such State, prior to the 1st day of January, 1861; and each parcel of land was declared to be, by virtue of said act, charged with its proportionate part; according to value, of the tax apportioned to such State by the act of

August 5, 1861; and it was further provided, that in addition thereto a penalty of fifty per cent. of said tax should be charged on said lands. The second section provides that the President shall, on or before the 1st day of July, 1862, declare by proclamation in what States, or parts of States, such insurrection exists; and that there-
 125 upon "the said several parcels of lands shall become charged with their respective portions of the said direct tax, and that "the same, together with the penalty, shall be a lien thereon, without any other or further proceeding whatever."

The President issued his proclamation, in pursuance of this provision, on the 1st day of July, 1862, and that part of Virginia in which the lands in controversy lie was declared to be in insurrection against the authority of the United States, so that the provisions of the act of August 5, 1861, could not be peaceably executed therein. 12 Stat. at Large 1266.

Section three provides, that the owner of any parcel of land may, within sixty days after the tax commissioners shall have fixed the amount, pay the tax thus charged thereon into the treasury or to the commissioners, by virtue whereof the land shall be discharged from said tax. The fourth section is in the following words: "And be it further enacted that the title of, in and to each and every piece or parcel of land upon which said tax has not been paid, as above provided, shall thereupon become forfeited to the United States; and, upon the sale hereinafter provided for, shall vest in the United States, or in the purchaser at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title and claim whatsoever."

Subsequent sections, which need not now be noticed more particularly, provide for the appointment of tax commissioners, who are to enter upon the discharge of their duties whenever the commanding general of the forces of the United States, entering into any such insurrectionary State or district, shall have established the military authority of the United States throughout any parish, district or county of the same, for the sale of forfeited lands; for striking
 126 them off to the United States in certain cases; *for the disposition by sale or lease of the lands so struck off to the United States, &c., &c. Some of these provisions will be noticed more particularly hereafter.

It is contended by the counsel for the plaintiffs in error, that by the provisions of the fourth section of the act of June 7, 1862, above quoted, any parcel of land upon which the tax is not paid within sixty days after the amount of it is ascertained, as provided by the third section, becomes, at the end of the sixty days, forfeited to the United States in such a sense that it, ipso facto, ceases to be the property of the former owner, and becomes the absolute property of the United States, so that when it is afterwards sold, it is sold as the property of the United States, and that this loss

of the property is inflicted upon the owner as a penalty for his default in the non-payment of the tax within the sixty days. This is the fundamental question in the present cases.

This section does not define, in terms, what is to be the effect of the forfeiture which it declares shall take place, so that we must resort to the common rules of construction to ascertain it.

It is incumbent upon the plaintiffs in error to make it clear, beyond all doubt, that it was the design of Congress to inflict such a forfeiture as they contend for. An intention to deprive a citizen of his freehold without trial, and in a manner never before practiced by the United States, will not be inferred by the court from general or ambiguous language, which will admit of a different interpretation. And in putting a construction upon the act of June 7, 1862, we must bear in mind the reasons for its enactment. The act of August 5, 1861, had provided for two great leading objects: 1. The proper assessment of the tax upon the several parcels of land; and 2. The collection of the tax so assessed. It being found impossible to execute the provisions

of that act in the insurrectionary
 127 *districts, Congress, by the act of June 7, 1862, adopted other provisions for the accomplishment of the same objects in those districts, which were deemed better suited to their condition and more likely to be effectual. That this was the reason for passing the act of June 7, 1862, appears distinctly from the first section. Any ambiguous words or provisions in that act should be construed with reference to those objects.

The language of the fourth section of the act of June 7, 1862, does not require the construction contended for. The terms "forfeited to the United States" do not necessarily import that the title shall be thereby divested out of the owner and vested in the United States. It is a rule of the common law, that where an act of Parliament declares that a person "shall forfeit" his lands to the King, or that a person's lands "shall be forfeited" to the King, the title to the lands is not divested out of the owner and vested in the King by the mere force of the forfeiture. An inquest office is necessary for that purpose. And, therefore, when a man is attainted of high treason, whereby all his lands are forfeited to the King, the freehold remains in him until office found for the King, so that he shall be tenant to every precipe. Plowden Com. 486. Mr. Blackwell, in his work on Tax Titles, ch. 32, speaking of the effect of statutes which provide that lands shall "be forfeited to the State" for the non-payment of taxes, regards it as "a serious question whether an inquisition is not necessary, in order to divest the title of the rightful proprietor and vest it in the State," and collects several cases in which that view has been maintained. It is otherwise if the intention of the Legislature is clearly indicated that the title shall pass by the mere

force of the forfeiture. Wild's lessee v. Serpell, 10 Gratt. 405; Fairfax's devisee v. Hunter's lessee, 7 Cranch R. 603; United States v. Repentigny, 5 Wall. U. S. R. 211.

128 *The question, therefore, is whether the intention of Congress is clearly indicated in this case, that the title of the owner shall be divested out of him, and vested in the United States, by the mere force of the forfeiture. The language of the section seems plainly to indicate the contrary. It declares that "upon the sale" thereafter provided for, the title "shall vest" in the United States, or in the purchaser, at the sale. Section 7, which provides for the sale of the forfeited land, as it originally stood, and the same section as amended by the act of February 6, 1863, provides that the land shall be bid off for the United States by the tax commissioner, in case it does not bring a certain price fixed by the act, in which case it is declared by section 4, the title shall, upon such sale, vest in the United States. What need was there to provide that the title should vest in the United States, in case the land should be bid off for them at the sale, if it was already vested in them by the forfeiture? Indeed, how could the title by possibility vest in the United States by their thus becoming purchasers at the sale, when it was already vested in them by the mere force of the forfeiture? The provision in question, therefore, plainly implies that the title does not vest in the United States by force of the forfeiture, and that it will do so only in the event that the land shall be bid off for the United States at the sale.

The act of June 7, 1862, provides for two sales. The first sale is to be made of each several parcel of land upon which the tax remains unpaid, after advertisement stating distinctly the amount due on each, (sections 7 and 14), and each parcel is to be sold separately for not less than the tax, penalty and costs charged upon it, and ten per cent. interest on said tax. The act provides that this sale is to be made "in case the taxes charged upon the said lots and parcels of land shall not be paid," as provided by the third section. The act of February 6,

129 1862, *recognizes the right of the owner, as we shall see hereafter, to prevent a sale by appearing in person before the commissioners, and paying the tax, with ten per cent. interest and the cost of advertising the land for sale, and recognizes his right also, without such payment, to control the sale by directing the land to be struck off to a purchaser other than the United States, at less than two-thirds of its assessed value. At this sale the United States becomes a bidder for the land. It is to be struck off to them at a sum not exceeding two-thirds of the assessed value, unless some person shall bid a larger sum. But within that limit the United States competes for the land with other bidders. Moreover, the act does not undertake to confer a complete and perfect title on the purchaser at this sale, but provides for re-

demption by the owner, or by any loyal citizen having an interest in or a lien on the land. There is another clause in the act of February 6, 1863, which is very significant. It is that which provides that lands which may be selected, under the direction of the President, for government use, may be bid off for the United States at the sale. Now the long established and uniform course in the disposition of lands belonging to the United States, is to reserve from sale such parcels as are selected for government use. The land belonging already to the United States, this is the natural and convenient course. Why the departure in the act of February 6, 1863, from this reasonable and settled usage, if the land to be sold under that act belongs already to the United States? Why, in any case, should land that already belongs to the United States, be sold to enable the United States to hold it for government use? The provision allowing such lands to be sold, and providing for their being bid off for the United States at the sale, affords a very strong implication

that Congress did not understand
130 *them to be already before the sale the property of the United States.

Section 11 provides for a sale, if directed by the President, of lands bid in for the United States at the first sale. In this second sale, the original subdivision of the parcels of land is not regarded. The act also undertakes to give a complete and perfect title to the purchaser at this sale, and directs that the whole proceeds of sale shall be paid into the treasury; one moiety of which it appropriates to certain specified purposes. There is no provision for paying into the treasury the surplus of the proceeds of the first sale.

Thus, the whole scheme of the act indicates, that at the first sale the land is sold as the property of the delinquent tax-payer, and not as the property of the United States; while at the second sale, it is sold as the property of the United States.

The eleventh section providing for a sale of lands bid off for the United States, contains no reservation of rights of redemption attaching in the first sale. And the provision of the act of February 6, 1863, providing for bidding off for the United States such lands as may be selected for government use, implies that there shall be no right of redemption in such cases, for such a right would defeat the object of the provision. It may be argued that these things show the United States does not acquire title as a purchaser at the sale in like manner as other purchasers, but holds by some other and better title. But all they can be really said to prove is, that the right of redemption from the first sale is not reserved to the owner as against the United States, in case they shall become the purchaser, but only against other purchasers. Whether that is the true construction, it is not necessary to enquire.

It was contended in the argument, that the forfeiture insisted on was provided by Congress as a penalty for non-pay-

131 ment *within the time prescribed by law, so as to induce the owner of the land to make prompt payment. It was further contended, that the constitution conferred upon Congress the same power to coerce the collection of taxes which the States possessed; that the States possess the power of forfeiting lands for non-payment of taxes, and exercised it before the adoption of the constitution; in proof of which reference was made to a statute of Virginia said to have been enacted in the year 1785.

But this argument does not justify the conclusion that is drawn from it. It is conceded, on all hands, that the government of the United States is one of limited powers. It can exercise only such powers as are conferred upon it by the constitution. The powers of a State government, on the other hand, are limited only by the constitution of the United States, or of the State itself. It does not follow, therefore, that because a State legislature may provide that lands shall be forfeited to the State in case the taxes due upon them are not paid, the same power belongs to Congress. That power belongs to the State legislature, unless it has been denied to it; it does not belong to Congress, unless it has been conferred upon it.

This argument assumes that the forfeiture contended for was designed, like an ordinary penalty of ten or twenty per cent. of the tax, only as a means of compelling the punctual payment of the tax. But is that so? The penalty is wholly out of proportion to the object to be accomplished. The law does not provide that the commissioners shall give notice, by advertisement or otherwise, that the assessments have been made, or that they have entered upon the discharge of their duties in the county. The tax-payer may never know what he owes, until he has lost his land by the forfeiture. The penalty, therefore, is imposed without actual default.

I cannot resist the impression that 132 this forfeiture, if it *is such as contended for, was designed really to get the land, and not to get the tax. And this will appear more clearly from this: that it follows from the theory of the plaintiffs in error, that the forfeiture does not satisfy the tax, but leaves the party still liable to pay it out of his goods and chattels, or other lands, under the act of August 5, 1861. The payment of this penalty of forfeiture, without payment of the tax, will no more satisfy the tax than the payment of the penalty of twenty per cent., without payment of the tax, will satisfy the tax, under section 36 of the act of August 5, 1861.

The power to collect taxes and to make all laws that shall be necessary and proper to carry that power into execution, includes all known and appropriate means of effectually collecting the taxes, unless some such means should be forbidden in some other part of the constitution. 18 How. U. S. R. 281. And it may be fairly inferred, that

when the people of the States conferred that power upon Congress, they meant to embrace all the means of collecting taxes then used and employed by the States, as far as the same were consistent with other parts of the constitution. But it would not follow that they conferred, or intended to confer, the power of forfeiting land absolutely to the United States, as a penalty for the non-payment of taxes, even if it could be shown that such a power was then employed by the States. Where such a power has been exercised by the States, it has not been as a means only of coercing the payment of taxes. It has been employed as a means of settling titles, as in this State, in the laws applicable to the western counties, which were the subject of adjudication in several cases reported in 10 Grattan's Reports, or for some other purpose besides the mere collection of the taxes.

But if that was not so, this penalty of forfeiture is beyond the power of Congress. Such forfeitures proceed *upon 133 the ground of a breach of the condition upon which every owner holds his land. The doctrine is thus stated in Blackwell on Tax Titles: "Every owner holds his estate upon the implied condition that he will furnish a list of his taxable estate, and promptly pay his share of the common burdens assessed against the entire community; and if he omits to comply with the condition, the paramount authority of the State, which is entitled to enter for the breach of this condition, comes in, as it has a right to do, and declares the estate forfeited for the breach of the condition." p. 460. This passage was cited by the counsel for the plaintiffs in error, as showing the principle, and the only principle, on which this class of forfeitures rests. How can this principle avail the United States in respect to lands the title to which was not derived from them, which are not held under their authority, and as to which they have not, either actually or in theory, the paramount title? How can such a right be claimed without trenching upon the local sovereignty of the States, and their paramount title and jurisdiction over the lands within their limits, which are fundamental principles of the constitution? If such a right had been claimed for the United States, it been suspected to result from the provision of the constitution, while it was under discussion, it would undoubtedly have aroused the jealousy of the States, and provoked their earnest opposition, as being dangerous to State sovereignty. We know, from the history of the times, that the clause giving to the United States exclusive jurisdiction over places purchased by the consent of the Legislature of the States for the erection of forts, &c., met with strong opposition on this ground. 2 Story on Const. 1224.

The exercise of such a power by Congress as is contended for in these cases is also inconsistent with the fifth article of the amendments to the constitution. 134 which *declares that no person "shall

be deprived of life, liberty or property without due process of law."

In the case of *Murray's lessee v. Hoboken Land and Improvement Company*, 18 How. U. S. R. 272, the question came before the Supreme Court, whether a title to land was valid which had been acquired by purchase at a sale made by a United States Marshal, by virtue of a distress warrant issued by the Solicitor of the Treasury against a defaulting collector of the customs, in pursuance of the act of Congress of May 15, 1820. 3 Stat. at Large 592. This depended on the question, whether the distress warrant, in pursuance of which the sale was made, was "due process of law," within the meaning of the amendment to the constitution above referred to.

Mr. Justice Curtis, delivering the opinion of the court in that case, said: "That the warrant now in question is legal process is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law?' The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it is due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article [fifth amendment] is a restraint on the legislative, as well as on the executive and judicial, powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will. To what principles, then, are we to resort to ascertain whether this process enacted by Congress is 'due process?' To this the answer must be two-fold. We must examine the constitution itself to see whether the process is in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England
135 before the emigration of *our ancestors, and which are shown not to have been unsuited to their civil and political condition, by having been acted on by them after the settlement of this country."

The learned judge then proceeds to show, that from the earliest ages of the common law, summary methods had been recognized and practiced in England for the recovery of the debts due to the Crown, and especially those due from receivers of the revenue; that this diversity between what is "due process of law" in respect to public defaulters and ordinary private debtors was well understood in his country and entered into the legislation of the Colonies, and especially into that of the States, after the Declaration of Independence, and before the adoption of the constitution; that in England and in this country the remedy against public defaulters was by summary process, without judicial enquiry to ascertain the existence and amount of the liability, against the body, lands and goods, or against the lands and goods, or against the body and goods, corresponding sub-

stantially with the remedy provided by the act of May 15, 1820. He says: "As we have already shown, the means provided by the act of 1820 do not differ in principle from those employed in England from remote antiquity, and in many of the States, as far as we know, without objection, for this purpose, at the time the constitution was formed."

It was held, therefore, that the warrant of distress, under which the land in that case was sold, was "due process of law," within the meaning of the constitution, and that the title acquired under it was valid.

Can a forfeiture of the land charged with taxes, such as is contended for in these cases, be regarded as "due process of law," upon the principles established by that case? Literally speaking, it is not any process at all, but operates by force of law, and without any process or proceeding

136 *whatever, except the ascertainment by the commissioners of the sum chargeable on the land. But that is probably immaterial.

The forfeiture of land to the Crown does not appear to have been a means recognized and employed in England, at any period of its history, for enforcing the payment of taxes or other debts to the Crown. If it had been, we should have found such forfeitures treated of in the English law books; but we nowhere find them mentioned.

The summary methods employed in England in early times for the collection of debts to the Crown seem to have been turned to purposes of oppression, and one of the chapters of Magna Charta provided for their restraint. Before that time, the King for his debt had execution of the body, lands and goods of his debtor, (2 Inst. 19,) but by Magna Charta it was provided, that the King should not seize any land or rent for any debt as long as the present goods and chattels of the debtors suffice to pay the debt, and the debtor himself is ready to satisfy therefor. In conformity with this provision, a conditional writ was framed, commanding the sheriff to enquire of the goods and chattels of the debtor, and if they were not sufficient, to extend the lands. Mr. Justice Curtis quotes Gilbert as saying, that since the statute 33 Henry 8, ch. 39, the practice has been to issue the writ in an absolute form against lands and goods, without requiring any previous inquisition as to the goods. 18 How. U. S. R. 277. But Lord Coke, in the second Institute, gives the form of the writ, which he says was the usual process after the statute of 33 Henry 8, and down to his own day, and it is in the conditional form above mentioned, requiring a previous inquisition as to the goods, and providing for an extent upon the land in the event only that the goods shall prove insufficient. 2 Inst. 19. And Lord Coke, commenting upon this writ, says: "Wherefore it appeareth,
137 that if *the goods and chattels of the King's debtor be sufficient, and so can be made to appear to the sheriff, where-

upon he may levy the King's debt, then ought not the sheriff to extend the lands and tenements of the debtor, or his heirs, or of any purchaser or terre tenant." *Ib.* The mode of collecting the land tax in England was by distress. The statute 4 W. & M. ch. 1, which established the land tax as it was continued by annual acts down to the period of the formation of the Federal constitution, provided that, for the collection of the tax, it should be lawful "to distrain the person or persons so refusing or neglecting to pay by his or their goods or chattels, or to distrain upon the messuages, lands, tenements and premises so charged, and the goods and chattels then and there found, and the distress so taken to keep by the space of four days, at the cost and charge of the owner thereof." Sect. 12. The section goes on to provide, that if the money be not paid within four days, the distress so taken shall be sold for the payment of the money, and the surplus paid to the owner. Section twenty-nine of the same act provides, that in case any lands or houses be unoccupied, and no distress can be found on the same, nor the person of the owner found in the county where the land lieth, by reason whereof the assessment on such unoccupied lands and houses cannot be levied, the name of the delinquent, the sum assessed, and the place where the land lies, shall be certified to the Court of Exchequer, which certificate is declared to be a charge on the person of the debtor, and on the lands and houses named therein, and to make the person debtor to the Crown for the sum assessed, and that the Court of Exchequer shall issue out process thereupon against the body, goods and the other lands of the debtor, until the sum due be fully levied and paid. The same mode for collecting taxes by distress was provided for in the last of the annual acts imposing a land tax, passed 38

138 *George 3, ch. 5. Many, if not all, of the intermediate acts between 4 W. & M. ch. 1, and 38 George 3, ch. 5, are omitted, except their titles, in the edition of the British statutes in the State library. But I have seen no reason for believing that any of them provided for a substantially different mode of collecting the tax. See 2 Burn. Eccl. Law, title Land Tax.

Mr. Justice Curtis, in the case above cited, refers to various statutes of the Colonies, and of the States before the adoption of the constitution, for the collection of public dues, and in all of them, as far as quoted by him, the process is given against the goods as well as the lands of the debtor, and generally with a provision that the lands shall not be taken unless the goods prove to be insufficient. In not one of them is there any provision for a forfeiture of the land, or for a proceeding in any form, against the land alone.

A statute of Virginia, said to have been passed in 1785, has been cited to us as an instance in which a State, before the adoption of the constitution, declared lands to be forfeited absolutely for the non-payment of

taxes. This is the only instance of the sort that has been cited to us. But this statute was really not passed in 1785, but in 1790, when this sort of forfeiture was for the first time introduced in Virginia. 2 Revised Code of 1819, 517. Opinion of Judge Roane in *Kinney v. Beverley*, 2 Hen. & Mun. 518.

But suppose this statute had really been passed in 1785. To make it avail anything to the plaintiffs in error, it would be necessary to show that forfeiture of the land for non-payment of the tax was one of the means then generally known and employed for the collection of taxes. An act of a single State, adopting a new and exceptional mode of proceeding, could have no weight in the argument.

139 *As I have already intimated, this class of forfeitures has not been employed in Virginia as one of the usual means of enforcing the payment of taxes, but rather for the purpose of establishing titles and settling vacant and abandoned lands. A reference to the act of 1790, and others which preceded it, will show what were then the ordinary methods of enforcing the payment of taxes, and in what cases and for what reasons the system of forfeiture applied. The whole series of these laws may be found in 2 Revised Code of 1819, 508 et seq.

The act of 1781 provided that the sheriff might distrain the lands, or slaves, goods or chattels which should be found upon the land, but that the lands should not be distrained "where other sufficient effects can be had thereon." Subsequent acts provided for an immediate distress upon lands, goods and chattels, and that the smallest number of acres of land should be sold which the lowest bidder would pay the taxes on. An act passed in 1788, reciting that the usual mode of selling land "produced great oppression," enacted that every such sale should be made on the premises, and that no sale should be made of any land for the payment of taxes, if other property sufficient belonging to the person chargeable could be found in the county. The same act provided for buying in for the State any land sold for taxes that should not bring one-half its value, with a right to the owner to redeem within two years; and that if it should not be redeemed within two years, it should be sold, and the proceeds of sale, after deducting the taxes, damages and expenses, paid over to the original owner of the land.

These references will show what were the ordinary methods of enforcing the payment of taxes in use in Virginia about the time of the adoption of the constitution. And it may be worth mentioning, that before the adoption of the constitution of the

140 United States, the legislature of *Virginia had re-enacted the provision of Magna Charta, that "no freeman shall be taken or imprisoned, or be deprived of his freehold, or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed, nor shall the commonwealth pass

upon him nor condemn him, but by the lawful judgment of his peers, or by the law of the land." 12 Hen. St. at Large, 186.

Looking at the spirit which animated all this legislation, we cannot doubt as to what would have been thought, at that day, of a statute declaring an immediate and absolute forfeiture of the whole land, as a penalty for non-payment of the tax within sixty days after the assessment of it, without notice to the owner, by advertisement or otherwise, of the assessment, and without any, even the least, effort to collect it.

Then came the act of December 20, 1790, above referred to, which introduced the principle of forfeiture. The first section repealed all laws then in force providing for the sale of land for taxes due thereon. The second section directed the sheriff to return a list of the lands where he cannot find in his county sufficient effects of the owner to satisfy the tax. The third section directs the auditor of the State, when it shall appear to him from the certificate of the county courts, or from other information, that a person chargeable with any such tax resides, or has slaves, or personal property, in some other county than that in which the land lies, to certify the amount of the tax to the sheriff of such other county, who is required to distrain therefor as for other taxes. Section 4 directs that a list of these insolvents, with the amount due from each, shall be furnished to the collector of taxes for the next year, who shall distrain for them, as for other taxes; and that in case such taxes cannot be collected in the succeeding year, the treasurer of the State shall cause to be advertised the names of the delinquents, with the quantity of

141 *land and its location, and the amount of tax due thereon. And then the 5th section provides that, in case the tax on any tract of land shall not be paid for the space of three years, the right to the same shall be "lost, forfeited, and vested in the commonwealth," and be subject to entry and grant as waste and unappropriated land.

It appears from this recital of the provisions of the act of 1790, that the forfeiture was not resorted to as one of the known and accustomed means of collecting a tax. It was resorted to as a new proceeding, when other means failed—when no effects could be found in the county, or in any other county, to satisfy the tax; and when, after advertisement, and a delay of three years, no person would pay it. It could hardly apply to any case in which the land had not been abandoned by the owner.

There is nothing, therefore, in the usages and modes of proceeding which prevailed in England or in this country before, or at the time of, the adoption of the constitution, which authorizes me to say, according to the principles of *Murray's lessee v. Hoboken Company*, that a peremptory and absolute forfeiture of title at the end of sixty days, as contended for in these cases, is "due process of law" for the collection of taxes due to the United States.

It does not alter the case that this statute was enacted during a period of civil war, and was designed to operate within a territory in which the civil authority of the United States was for the time subverted. Congress still claimed Virginia as a State of the Union. That claim was distinctly asserted by the act of August 5, 1861, laying and apportioning the direct tax, and quite as distinctly by the act of June 7, 1862, providing for the collection of the tax in the insurrectionary districts. This last act was passed in order to enforce compliance, by the people of those districts, with a duty devolved upon all the people, in pursuance of the constitution. It

142 was not competent *for Congress, while professing to exercise a power given by the constitution, to trample under foot the restraints imposed upon it by that instrument. For example, Congress could not exercise the power of taxation, and disregard the rule of apportionment prescribed by the constitution, in respect to the States in rebellion. The power of taxation is not a war power, to be employed for the purpose of compelling the submission of men in arms against the government. In short, while the state of war might furnish the motive for such legislation, it could not supply the power to enact it. As was said by Mr. Justice Davis, delivering the opinion of the Supreme Court in *Ex parte Milligan*, 4 Wall. U. S. R. 2, 120: "The constitution of the United States is a law for rulers and people, equally in war and in peace, and covers, with the shield of its protection, all classes of men at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism; but the theory of necessity on which it rests is false, for the government, within the constitution, has all the powers granted to it which are necessary to preserve its existence."

This forfeiture cannot be sustained as a forfeiture for crime, like the forfeitures which take place under the revenue and navigation laws, or under the act of August 6, 1861. In such cases, the thing forfeited is the instrument by which the offence was committed, or was the fruit of the offence, and is treated as being itself, in some sort, the offender. But the land of a delinquent tax-payer cannot be brought within the principle of this class of cases; it is neither the instrument nor the fruit of any offence. Nor can we suppose that Congress intended to make it a criminal, or even a quasi criminal offence, for a man not to

143 *pay his taxes, especially without notice of the amount of them.

Nor can we suppose that Congress designed this forfeiture as a means of confiscating the property of persons in rebellion against the government. The acts of August 6, 1861, July 17, 1862, and March 13, 1863, make provision for the confiscation of

property in certain specified cases arising out of the rebellion, and embracing a large number of acts. We must suppose that these acts embrace all the cases in which Congress thought it proper to provide for this extraordinary and exceptional mode of punishment. We are not at liberty to say that Congress designed, by the act of June 7, 1862, to establish another system of confiscation covertly, under the disguise of a system for the collection of taxes, and especially one that would embrace those that were innocent of participation in the rebellion as well as those who were guilty, and one that would forfeit the land in fee simple, when, by the avowed system of confiscation established by the act of July 17, 1862, it could only be forfeited for the life of the offender. 12 Stat. at Large, 627.

Moreover, if we regard this forfeiture as designed for the punishment of persons in rebellion against the United States, the provision is liable to a still graver objection.

In that view of the act, it declares, in effect, that the non-payment of the tax within sixty days is sufficient evidence of participation in the rebellion, and is a legislative conviction and punishment, without trial, of all who fail to pay. This is a violation of that provision of the constitution which inhibits Congress from passing a bill of attainder. According to the decision of the Supreme Court in *Cummings v. State of Missouri*, 4 Wall. U. S. R. 277, that provision applies to every act of Congress which assumes guilt and inflicts punishment without judicial trial, whatever be

the character or degree of the punishment *inflicted. It matters not that the person is not reached. The deprivation of property is equally a punishment. It matters not that it is not called a punishment, but only purports to be a stringent measure for the collection of taxes. If it is, as I am now supposing, a legislative deprivation of property for participation in the rebellion, Congress could no more inflict it under the disguise of a system for the collection of taxes than it could inflict it for the avowed purpose of punishment. As was said by Mr. Justice Field, delivering the opinion of the Supreme Court in *Cummings v. The State of Missouri*: "The purpose of the law-maker, in the case supposed, would be openly avowed; in the case existing [upon the view I am now considering] it is only disguised. The legal result must be the same, for what cannot be done directly, cannot be done indirectly. The constitution deals with substance, not shadows. Its inhibitions are levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile provision."

For these reasons, I am constrained to think that it was not within the constitutional power of Congress to declare that,

upon non-payment of the tax within sixty days, the land charged with the tax should be absolutely forfeited to the United States. It follows, that if, on the true construction of the act of June 7, 1862, it provides for such a forfeiture, the plaintiffs in error could acquire no title by their purchases. The forfeiture did not vest the title to the lands in the United States, and the commissioners could not pass a title to them as the property of the United States.

As I have already stated, however, 145 I do not think that *we are compelled to place that construction upon the act of Congress. The forfeiture seems to have been provided for as a means of enabling the United States to make a sale of the land. Whether it was appropriate for that purpose, or upon what particular theory, or with what particular view, the provision was made, is wholly unimportant, if I am right in holding that it was not designed, by its own mere force, to divest the title out of the owner and to vest it in the United States.

It remains to enquire into the regularity of the proceedings under which the plaintiffs in error claim title.

The act of February 6, 1863, provides, that the certificate of sale "shall be received in all courts and places as prima facie evidence of the regularity and validity of the sale and of the title of the purchaser in purchasing under the same." And the last provision of that act declares, that the certificate of the commissioners shall only be affected as evidence of the regularity and validity of the sale by establishing: 1. That the property was not subject to taxes; or, 2. That the taxes had been paid previous to sale; or, 3. That the property had been redeemed according to the provisions of that act.

The first objection taken to the sale is, that the whole land was sold; when it appears from the facts that the land might have been divided without prejudice to it, and a part of it sold for enough to pay the sum due to the United States. It was contended by the counsel for the defendants in error, that the commissioners had no authority, upon a proper construction of the act, to sell the whole land when the money charged upon it might have been made by the sale of only a part of it. He contended further, that the certificate of sale was not intended, in any case, to preclude enquiry into the authority of the commissioners to make a sale, but that it was intended only to preclude enquiry (except on the grounds

146 specified) in *respect to the regularity of the proceedings of the commissioners, in cases where they had authority to sell. On the other side it is contended, that the act contemplates that the whole land charged with tax shall be sold, in every case, and that it does not allow any impeachment of the certificate, on the score either of irregularity or want of authority, except on the grounds specified. I do not think it necessary to decide these questions. I will assume, for the present purpose, that

the view taken by the counsel for the plaintiffs in error, on these points, is the correct one. The substance of it is, that the act requires that in all cases the whole land shall be sold, whatever its value, and whatever the amount of the tax, even though an inconsiderable part of it would suffice to pay the tax, and that, after a sale has been made, there shall be no enquiry to ascertain whether the tax might not have been paid by the sale of part of the land.

Now the authority of Congress to make a sale at all results from the power to lay and collect taxes, and the power to pass all laws which shall be necessary and proper to carry that power into execution. How can it be said that a sale of the whole land, in every case whatever, is "necessary and proper" as a means of collecting the tax due upon it? According to the decision of the Supreme Court in *McCulloch v. State of Maryland*, 4 Wheat. U. S. R. 316, when any measure, in its nature, is appropriate as a means of carrying into execution a power expressly granted by the constitution, Congress is the sole judge of the necessity of adopting that means in the particular case; that is a question of legislative discretion, not of judicial cognizance. But in every case it must appear that the measure adopted, in its nature, is appropriate as a means of carrying the granted power into execution.

How can it be said that a sale of the whole land, in every case whatever, is appropriate as a means of collecting
147 *the tax upon it? Can the sale of five hundred acres of land be appropriate as a means of collecting a tax, which might be collected by the sale of one acre? Congress might just as well direct that the whole of the defendants' estate should be sold under every execution, without reference to the value of the estate or to the amount due on the execution.

To avoid a misapprehension of my meaning it is proper to add, that I am not now questioning the power of Congress to declare that the certificate of sale shall, as between the owner and the purchaser, be conclusive as to the necessity or propriety of selling the quantity of land actually sold in the particular case, where a discretion is given to the commissioners to sell the whole land, if part of it cannot be sold, without injury to the residue, or in any like case. I am only questioning the power of Congress to declare that, in every case, the whole land shall be sold.

Another objection to the sale, insisted on by the counsel for the defendants in error is, that before the sale of the land, though after the expiration of the sixty days, the amount of the tax, penalty and costs was tendered to the commissioners, who refused to receive it; that this was equivalent, in legal effect, to the actual payment of the money; and that, as the only authority to make a sale at all was to raise the money due, the payment, or the tender and refusal of the money, before the sale, put an end to the authority. The answer made to this

is, that by the provisions of the act, no payment of the money, after the expiration of the sixty days, could prevent a sale, except only a payment of it by the owner in person; and that Congress had a right to require payment from the owner in person because the land was, by the forfeiture, already the property of the United States.

The counsel for the defendants in 148 error insists, that the *act of February 6, 1863, does not require that payment, after the expiration of the sixty days and before the sale, shall, in order to prevent a sale, be made by the owner in person, and that the provision as to the owner appearing in person and paying the money has reference only to the authority of the commissioners to bid in the land for the United States.

I do not concur in this view. I think the plain meaning of the act is, that if the owner will appear in person and pay the money, the land shall not be sold. Why receive the money if the land is to be sold notwithstanding? And what owner would pay the money if it would not save his land from sale? Then does not the provision that the owner, by appearing in person and paying the money may prevent the sale, imply that a sale cannot be prevented by the payment of the money by any other person? I think it does. *Expressio unius, exclusio alterius*.

But I think the objection to the sale is well founded. In the view of the act of Congress which I have endeavored to establish, it only authorizes, or could authorize, a sale to be made for the purpose of raising the money due. If the money is paid, no matter by whom, before a sale is made, the reason for the making a sale ceases, and the authority to make it ceases also. If the money, instead of being actually paid, is tendered to the commissioners, and they refuse to receive it because not tendered by the owner in person, the legal effect is the same as if it had been paid. Their refusal to receive the money, which they ought to have received, cannot give them an authority to sell which they would not have had if they had done their duty by receiving it. There was, in these cases, an offer to pay the money by persons who appeared before the commissioners for the purpose, and were prepared to do it, though there was
no actual production and tender of the

149 *money. But actual production and tender of the money were not necessary, when the commissioners declared to the parties who offered to pay that they would not receive it. *Vide Bacon Abr. Tender, F.* Congress might require payment by the owner in person as a condition of redemption after sale. It might, in the act directing the sale, allow redemption on such terms as it might prescribe, or it might refuse to allow it at all. But the case is otherwise when the payment is offered before sale.

The result is, that the plaintiffs in error acquired no title by their purchases.

The application is each of these cases to

remove it into the Federal Court, in pursuance of the act of March 3, 1863, was properly overruled, as the act does not embrace such cases.

I think the judgment of the District Court in each of these cases should be affirmed.

MONCURE, P., concurred in the opinion of Joynes, J.

Judgment affirmed.

150 *Scott's Ex'ix v. Scott.

January Term, 1868, Richmond.

Life Estate—Conveyance to Remaindermen—Case at Bar.—E owns an estate for her life in property, both real and personal including slaves; and S owns the remainder in fee therein; and E and her trustee enter into a contract called by the parties a lease, by which they convey to S the life estate of E in the whole of the property, and S, in consideration thereof, undertakes to pay E annually for her life seven hundred dollars as rent, and to pay all taxes and legal charges on the estate; and the usual remedies for the recovery of these annual sums were reserved. S was put into possession of the property, and held and treated it as his own. **HOLD:**

1. **Same—Same—Surrender—Merger.**—*Though the instrument was called a lease, and the sums reserved was called a rent, the contract was a surrender, and the life estate of E was merged in the estate of S.
2. **Same—Same—Unsealed Contract—Effect as to Land.**—The instrument not being under seal, it was not as to the land, an express surrender; but it was a contract for a surrender, which was carried out by the parties, by the delivery of possession and the payment of money under it; and it, therefore, has all the legal effect of an express surrender by deed. As to the personal property, no deed was necessary.
3. **Same—Same—Emancipation of Slaves—Effect.**—The slaves having been emancipated by the proclamation of the President of the United States, this does not entitle S to any abatement from the amount of the annual payments which he contracted to make.

In June, 1865, Eliza D. Scott filed her bill in the County court of Stafford county, which was afterwards removed to the

151 Circuit court of the county. In it she *stated—That some time previous to the year 1849, Richard M. Scott, of Bush Hill, Stafford county, Va., by a will made by him, devised and bequeathed his St. Marysville estate, in said county, being a large landed property, twenty-five or more negroes, and a large amount of other personal property, in trust to William H. Fitzhugh and Edwin C. Fitzhugh, for the benefit of Richard M. Scott, Jr., during his life, and after his death, the profits of said property was to be paid to the plaintiff for her life; the whole of said estate to be subject by way of rent to the annual payment of \$200 on the 1st of January of each year,

*See principal case cited in *McDodrill v. Pardee*, etc., Co., 40 W. Va. 581, 21 S. E. Rep. 884.

to his heirs. That this will was admitted to record in the court of the county of Stafford, previous to the year 1849; and that previous to that year Richard M. Scott, Jr. 1st, the first beneficiary under the will, died; and by the will the profits of the estate were then to be paid to the plaintiff. That William H. Fitzhugh alone qualified as trustee under the will. That in August, 1850, Fitzhugh and the plaintiff executed a lease to Richard M. Scott, Jr. 2d, of the said property, for and during the life of the plaintiff; which lease was signed by them, and by the said R. M. Scott, Jr. 2, as lessee, and was under seal dated about August 30th, 1850, and recorded in the clerk's office of Stafford county: by the terms of which lease the lessors agreed that the lessee should have possession of said property and the profits thereof from the 1st of January, 1850, and should hold the same during the life of the plaintiff; and the lessee covenanted and agreed to pay to the lessors the sum of \$900 per annum, as rent of the said premises and property, on the 1st of January, 1851, and each succeeding January, during the life of the plaintiff; and to pay all taxes and legal charges against the said estate; subject to the deduction of \$200 per annum, the rent charge upon the estate. That the lessee thereupon took possession of the said 152 property; and he and his *representatives have held it ever since. She charged that no rent had been paid since the 1st of January, 1861, and that the rent for the years 1861, '62, '63 and '64 were then due; that Wm. M. Fitzhugh was dead; that the records of Stafford county court were destroyed; that Richard M. Scott, Jr. 2d, was dead, and Virginia Scott was his executrix; and making her a party, the plaintiff asked for a decree against her for the amount then due, with interest, and for any sums that might thereafter become due on said lease; and for general relief.

Virginia Scott answered the bill. She admitted the facts of the will and the lease as stated in the bill; except that she said the will was not lost, but was recorded in Fairfax county; and that the lease, of which she exhibited what she said was a copy of the original in her possession, was not under seal. She admitted the rent due in 1861 and subsequently had not been paid; and alleges that in the years 1861 and 1862 the slaves, which constituted the most remunerative portion of the estate, left her, and on the 1st of January, 1863, they became free under the proclamation of the President of the United States. She insists, therefore that there should be an apportionment of the rent.

The lease is signed by Fitzhugh and Richard M. Scott, Jr. 2d, and after reciting the will of Richard M. Scott, Sr., as stated in the bill, proceeds; and whereas the said Richard M. Scott, (Jr. 2d,) who at the death of the said Elizabeth B. Scott will be entitled in reversion, and the said Wm. H. Fitzhugh, trustee as aforesaid, have agreed that it will promote the interest of the said

Richard M. Scott, and render secure and certain the interest of Elizabeth D. Scott, that the said Richard M. Scott should obtain possession of the estate, both real and personal: Now this agreement witnesseth that the said Wm. H. Fitzhugh has contracted with, and doth hereby lease the estate 153 *aforesaid, consisting of the landed estate, including two fisheries, and the following slaves, (naming them,) in number twenty-five, and all other property of every description belonging to said estate, for and during the natural life of the said Elizabeth D. Scott, to the said Richard M. Scott; the property to be delivered on the 1st of January, 1851. And the said Richard M. Scott does hereby contract to pay, &c., as stated in the bill. The said Wm. H. Fitzhugh, trustee, to be entitled to the usual remedies for the recovery of the rent in case the tenant shall at any time be in default. In testimony whereof, the parties to these presents have hereunto subscribed their names on the day and year in these articles written.

The only witness examined as to the value of the estate was a son of the plaintiff, who seems to have acted as her agent before the lease to Scott. He states there were seven hundred and fifty acres of land. That the use of the estate was worth from \$2500 to \$2700 per annum. That he had been offered \$500 for the farm and \$1200 for the fisheries, provided he could get Fitzhugh removed from the trusteeship, for five years; and that the slaves were worth about \$1000 per annum.

The deposition of the plaintiff was taken, and was not excepted to. She says that she had been informed, but does not know of her own knowledge, that the defendant had sold some of the slaves; and she filed with her bill a copy of a letter from Scott to herself, written in 1852, in which he says: In reply to your interrogatory, as to whether Lizzie is well and living, and what I will take for her, I have only to say that none of my servants are for sale.

The cause came on to be heard on the 15th day of June, 1866, when the court held that the contract between Fitzhugh and Richard M. Scott was an executed contract; and that there should be no abatement or 154 apportionment of the annual amount payable to the plaintiff by the terms of said contract; and made a decree in her favor for \$3500, with interest from the dates when the annual sums became due until paid; and her costs. This decree included the amount payable on the 1st January, 1866.

From this decree the executrix of Richard M. Scott, Jr. 2d, obtained an appeal to the District Court of Appeals at Fredericksburg; where it was affirmed; and from that decree there was an appeal to this court.

Beach, for the appellant.

The only question in this case is, whether there should be an abatement of the rent. This is a demise of real and personal estate. Where such is the case, and there is an

eviction of the personalty, then there shall be an abatement of the rent. This was so decided in *Newton v. Wilson*, 3 Hen. & Mun. 470. This case is referred to in 1 Tuck. Com. Book 2, ch. 3. Then was there an eviction of the personalty? I insist that there was in this case a technical eviction; but if not a technical eviction, there was what is equivalent to it.

In the case of a slave there may be an eviction in two modes: 1st. If he is recovered by a third person by a better title. 2d. If he recovers his freedom, the effect must be the same. The essence of the eviction consists in the loss of the right to the service of the slave. There can be no difference in its effect, whether the slave recovers his freedom by action of law, or being entitled to his freedom he gets it without suit. When a state of facts occur, which by recognized principles of law, gives him freedom, this is a technical eviction.

But let us suppose that this is not a technical eviction. The foundation of the doctrine of apportionment is the failure of consideration. If A demise B ten 155 acres of *land, and B is evicted of five acres by better title, he is entitled to an abatement of rent, for the failure of the consideration in which the rent was contracted to be given. And in the case of slaves, whenever the lessee loses the slave without wrong on his part, he is entitled to an abatement. The slave may die or run away. In the first case, the hire ceases on his death; if he runs away, the lessee still has the right to his services. In the case of real estate there is no apportionment, because the lessee has the consideration for which he was to pay. But a court of equity will apportion the rent even when a court of law will not. *Mason v. Moyers*, 2 Rob. R. 606; 1 Tuck. Com. Book 2, ch. 3. In this case it is declared in the lease, that it is an arrangement for the benefit of both. In equity, therefore, the loss ought to be divided.

But the lease from Fitzhugh is not in law a lease for life. To create a term for more than five years, the lease must be by deed; and this is not a deed. At most, it could only avail as a lease for five years; and the holding over afterwards by the lessee and his representative, was a holding from year to year only—on the terms of the lease, to be sure, but only so far as these terms were applicable; and since the holding over was of only a part of the demised property, the rent should have been apportioned accordingly.

But it will be said that this was a sale of the property. The document does not purport to be a sale. It is a formal lease. And the parties would have defeated the object of the lease if they had intended a sale. They designed to secure to Mrs. Scott her annual rent; and yet, if it was a sale, this object is defeated; her right of distress would have been gone; and Scott might have sold the property without leaving her any lien upon the land. To treat this as a

sale is to go in the face of the document, and defeat the object the parties had in view.

156 *The proclamation of the President operated to the extent of the occupation of the United States; and as it occupied the whole, it operated upon and over the whole.

Lawrence B. Taylor, for the appellee.

It is said by the counsel, that the contract under which these parties claim is a lease, and that the lessee having lost the slaves by Lincoln's proclamation, she is entitled to an abatement of the rent.

First.—If it is a lease, the lessee is not entitled to an abatement of the rent. I have not been able to find any case which goes beyond this point: That the lessee fails to enjoy the property by the act of the lessor, or by better title in another, or by any act for which the lessor is responsible. And if for defect of title, the defect must have existed at the time of the lease. The case of *Newton v. Wilson*, 3 Hen. & Munf. 470, cited by the counsel on the other side, was the lease of a mill and the miller; and the lessor had previously manumitted the miller. In the other case cited, of *Mason v. Moyers*, 2 Rob. R. 606, there was a lease for three years, with condition if the land was sold, the lessee should give possession. He was entitled to sow his fall crop; and when about to sow it he was deterred by a threat of the purchasers, of whom the lessor was one, that they would claim it. Having been distrained for his rent, he went into equity for relief; and that court gave the relief on the ground of this action of the lessor. If the slaves had been sick, or had ran away, the lessee would not have been entitled to any abatement; and even if they had died, this law is the same. The only case in which it has been held otherwise is a decision of Chancellor Creed Taylor; but all the cases in the late slave States are opposed to him. *Harrison v. Murrell*, 5 Monr. R. 359. He referred 157 also to 1 Tuck. Com. book *2, ch. 3, pp. 30, 31, 32; *Ross v. Overton*, 3 Call 268. But, in fact, there is no evidence that the slaves were lost by the President's proclamation. The answer states they were lost by their running away in 1861 and 1862.

Second.—This was an assignment or sale of the property, and not a lease. The distinction between an assignment and a lease is clearly stated by Archbold, *Land & Ten.* p. 2, 55 Law Libr. 32. When the whole interest passes, it is an assignment. *Palmer v. Edwards*, 1 Doug. R. 187, note; *Pluck v. Digges*, 5 Bligh. N. S. 31. By a lease the lessor grants less than his own. Archbold *Land & Ten.* 59, 55 Law Libr. Then what is this contract? The devise was to the trustee to pay over the rents and profits to Eliza D. Scott for her life; the reversion was in Richard M. Scott, Jr. 2. The property consisted of several hundred acres of land, twenty-five slaves, two fisheries, and a large amount of personal prop-

erty. The fisheries were worth at least five hundred dollars a year, and the land and negroes fifteen hundred dollars a year. Mrs. Scott, an old lady, wanted a certainty; and this contract was made for the benefit of both parties. Richard M. Scott went into possession of the property under that contract, used and enjoyed it during his life, and his widow has done so since his death; and they paid the rents until 1860. The case of *Michie v. Lawrence's ex'or*, &c., 5 Rand. 571, sustains this view of the contract. Judge Green said in that case, that if it was a sale, then Michie could have sold. And there can be no question in this case but Richard M. Scott could have sold.

JOYNES, J. It has been contended for the appellant, that the contract out of which this suit arose is to be regarded as a lease of the land, slaves and other personal property therein mentioned, for an annual rent; and that as the right to the services 158 of the slaves has been lost by their emancipation, the appellant is entitled to an apportionment of the rent, upon the principles of the case of *Newton v. Wilson*, 3 Hen. & Munf. 470. For the appellee it has been contended, that the appellant has no right to claim an apportionment, even if the contract is to be regarded as a lease and the annual payment as a rent. This position involves an objection to the ground on which the decision in *Newton v. Wilson* was placed. It is said that that was a case of eviction by title paramount, and that the decision should have been placed on that ground, which, it is argued, has no application to the present case. For the appellant it is argued, on the other hand, that for the purposes of this case, the emancipation of the slaves had the effect of an eviction by title paramount. But it is further contended for the appellee, that the contract was really a sale, and the annual payments a purchase money, payable in annual instalments during the life of the appellee, the amount of the purchase money being thus made dependent upon the duration of the appellee's life. Thus regarding the contract, the counsel for the appellee insisted, that it is like an ordinary sale of slaves, in which he insisted that the agreed price must be paid, notwithstanding the loss of the slaves by their emancipation.

In the view which I take of the case, it is not necessary to decide either of these questions, and I therefore express no opinion upon either of them. They are important questions, which ought not to be decided until they are directly presented.

The facts of the case are, in substance, that, under the will of Richard M. Scott, Sr., Richard M. Scott, Jr., the second, the testator of the appellant, was entitled to the St. Marysville plantation, with the slaves, stock and other personal property upon it, subject to a life estate in Eliza D. Scott, the appellee, given to her by the same will, and held in trust for her by

William H. Fitzhugh. This life
 159 *estate intercepted the possession and enjoyment of the property by Richard M. Scott, Jr., the second. He was naturally desirous to extinguish it, so as to get the possession and control of his property. To accomplish that object, and at the same time to secure to Mrs. Scott the benefit of her life estate, he entered into a contract with Fitzhugh, the trustee, by which Fitzhugh relinquished to him the possession and enjoyment of the whole property, real and personal; and he agreed, in consideration thereof, to pay to Fitzhugh as trustee a certain annual sum during the life of Mrs. Scott, and pay all taxes and legal charges on the said property. This was the substance of the arrangement, though not the form of it. In form it purported to be a lease by Fitzhugh to Scott during the life of Mrs. Scott, and the annual payment was called a rent, for the recovery of which the usual remedies were reserved in case the tenant should make default in payment. There was no covenant by the trustee for title or for quiet enjoyment, nor was there any restriction upon Richard M. Scott as to the use or disposition of the property. No reversion was left in the trustee or in Mrs. Scott.

The claim now set up is not founded upon any express stipulation in the contract. We must look, therefore, to the character and objects of the contract, to ascertain whether any stipulation can reasonably be implied as incident to it, upon which the claim of the appellant can be sustained.

The contract was, in effect, what is known in technical language as a surrender. A surrender is defined to be a "yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown by mutual agreement between them." 2 Black. Com. 326. A surrender differs from an assignment. An assignment of an estate for life or for years is a transfer of the whole interest of

160 *the assignor to some one other than the immediate reversioner or remainderman holding an estate which is larger than that of the assignor. The estate assigned remains as an estate distinct from that of the reversioner or remainderman, and vests in the assignee, who stands, for most purposes, in the shoes of the assignor. But when the transfer of the whole interest in an estate for life or for years is made, as in this case, to the person holding the immediate reversion or remainder in fee, the estate transferred is extinguished by merger, and the transfer operates as a surrender. As there was no deed in this case, the contract not being under seal, it was not a case, as to the land, of express surrender, because, under our statute, a deed is necessary to convey a life estate in land by surrender as well as in other cases. But the contract was an agreement for a surrender, which was carried into effect by the parties by the delivery of possession and the payment of money under it, and it had,

therefore, all the legal effect of an express surrender by deed. Taylor on Landlord and Tenant, §§ 507-509. As to the personal property, no deed was necessary.

The effect of the arrangement, therefore, was to extinguish the life estate of Mrs. Scott, which intercepted the enjoyment of the property by Richard M. Scott, whereby he became invested with the possession of the property, and with an absolute and unencumbered title to it as owner. Less than this would not have effected the objects which Richard M. Scott probably had in view. Looking at the relative situations of the parties, their respective rights under the will of Richard M. Scott, Sr., and the language of the contract, it is obvious that Richard M. Scott had two objects in view: 1. To get the possession of his property; and, 2. To get the unrestricted right to control and use it as he might see fit. For

these purposes, it was necessary that 161 the encumbrance of Mrs. *Scott's title should be removed entirely out of the way. A lease would not have accomplished these objects. It would have given him the possession of the property, but not the right to use and control it as owner. And it was doubtless understood by the parties that the effect of the arrangement was wholly to extinguish the title of Mrs. Scott, by substituting the annual payments under the contract for the rents and profits under the will, and to give to Richard M. Scott unrestricted control of the property as owner. For it appears from the letter exhibited with the bill, that Mrs. Scott proposed to Richard M. Scott to purchase one of the slaves embraced in the contract, and that he declined the proposition, saying that none of his slaves were for sale. Mrs. Scott also says, in her deposition, that she has understood that Richard M. Scott had sold some of the slaves before their emancipation, which, if not true, might and probably would have been disproved.

The reservation to the trustee of the usual remedies for the recovery of the annual payments in rent does not affect the view which I take of the substance and effect of this contract. It is a settled principle of the common law, that where a lease is made of lands and chattels, reserving a sum in gross as rent, though the rent is greater by reason of the chattels, it is regarded as issuing out of the land alone. *Spencer's case*, 5 Rep. 16; *Newman v. Anderton*, 2 New Rep. 224. And so far has this principle been carried, that it has been held, that if the lessee is evicted of the land, the rent is gone, and there can be no apportionment in respect of the goods. *Emolt v. Cole*, Dyer R. 212, Marg.; *Fitchburg Cotton Manufacturing Company v. Melvin*, 15 Mass. R. 268; *Woodfal Land. & Ten.* 284.

The remedies reserved, therefore, were, as they could only be, remedies in re- 162 spect to the land. They were: *1. The right to distrain; and, 2. The right to re-enter upon default of payment. But these would create no lien on the land, nor restrict the right of Richard M. Scott to

make sale of it. Their utmost effect would be to render the purchaser of the land from Richard M. Scott liable as assignee, upon the covenants of the lease. Whether that would be so in this case, it is not material to enquire. But these remedies for enforcing payment of the rent would have no sort of effect upon the slaves or other personal property. They might, like any other personal property belonging to Richard M. Scott, be distrained for the rent, if found upon the land, but not otherwise.

Such being, in my view, the object and effect of this contract as understood by the parties, I do not think that there is any ground upon which the claim of the appellant can be sustained. There has been no failure of the consideration upon which Richard M. Scott contracted to make the annual payments. The consideration was the extinguishment of the claim of Mrs. Scott, which operated as an encumbrance on his property and an impediment to his enjoyment of it; and that has been fully accomplished. There is no ground to imply an agreement on the part of Mrs. Scott to relinquish any part of her claim in case of the loss of the slaves by emancipation or otherwise, without eviction by title paramount, if indeed she could be held bound to do so in case of such an eviction. Richard M. Scott did not consider himself as buying or hiring the slaves from Mrs. Scott, and whatever arguments would apply to the case of a sale or a hiring of slaves, as to which I express no opinion, they can have no just application to this case, as I understand it. The object of Richard M. Scott was not to acquire a title from Mrs. Scott. The transaction implies no reliance upon her for reimbursement in case he should lose any part of the property, even if it can be said to imply any reliance

163 upon her for *the goodness of the title under which she held her life estate. If his title was good, hers was good, and I think the fair inference is, that he took the risk of her title, which was really carved out of his own. Looking at the real character and object of the transaction, I think the present case is substantially the same as if Mrs. Scott had held a mortgage on the slaves, executed by Richard M. Scott, Sr., or had been entitled to an annuity charged upon them by the will of said Richard M. Scott, Sr., and Richard M. Scott, Jr., the second, had relieved the slaves from the encumbrance by giving other security for the payment of the debt or annuity.

The case is not altered by the fact that this is a suit in equity. The claim of the appellee is founded upon the contract, and she came into equity only because there was no trustee who could enforce the contract at law. It is not a case, therefore, for the application of the maxim that he who asks equity must do equity. *Gilliatt v. Lynch*, 2 Leigh 535. And besides, this does not appear to be a case of hardship in which a court of equity would feel disposed to give relief by the application of that

maxim. It seems, from the evidence, that the annual sum to be paid to Mrs. Scott was fixed at a low rate, and that the land and fisheries are worth the whole of it.

I think the decree should be affirmed, the appellant having waived all objection on the ground that the decree embraces a sum not due when the suit was brought.

MONCURE, P. I do not know that there is anything in the opinion of my brother Joynes in this case from which I would dissent, and had I seen that opinion before I wrote my own, I might have concurred in it, and thus saved myself the trouble of writing one. But I wrote my opinion during the last term, while his was not written until a few days ago. There is 164 nothing in his which *is in conflict with anything in mine; and as I still entertain the same opinion, I will therefore proceed to deliver it as it is written. The counsel for the appellant maintained, that the contract in the proceedings mentioned was a lease for life by a tenant for life to the remainderman of land, slaves and other property, and that the lessee was entitled to an apportionment of the rent on account of the loss of the slaves during the term by the effect of the war. In my opinion I endeavor to show, that even if he were right in maintaining that the contract was a lease, he would be wrong in his conclusion that there ought to be an apportionment of the rent; but I then proceed to say, that I think the contract was an assignment or sale, and not a lease, and I endeavor to show that, a fortiori, there ought to be no such apportionment. My brother Joynes views the contract neither as a lease nor as a sale; but as a surrender. I have no fault to find with that view. I consider the effect of a sale and surrender in regard to this case as precisely the same. Every surrender for value is in effect a sale; or, perhaps, more properly speaking, is the consequence of a sale. A sale by a particular tenant to the remainderman amounts to a surrender, and operates a merger of the term, unless there be some good cause for the continued separation of the term and the remainder. Whether there be such cause in this case or not, I deem it immaterial to enquire, as, in my view, it is wholly immaterial whether the contract be considered a sale or a surrender. With this preliminary explanation, which I thought to be due to myself, I proceed with my opinion:

If in this case Mrs. Eliza D. Scott, the appellee, had been the fee-simple owner of the St. Marysville estate, with all the slaves and other personality thereto attached, and had leased the whole for her life to Richard M. Scott, the testator of the appellant, at an annual rent of seven hundred dollars, covenanted to be paid by 165 the lessee without *condition or exception, I would still have been of opinion that the lessee was entitled to no abatement of the rent on account of the loss of the slaves from the effects of the war; and this upon the principle of the English

decisions, which show, that "on an express covenant to pay rent during the term, an action may be maintained for the whole rent stipulated to be paid, and for the whole time, notwithstanding there may be a fire which burns down houses on the leased premises, and deprives the lessee of the enjoyment thereof for part of the term." 2 Rob. Pr. new ed. p. 52, citing *Paradine v. Jane*, *Alley v. Monk*, 2 Str. R. 763; 2 *Ld. Raym. R.* 1477; *Belfour v. Weston*, 1 T. R. 310; and it seems that "the same rule has been acted on in a case wherein the agreement has not been by deed—*Baker v. Holtzaffell*, 4 Taunt. R. 45—and it matters not whether there is an agreement in writing for a term of years, or only a tenancy from year to year." *Izon v. Gorton, &c.*, 5 Bing. N. C. 501; 35 E. C. L. R. 198; 2 Rob. Pr. supra. This rule has been found fault with by judges, as well in England as in this country, and we find that great Judge Lord Northampton saying: "The justice of the case is so clear that a man should not pay rent for what he cannot enjoy, and that occasioned by an accident which he did not undertake to stand to," and he was "much surprised it should be looked upon as so clear a thing that there should be no defence to such an action at law; and that such a case as this should not be considered as much an eviction as if it had been an eviction of title; for," said he, "the destruction of the house is the destruction of the thing." *Brown v. Quilter*, Amb. R. 621. But *McDonald, C. B.*, questioned whether there is any real resemblance in such a case to that of an eviction of the tenant by title paramount to which Lord Northampton had assimilated it. "The tenant," says this Chief Baron,

"can only be evicted where the title 166 of the *landlord was originally bad, where he never had in truth anything to demise, and the pretending to do so was a fraud upon the lessee. In the present case, there was a full capacity to demise the thing leased on any terms which the parties might agree upon. The possibility of destruction by fire was in their contemplation in making the lease; and it would have been very easy to provide against the payment of rent in such an event, or for apportioning the rent on a partial loss, if such had been the intention of the parties; on the contrary, the lessee has expressly stipulated to pay the rent during the term at all events, and it is very difficult to say that that was not the intention." *Hare v. Groves, &c.*, 3 Anstr. R. 693, 4; 698; 2 Rob. Pr. supra, from which the above quotations are taken. The reason of the rule is thus clearly and strongly stated by the Chief Baron, and seems to commend itself to our understanding and approbation, and I can certainly see nothing unjust or objectionable in it. The rule has stood the test of time and innovation in England, and remains, I believe, to this day, the law of that country. However it may have been changed or modified by adjudication or legislation in some of our sister States, if

such be the fact, it has been, and yet is, the settled and approved law of our State. In *Ross v. Overton*, 3 Call 309, the lessee of a mill having covenanted, in addition to the rents reserved, to make certain improvements and deliver the mill with such improvements at the end of his term in proper tenantable repair, and the mill during the lease having been destroyed by the ice, three arbitrators, to whom the matter was referred, awarded that the lessee should pay the rents, notwithstanding the destruction of the mill, and should perform the other covenants contained in the lease; and the Court of Appeals expressed an opinion that the arbitrators did not mistake the law. In the half century which has elapsed since this award, (as is 167 *well said in 2 Rob. Pr. p. 54,) no attempt has been made to change or explain the law. On the contrary, in the revision of 1849, the revisors proposed to the Legislature the adoption of the following as the fourteenth section of chapter 117 of the Code:

"§ 14. No covenant or promise by a lessee to pay the rent, or that he will leave the premises in good repair, shall have the effect, if the buildings thereon are destroyed by fire or otherwise without fault or negligence on his part, of binding him to make such payment or erect such buildings again, unless there be other words, showing it to be the intent of the parties that he should be so bound. But in case of such destruction, there shall be a reasonable reduction of the rent for such time as may elapse until there be again upon the premises buildings of as much value to the tenant for his purposes as what may have been so destroyed."

And the revisors strongly sustained this recommendation by a lengthy note appended to their report, page —, in which they referred to several American cases in which the wisdom of the rule had been questioned. The section as thus proposed by them was not adopted by the Legislature, but was altered by the committee on revision, and as so altered was adopted and embodied in the Code as § 19, ch. 117, in the following words:

"No covenant or promise by a lessee, that he will leave the premises in good repair, shall have the effect, if the buildings are destroyed by fire or otherwise without fault or negligence on his part, of binding him to erect such buildings again, unless there be other words showing it to be the intent of the parties that he should be so bound."

The Legislature thus adopted the suggestion of the revisors as to the obligation of the lessee to re-erect buildings destroyed by fire or otherwise, without fault or negligence on his part, under a general 168 covenant or promise to *leave the premises in good repair, but rejected their recommendation in regard to his obligation to pay the full amount of the rent in case of such destruction under a general covenant or promise to pay the rent. This action and non-action of the

Legislature seem to me to give to the rule in question, which had been so long established by the courts, almost the force and effect of statutory law. Whether the rule were a wise one in its origin or not, it seems to me that it would be unwise to alter it after it has so long received the sanction of our courts, and still more so to alter it after it has received the sanction of the Legislature. If it be altered at all, it ought to be altered not by the courts, but by the Legislature. The maxim *stare decisis* strongly applies, and gives to the rule the nature of a law. It has received the commendation of some of our most distinguished jurists. Chancellor Kent, in speaking of it, says: "But I apprehend that the law, as it is now settled on that point, rests on solid foundations of justice and policy. It is to be observed that the case only applies to express agreements to pay; and if a party will voluntarily create a duty or charge upon himself, he ought to abide by it when the other party is not in fault, and when he might have provided, if he had chosen, against his responsibility in case of such accidents. The loss of the rent must fall either on the lessor or lessee; and there is no more equity that the landlord should bear it than the tenant, when the tenant has engaged expressly to pay the rent, and when the landlord must bear the loss of the property destroyed." 3 Kent 467, marg. Judge Tucker vindicates the rule in terms of like import. 2 Tuck. Com. book 2, ch. 3, p. 32. And Judge Allen, in his opinion in *Thompson v. Pendell*, 12 Leigh 591, in which Judge Stanard concurred, says in regard to it: "The hardship is more apparent than real, and the

rule may be vindicated upon considerations both of justice and "good policy." The reason of the rule in its origin is, that a covenant to pay rent, generally, is intended to bind the covenantor to pay the whole rent, notwithstanding the demised subject or part of it may be destroyed by fire or otherwise during the term; and that if the parties intend to make any exception, they ought to do so expressly in the lease. Whatever may be said of the soundness of this reason for the rule in its origin, it certainly derives greatly augmented force from the fact that the rule has been long sanctioned by the courts, and still more from the fact that it has been approved by the Legislature. When parties make a lease in the present state of the law containing a general covenant for the payment of the rent, without condition or exception, they must be presumed to intend that the lessee shall be bound for the whole rent, notwithstanding the destruction of the demised subject, or part of it, by fire or otherwise during the term, without the fault of the lessor; and to give to the covenant a different effect would, it seems to me, be to alter the contract of the parties.

The same rule prevails in equity as at law on this subject; for courts of equity have no more right than courts of law to change the contracts of parties. 18 Ves.

115; *Leeds v. Cheetham*, 1 Sim. R. 146, 2 Cond. Eng. Ch. R. 74; *Gates v. Green*, 4 Paige's R. 355. In *Leeds v. Cheetham*, the Master of the Rolls, after stating the rule of law, proceeds to say: "It appears to me that in this respect equity must follow the law. The plaintiff might have provided in the lease for a suspension of the rent in case of accident by fire; but not having done so, a court of equity cannot supply that provision which he has omitted to make for himself; and it must be intended that the purpose of the parties was according to the legal effect of the contract." And in *Gates v. Green*, Chancellor Walworth, while he complained of the 170 rule as being against natural law and equity, yet considered it well settled, and that "a lessee of premises which are burned, has no relief against an express covenant to pay the rent, either at law or in equity, unless he has protected himself by a stipulation in the lease, or the landlord has covenanted to re-build." The case of *Mason, &c. v. Moyers*, 2 Rob. 606, relied on by the counsel for the appellant, is not at all in conflict with what has been said or the cases before referred to. The tenant was relieved in equity in that case, because he had been prevented by the landlord's own act from fully enjoying the use of the demised premises, and was therefore clearly entitled to an abatement of the rent. The only question was, whether his remedy was at law or in equity, and it was held that, under the peculiar circumstances of the case, he might be relieved in equity.

But though personality may be rented with land, yet the rent issues out of the land and not out of the personality, so that if the personality be lost without the fault of the landlord, or from a cause for which he is not responsible, there seems to be no good reason why the tenant should not be bound for the whole rent, even though the loss may have occurred without his fault. All of the land out of which alone the rent issues still remains in the possession of the tenant, and his obligation to pay the entire rent would seem to continue also. The first case we have on this subject was one of this kind; of which we have the following account in 3 Kent's Com. 465, marg.: "In *Tavernor's case*, (1 Dyer, 5, 8, b,) which arose in 34 and 35 Hen. VIII, a man made a lease of land, and of a flock of sheep, rendering a certain rent, and all the sheep died. The question was, whether the tenant could have relief from this calamity, at the expense of the landlord, by an apportionment of the rent. It was very much debated, and different opinions were entertained by the sergeants and judges who discussed the subject. Some of them 171 thought there was good reason and equity to apportion the rent, or in other words, to make a proportional deduction for the loss of the sheep. But others held to the contrary opinion, and that though the sea, or an inundation, should gain upon the land, or part of it be burnt by wild fire, the entire rent must issue out

of the remainder, and that it would be different if part of the land should be recovered from the tenant by a title paramount to that derived from his landlord. The point was left unsettled by this early decision; but the opinion of those who were for the payment of the entire rent gained a decided superiority in the course of the subsequent century." And the learned commentator then proceeds to give us an account of the case of *Paradine v. Jane*, *Aleyn*, 26, and other subsequent cases, which result in establishing the rule that "a tenant is not excused from the payment of rent, when he is deprived, even by inevitable necessity or misfortune, and without any default on his part, or on the part of his landlord, of the enjoyment of the premises." *Id.* 465-468, *marg.* Now it will be observed that in *Tavernor's* case no distinction was taken by counsel or court, between the effect of a loss of real and personal estate, upon the obligation of the tenant to pay the entire rent, where both are included in one demise. And it was evidently conceded in that case, and has never been denied in any subsequent case, that the same rule applies to both in this respect. Indeed, the rule would seem to apply a fortiori to personal estate, since the rent is supposed to issue out of the realty, though that may be a mere technicality.

The case of *Newton v. Wilson*, 3 *Hen. & Mun.* 470, so much relied on by the counsel for the appellant, is not at all in conflict with what has been said. That was a plain case for relief on well settled principles, independently of the rule aforesaid. There the lease embraced land and a mill with a negro miller. The miller had 172 been emancipated *by the lessor before the execution of the lease, and during the term left the service of the lessee. That the lessee should have been held liable to continue to pay for the service of the negro after it had been lost, as if by title paramount and by the fault, if not the fraud of the lessor, would have been contrary to one of the plainest principles of law. Every sale of personal property in the possession of the vendor, whether such sale be absolute or for a limited term only, implies a warranty of title in the absence of anything in the contract of sale to the contrary; and when the vendee loses the property by reason of want of title in the vendor at the time of the sale, he has a plain recourse over against the vendor on the implied warranty aforesaid, and may defend himself to the extent of his loss against the claim of the vendor for the purchase money. It was properly held, therefore, in *Newton v. Wilson*, that the tenant was entitled to an abatement of the rent on account of his loss of the services of the miller. But that is a very different case from one in which the loss of personalty included in a demise occurs without the fault of the lessor, and without any breach of contract on his part. He stands in regard to such property precisely as he would if it had been sold or hired for a term to

the lessee, by itself and without being connected with the land, for a sum payable in instalments during the term, as rent is usually paid. The only difference between the two cases being, that in one the purchase money or hire is incorporated with the rent as part thereof, and in the other it is unconnected with any rent. But this difference cannot affect the rights of the parties. Now suppose that the appellee, instead of renting the whole subject to the lessee, had hired the slaves to him for her life, for an annual sum payable during her life; would he have been discharged from his obligation to pay these sums accordingly, in whole or in part, by the loss of the slaves, or any of them during

173 *the term without her fault? Could it make any difference that the purchase money thus payable is called hire instead of purchase money in the contract? Is not this mere matter of form, instead of substance? It has never been held that in such a case the vendee or lessee would be discharged as aforesaid. It is true that in *George v. Elliot*, 2 *Hen. & Mun.* 1, it was held by Chancellor Taylor, that if a slave who is hired for a year be sick or run away, the tenant must nevertheless pay the hire; but if the slave die, without any fault of the tenant, the owner and not the tenant should lose the hire from the death of the slave, unless otherwise agreed upon. But there never has been a decision to that effect by this court, and the latter branch of it seems to be opposed to the principle which has been acted on in analogous cases; and is contrary to a decision of the Court of Appeals of Kentucky, in which the opinion of Chancellor Taylor was referred to and disapproved, and it was held that the hirer of a slave for a year, which died before the expiration of the year, was not entitled on that account to relief, even in equity, from his express undertaking, fairly and lawfully made, to pay the amount of the hire. *Harrison v. Murrell*, 5 *Monr. R.* 359. The decision of Chancellor Taylor seems always to have been acquiesced in in this State, since it was pronounced in 1806, and whether right or wrong originally, it ought not now to be disturbed; because contracts have been subsequently made in reference to it as a correct exposition of the law, and it has thus become, in effect, a part of such contracts. But its operation ought to be confined to just such a case as was then before the court, and not to be further extended. It would therefore apply to the very common case of slaves hired by the year, but not to the extraordinary case of slaves sold or hired for a long term of years or a lifetime.

In order that we may better understand the rule in *question, it may be well for us to look a little more to the reason of it. It will be found to be not at all in conflict with the contract of the parties; but, on the contrary, it consists with and pursues their contract, express or implied. I find the reason of the rule nowhere better explained than by Baron Parke, in

Hart v. Windsor, 12 Mees. & Wels. 68, 85: "Considering this case," says he, "without reference to the modern authorities, which are said to be at variance, it is clear from the word 'demise,' in a lease under seal, the law implies a covenant; in a lease not under seal, a contract for title to the estate merely—that is, for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term; and the word 'let,' or any equivalent words which constitute a lease, have no doubt the same effect, but not more. There is no authority for saying that these words imply a contract for any particular state of the property at the time of the demise, and there are many which clearly show that there is no implied contract that the property shall continue fit for the purpose for which it is demised, as the tenant can neither maintain an action, nor is he exonerated from the payment of rent, if the house demised is blown down or destroyed by fire, or gained upon by the sea, or the occupation rendered impracticable by the King's enemies, or where a wharf demised was swept away by the Thames. In all these cases the estate of the lessor continues, and that is all the lessor impliedly warrants." Now here we have a full and clear explanation of this whole subject—a touchstone to which all the cases may be brought to ascertain their correctness in principle. The lessor undertakes, either expressly or by implication, that he is entitled to the estate which he professes to demise, and will not disturb the lessee in the enjoyment of it during the term, consequently he undertakes that the lessee shall

not be evicted either by himself
175 *or by any person claiming under him, or by title paramount; but he does not undertake that the lessee shall not lose the property, or any part of it, by the act of God, or "the King's enemies," or any other cause not proceeding in whole or in part from any act or default of the lessor. In the language of Chancellor Kent, "it is well settled, that upon an express contract to pay rent, the loss of the premises by fire, or inundation, or external violence, will not exempt the party from his obligation to pay the rent." 3 Com. 466. If such exemption be contemplated or intended by the parties, their intention should be expressed in the lease, and not being expressed, it will be implied that such was not their intention. To hold the lessee to be exempt in such a case, would be to interpolate a term in the contract.

Having thus ascertained the rule and the reason of it, I now proceed to the application of it to this case. I think it plainly applies to the case, and that the lessee (if lessee he can be called) is not exempt from the payment of any part of the rent (if rent it can be called) by reason of the loss of the slaves included in the demise from the effects of the war. It is not pretended that the supposed lessor was not entitled to the slaves for her life at the time of the demise,

or had not a perfect right to convey them for her life to the lessee, or that she or any person claiming under her has disturbed the lessee in his quiet and peaceful enjoyment of them, or that the cause of the loss, in whole or in part, proceeded from any act or default of hers. Why, then, does not the case stand precisely on the same ground as if the slaves had all perished during the term by cholera or other disease? or had run away to Canada or some free state, and thus been lost? In such a case certainly the lessee would not, on that account, be exempt from the payment of any part of the rent; and this I understand to be admitted by the counsel for the

176 *appellant. But whether admitted or not, such I think is the settled law.

The parties knew that the slaves were perishable, and that some or all of them might, at any time, die or run away, or otherwise cease to be slaves. That some of them would die during the life of the lessor was a very probable fact. That some of them might run away, and thus become free, was not at all improbable. They lived on the Potomac river, near the border of the free States, where the facilities of escape were very great and often made available for that purpose. It was possible, though not so probable, that the slaves might all be swept off by cholera or other epidemic, or might cease to be slaves by the effects of the war or the action of the government. The property, in its nature, was subject to many and peculiar perils. But all these perils were known to the parties, and the risk of all was assumed and encountered by the lessee, in binding himself to pay an annual sum for the estate, without condition or exception. The counsel for the plaintiff in error argues, that the loss in this case stands on the same principle of a loss by title paramount. But in this I think he is clearly mistaken. When the loss is by title paramount the lessor at the time of making the lease had not the title which he undertook to convey, and thus he violates his implied warranty, if he does not actually commit a fraud. But here the lessor, at the time of the lease, had a perfect title for life to the slaves, recognized and assured by both of the governments, State and Federal, under which she lived; and that they have since ceased to be slaves is certainly not her fault. The loss in this case stands on the same principle of a loss by the act of God or "the King's enemies"—both of which stand on the same footing in this respect. In the leading case on this subject, *Paradine v. Jane*, an action of debt was brought for rent upon a lease for years, and the defendant pleaded, by way of
177 excuse for the non-payment of the rent, that he had been driven from the premises by public enemies, viz., by Prince Rupert and his soldiers. But Rolle, J., overruled the plea, and held that neither the hostile army nor an inundation would exempt the tenant from paying rent. The principle extends to every case in which the cause of the loss is an act of force or power

—vis major—which cannot be controlled or resisted; and such is the case here, whether the loss proceeded from the effect of war or the action of government.

I have thus far been considering the case as if it were a lease for life by a person entitled to the fee-simple estate. But let us now view it as it really is, a contract between a person entitled to a life estate and the remainderman for the purpose of transferring and surrendering the life estate to the remainderman in consideration of an annual sum to be paid by the latter to the former. The counsel for the defendant in error contended, that the contract in this case is an assignment, and not a lease, and therefore the testator of the plaintiff in error was not in fact a lessee, but a purchaser, of the life estate, not for a gross sum to be sure, but for purchase money to be paid in the form of an annuity for life. And in support of this view, he referred to Archbold's law of Landlord and Tenant, p. 69, 53 Law Library 85, in which it is said that an assignment "differs from a lease in this, that by a lease a lessor grants an interest less than his own, reserving to himself a reversion; but by an assignment, he parts with the whole property. If a man convey the whole of his interest by deed, it is an assignment, not a lease, although by the deed he reserves rent to himself, and the deed contain covenants which are not in the original lease or conveyance to him." This view seems to be correct, and if so, it seems to be conclusive of the case; for

surely a purchaser of property, which
178 is afterwards lost without the *fault of the vendor, has no recourse against the latter, unless there be some stipulation in the contract of sale which gives such recourse. In answer to this view, the counsel for the plaintiff in error referred to the case of *Michie v. Lawrence*, 5 Rand. 571, in which it was held that no set form of words is necessary to constitute a lease; and a contract between two persons that one should have, during the life of the other, land, negroes, &c., he paying therefor a stipulated annual sum, is not a sale, but a lease. That case came precisely within the description of a lease as laid down by Archbold, in giving the distinction between an assignment and a lease, as already stated. Wood, the lessor in that case, was owner of the fee, and granted an interest less than her own, to wit, an estate for her life to the lessee Michie, reserving to herself the reversion. The annual sum to be paid was not in terms called "rent" in the contract, but that made no difference; the court said the contract was in substance a lease, and such was clearly the intention of the parties. Here the appellee had only a life estate in the property, and that she conveyed to the remainderman, reserving no reversion to herself. And though the purchase money is payable in annual sums for her life, which is called rent, yet that makes no difference. As in the case of *Michie v. Lawrence*, we must look at the substance, and not the form, of

the thing, and the contract is in substance an assignment, and such was clearly the intention of the parties. That such was their intention, I think conclusively appears from the relation of the parties, the objects they had in view, and all the circumstances of the case. Many years ago Richard M. Scott, the elder, late of Bush Hill, in the county of Fairfax, devised and bequeathed his estate of St. Marysville, with slaves and other personalty thereto attached, in the county of Stafford, subject however to an

annual rent of two hundred dollars
179 reserved to *the testator and his heirs, to trustees for the use of Richard M. Scott, son of the appellee, during his life, and then for the use of the appellee during her life, with remainder in fee to Richard M. Scott, son of the said testator Richard M. Scott, and testator of the appellant. William H. Fitzhugh, one of the trustees, alone accepted the trust, and received and held the estate, and applied the rents and profits, after paying the rent of two hundred dollars reserved thereon as aforesaid, to the use of the first beneficiary, Richard M. Scott, during his life, and then to the use of the second beneficiary, the appellee, until the 30th day of August, 1850, when the contract of that date was entered into between the said trustee and the remainderman, the testator of the appellant, whereby the former conveyed or, as it is said, leased to the latter all the property aforesaid from and after the 1st day of January, 1851, for and during the life of the appellee, for an annual sum, or rent as it is called, of nine hundred dollars, out of which was to be paid to the party entitled thereto the said reserved annual rent of two hundred dollars; leaving the annual sum of seven hundred dollars to be paid and applied to the use of the appellee during her life. And by the said contract it was further stipulated, that the grantee or tenant was to pay all taxes and legal charges against the said estate, and that the trustee should be entitled to the usual remedies for the recovery of the rent, in case the tenant should at any time be in default.

Now it is obvious, from the relation of the parties and their respective interests in the property, and the nature of the property itself, that it was the intention of the parties by this arrangement to merge the particular estate in the remainder, to invest the remainderman with the entire fee-simple estate, and place him in the immediate possession and control of the property, to do with the same as he might think proper; and at the same time to secure to

180 *the appellee a certain annuity for life instead of a claim to uncertain rents and profits. That such was the intention, is plainly indicated by the contract itself, which recites, that "whereas the said Richard M. Scott, who at the death of the said Elizabeth D. Scott will be entitled in reversion, and the said William H. Fitzhugh, trustee as aforesaid, have agreed that it will promote the interest of the said Richard M. Scott, and render secure and

certain the interest of Elizabeth D. Scott, that the said Richard M. Scott should obtain possession of the estate both real and personal." And the same intention is just as plainly indicated by the decree of the Circuit Court of Stafford made in June, 1852, in a suit in which the said E. D. Scott was plaintiff and the said W. H. Fitzhugh and others were defendants, to which it seems the said R. M. Scott, testator of the appellant, was a party; by which decree the said contract or lease was, by consent of said plaintiff and said Fitzhugh, confirmed; and after reciting that the "whole trust subject being in the possession of the person who is entitled thereto in remainder after the death of the plaintiff under the said will, and is also entitled to it during the life of the plaintiff under the said lease, subject to the rents and covenants therein reserved and contained, and who, without the intervention of a trustee, can pay and apportion the rents to and among the parties entitled thereto, the said person being himself entitled (as is believed,) to the annual sum of \$200 charged upon the said subject in the will of the said testator, and the plaintiff, who is entitled to the residue of the rent reserved in said lease, being willing to look to the tenant therefor and not to the said Fitzhugh; the court, by like consent, accepted the resignation of said Fitzhugh as trustee and discharged him from the further execution of the trust, and declared the plaintiff to be thenceforth

181 entitled to receive the rent reserved by the said lease, and which might thereafter accrue, after deducting the said annual sum of \$200, and that she might, at her own costs and charges, sue for the same, if necessary, in the name of the said Fitzhugh. It is true that the contract or lease declares "the said W. H. Fitzhugh, trustee, to be entitled to the usual remedies for the recovery of the rent in case the tenant shall at any time be in default," and thus seems to reserve the remedy by distress for the so-called rent, and to make it in effect a rent charge. But whether this be so or not cannot affect the question as to the right of apportionment of the rent. The only object of the charge, if it be one, was to benefit the vendor and secure the payment of the money, not to injure him. There can be no doubt but that the parties, in graduating and fixing the amount of the rent or annuity to be received by the appellee, made all due allowances for all the risks to which the property, from its nature and situation, was exposed, and agreed upon an annual sum which at all events was intended to be paid to the appellee. Such would appear to be the fact from the apparent disparity between the yearly value of the property as proved by the only evidence in the record, and the amount of the said annual sum. It was doubtless not contemplated by either party that property in slaves was in any immediate danger of the complete annihilation which afterwards happened to it; but still, that was one of the risks which the vendee encountered. Nor can there be any doubt but that it was

intended by the arrangement aforesaid to give to the vendee or lessee aforesaid, whichever he may be called, the right to dispose of the property at his pleasure, and thus to sell it if he chose, from and after the date of the contract, or rather the 1st day of January thereafter, when it was to go into effect. The land, of course,

182 would remain subject *to the charge for the security of the rent, if any such charge was created thereon. But certainly the slaves were subject to no such charge, unless they happened to be on the land, and therefore liable to be distrained for the rent thereafter in arrear, like any other property of the vendee or lessee or his assigns thereon. It does not appear what has been done with the land, slaves, or other property since the execution of the contract. On this subject the record is very meagre of facts. The land may have been long since sold, and some of the slaves also. The only evidence on the subject which the record affords is the deposition of the appellee taken in October, 1865, in which she states that she had been informed by others that the appellant had sold some of the slaves, but she could not state anything in regard thereto from her personal knowledge. She was a non-resident of the State, and therefore, probably, had no personal knowledge. It may be said that this is hearsay evidence, and therefore not admissible; though it was not excepted to, and probably would have been disproved if the fact had been otherwise and had been deemed material. I think the substance of the contract was a sale for an annuity for life instead of a gross sum; and that if it was intended by the parties to make the annuity a rent charge on the property, the only effect of it was to give the annuitant an additional security, and not to subject him to risks which would otherwise devolve on the vendee.

In regard to the objection taken to the lease as not being under seal, the original lease has been lost, together with all the papers in the suit in Stafford. But it is recited in the decree in that suit as having been by deed; and if the testator of the appellant was a party to that suit, as we must take him to have been, he is bound by the proceedings in that suit. But 183 even if it were not *under seal, it is a binding contract in a court of equity where the parties now are.

The last assignment of errors was withdrawn in the argument, and need not be further noticed.

I am of opinion to affirm the decree.

RIVES, J., concurred in the opinion of Joynes, J.

Decree affirmed.

184

*Broughton v. Coffey.

January Term, 1868, Richmond.

1. Chancery Practice—Specific Execution of Contract—Answer Partly False—Effect.*—In a suit by the

*Chancery Practice—Answer Partly False—Effect.—See *Fant v. Miller*, 17 Gratt. 187, and *foot-note*, where the principal case is cited.

vendee for the specific execution of a contract for the purchase of land, the defendant denies the contract as stated in the bill. The fact that the answer is disproved as to some facts which are denied, does not destroy the weight ascribed to it by law, in respect to other facts, as to which it is not disproved by the required amount of evidence.

2. Sale of Land—Deed—Parol Evidence—Case at Bar.*—

On a parol contract for the sale of land, the vendor executes a deed by which he conveys a part of the land purchased to the vendee. It is not competent for the vendee to prove by parol evidence that the deed was in only part execution of the contract, and that the vendor had agreed at the time the deed was executed that he would convey the remainder at another day.

3. Same—Same—Same—Same.—Such an agreement could only be relied on as an independent contract: and must either have been in writing, or there must have been part performance.

This was a suit in equity in the Circuit Court of Fairfax for the specific execution of a contract, by Wait Broughton against Francis Coffey. The plaintiff in his bill charged—That in the month of May, 1848, he visited the county of Fairfax from New York, for the purpose of purchasing land, when he met Francis Coffey, who informed him he had land for sale. That he had about four hundred and fifty acres, for which he would take \$1,500. That Coffey took him over the land and around the boundaries, and showed him the corners. That the plaintiff *went a second time with a friend, and Coffey pointed out the best portions of the land as an inducement to the plaintiff to buy it. That the plaintiff then concluded to purchase it, at the price, and agreed to meet the next day at the office of T. R. Love, to make the payment, it being cash, the possession to be given on the 1st of June. That when they met at the office of Love, and whilst the deed was being written, Coffey observed to the plaintiff that there was a part of the land, seventy or eighty acres, a lot, he did not wish to embrace in the deed at that time; that there was some question of title or something to arrange first; that he would make the deed for the balance; and that he would make the deed for the other thereafter; the purchase money could all be paid, and the plaintiff could take possession; which was agreed on. That the plaintiff paid the whole purchase

money, and took the deed as suggested. He was put in possession of the whole land by Coffey, and he held and occupied it, not presuming any difficulty, and that Coffey was honest and meant honest, until some two years ago, when plaintiff heard that he claimed he had not sold a piece of the land, and sued the plaintiff for a trespass; which suit was tried, and a verdict found on the evidence, for the defendant, the present plaintiff; after which Coffey proposed to the plaintiff to take half of the lot claimed. That Coffey had frequently said that he had sold all his land that he then held, and was going off; and that he did move out of the county. That notwithstanding these facts, he still fails and refuses to make the plaintiff the deed for the balance of the land; and that the plaintiff is now inclined to the opinion that Coffey designed to impose upon him, he being a stranger, and confiding in what he said.

The bill made Coffey a party defendant, and called upon him to answer; and prayed that he might be compelled to 186 *make the plaintiff a deed for the balance of the land; and for general relief.

Coffey answered the bill. He says it is true the plaintiff called upon him in 1848 to purchase land, and he showed him the land which defendant sold and conveyed to him; but it is not true he told plaintiff that the said tract contained about four hundred and fifty acres, or that the defendant had about four hundred and fifty acres which he was willing to sell. On the contrary, he told the plaintiff that the land he was willing to sell contained to the best of his belief between three hundred and fifty and four hundred acres. And every allegation in the bill in opposition to this statement he denies to be true. That defendant sold to the plaintiff the land which he afterwards conveyed to him by the deed which he files with his answer, for the sum of \$1,500, and afterwards put him in possession thereof. And he denies that he sold the plaintiff any land not embraced in the deed, or put him in possession of any other land, or that the sum of \$1,500 was paid or agreed to be paid for more land than was embraced in the deed. He denies that in the office of Love, or at any other time or place, he made the statement set out in the bill in relation to the seventy or eighty acres, or that any such agreement was entered into between himself and the plaintiff. He says he owned two distinct tracts of land in Fairfax county derived from his father, Francis Coffey, deceased; one, the tract he conveyed to the plaintiff, supposed to contain three hundred and seventy-eight acres, devised to him by his father, and the other conveyed to him by deed in July, 1813, described as containing seventy-six acres. He says it is true he showed the plaintiff a part of this last tract, and plaintiff wanted to buy it; but he refused to sell it, and did not sell it to plaintiff, or put him in possession of it. That at the time of the sale to the plaintiff, this last tract had not

*Sale of Land—Deed—Parol Evidence.—In *Troll v. Carter*, 15 W. Va. 576, the court said: "It is a general rule of evidence, that parol testimony cannot be admitted to vary or add to a written contract, and especially a contract or deed conveying lands. See *Towner v. Lucas*, Ex'or, 13 Gratt. 706; *Broughton v. Coffey*, 19 Gratt. 144; *Hurst v. Hurst*, 7 W. Va. 298; *Stevens v. Cooper*, 1 John. Ch. 425; *Flint v. Shelton*, 13 Mass. 343; *Holmes v. Simmons*, 3 Desau. (S. C.) 140; *Little Kanawha Navigation Company v. Rice*, 9 W. Va. 636." See, in accord, *Lockwood v. Holliday*, 16 W. Va. 651; *Hukill v. Guffey*, 37 W. Va. 428, 16 S. E. Rep. 544. See *Woodward v. Foster*, 18 Gratt. 200, and foot-note, where there is an exhaustive collection of authorities.

187 been transferred to *him on the land revenue books of the county, and in consequence thereof he had never paid taxes thereon; nor was said land assessed with taxes until some time after the sale to the plaintiff. He denies that after the decision of the action of trespass alluded to in the complainant's bill, or at any time, he proposed to the plaintiff to take half of said land. He has never admitted the complainant's claim to any portion of said land, or agreed to let him have any part of it. And in regard to said pretended agreement, he pleads the statute of frauds, and says, that if made, it was not in writing, and was therefore void.

The deed from Coffey to Broughton, in consideration of \$1,500, conveys to the latter a tract of land devised to Coffey by his father, and the metes and bounds are set out in it. And it does not include the other land conveyed to him in 1813 by his father.

It appeared from the certificate of the clerk of the Circuit Court of Fairfax, that in January, 1852, Coffey brought an action of trespass *quare clausum fregit* against Broughton, which was decided at the October term, 1853, by a verdict of the jury in favor of the defendant. But it does not appear from the certificate where the trespass was laid, or what was the ground of defence.

The deposition of Lyman Broughton, a son of the plaintiff, was twice taken by the plaintiff. He was with his father when he went over the land to examine it, and he proves that Coffey showed them the land in controversy as a part of the land he offered to sell, and pointed out the corners of the whole tract, and the witness specifies corners, some of which he says were upon this tract. He also says, that Broughton was put in possession of the land in controversy, and exercised acts of ownership over it by cutting timber and rails. He says he was present at Love's office at the time the money was paid by Broughton to Coffey, and that Coffey said he could not make

188 a *deed for the land in controversy that day; it was in dispute. That Broughton told Coffey he would pay him for the land on that day, and take a deed for the land at some other day. In his second deposition he says: "Francis Coffey told Wait Broughton that he could not give him a deed for that lot of land, (the lot in controversy), that it was in dispute; said Broughton told said Coffey that he would pay him for the whole that day, and he (Coffey) could make him a deed for the lot referred to at some other time; he could make him a deed for the old place on that day. The purchase money was then paid, \$1,500."

Two other witnesses proved that Coffey had stated to them that he had sold the whole of his lands to Broughton. One of these witnesses was present when the verbal contract was concluded, and says: "There was a conversation between them about the lines, or whether there should be a survey. Mr. Coffey said there was no need of a sur-

vey; he had gone round and showed them the lines. Broughton said, Mr. Coffey, you sell me all your possession; and Mr. Coffey replied yes, all I pay tax for. Mr. Broughton replied, he could not ask any more of any man than all his possession, or what he paid tax for." This witness and another considered \$1,500 a fair price for the whole of the land.

J. G. Gunnell, a witness for the defendant, stated that he was present when the deed from Coffey to Broughton was made, and heard some conversation between the parties, whilst Mr. Love was drawing the deed. Broughton wanted more land put in the deed; Coffey said he would not sell any more land than he paid tax for. I understood it, that there was some land which Broughton wanted Coffey to put in the deed referred to, which Coffey refused to do; what land it was, I cannot say.

John H. Coffey, another witness, stated that he was present at Mr. Love's office 189 when the deed was made, and *it was understood between his uncle and Broughton that the latter was to have what land Coffey then paid taxes for.

In February, 1854, the cause came on to be heard, when the court dismissed the bill, with costs. And thereupon Broughton applied to this court for an appeal, which was allowed.

Beach, for the appellant.

Dulaney, for the appellee.

RIVES, J. The Judge below conceded that "if there were no deed in this case, the evidence would be sufficient to show such part performance of a parol contract as to entitle the plaintiff to specific performance." To the propriety of this concession, my brothers here object, and hold that under the pleadings and proofs in this case there has not been such part performance as to take it out of the Statute of Frauds.

In this opinion, I cannot concur; and although it be a question of evidence, I deem it proper to express briefly the reasons of my dissent. There is no question as to the payment of the purchase money; the difficulty exists as to the proof of possession. The bill alleges possession of "the whole land;" but this is denied by the answer, which insists that the parcel of seventy or eighty acres in dispute was never included in the sale, nor possession given of it. This parcel was conveyed to the appellee by his father by deed bearing date the 29th day of July, 1813, and the part covered by his deed of 1st May, 1848, to the appellant, was devised to him by his father's will under date of 1st February, 1817. These were parcels of one entire tract. That all of it was embraced in the original parol contract is not only proven by the appellant's son, but also by the pointed 190 and explicit admissions *of the appellee to two other witnesses in the cause, that he had sold all of his lands, without any reservation whatsoever. If, therefore, possession had been delivered un-

der the parol contract, there would have been no pretence for restricting it to one of these parcels rather than another. Shall the deed have the effect to restrict it to the parcel conveyed? Of course it shall, if the deed is to be accepted as the full expression of the entire contract; but if it is to be viewed under the circumstances as the execution of only a part of the contract, it seems to me it would be difficult to circumscribe the acknowledged possession of the appellant to the land deeded, and exclude from it the whole that was bargained for and paid for.

But the testimony of the single witness as to possession is not only aided by this corroborative circumstance, but by a material fact averred by the bill, and virtually admitted by the answer. The complainant states, "he was put in possession of the whole land by Coffey, and he held and occupied it, not presuming any difficulty, and that Coffey was honest and meant honest, until some two years, when he heard he claimed not to have sold a piece of the land, and sued your orator for a trespass; which suit was tried, and a verdict on the evidence found for the defendant, your orator; after which said Coffey proposed to your orator to take half of the lot claimed." In support of this allegation, the clerk's certificate is filed of the institution of such a suit between these parties of trespass *quare clausum fregit*, 30th January, 1852, and a verdict for the defendant at the October term, 1853. This would seem to be too vague and indefinite to admit of weight or application in this case, if it were not aided by the context of the bill, and more especially by the character of the answer on this point. It will be seen that the respondent in no wise denies the existence and result of this suit, and its relation to this land; he does not contradict the 191 averment that "he had sought to test his title to it in this way, and had been defeated; but contents himself with denying, "that after the decision of the action of trespass alluded to in the complainant's bill, or at any other time, he proposed to the complainant to take half of said land." If this action had nothing to do with his claim to, and the complainant's possession of, this lot of land in dispute, the respondent should have shown or averred it; and his failure to do so must be construed into a tacit admission of the main averment of such a suit with such a result, and with reference to this very lot. The denial of possession by the answer, therefore, is adequately disproved and overborne under the pleadings by this significant fact, taken in connection with the positive testimony of the witness Broughton.

I now turn to the question of law that arises upon the state of facts in this cause. It pertains to that cardinal rule of evidence which excludes parol testimony as "the means of contradicting or varying the terms of a valid written instrument." Among the exceptions to this rule is the case where the original contract was verbal and entire,

and a part only of it was reduced to writing." 1 Greenleaf § 284a, 12th ed. by Redfield, and cases cited in note. The decisions of this court afford a very apt illustration of this principle in the case of hire-bonds. The contract of hire is verbal and entire, stipulating: 1. The term of the bailment and sum to be paid; and, 2. The employment of the slave. The hire-bond is usually the written expression of the former; and the latter left to rest upon parol proof. Hence, a hire-bond, being the reduction to writing of only a part of the contract of hiring, does not preclude parol testimony as to the remaining part of the verbal agreement as to the mode of employment. *Harvey v. Skipwith*, 16 Gratt. 410; *Howell v. Cowles*, 6 Gratt. 393. It is an obvious objection to his use of parol 192 testimony, "that the excuse for it can only appear by its introduction, because in its absence the writing must be taken as the whole of the contract. Hence Greenleaf adds: "But this is a qualification of the general rule which, although correct in strictness of principle, it will be always difficult to apply in practice, without materially trenching on the integrity of the rule itself. But the English courts do not hesitate to act upon the exception, especially where that seems the only mode of reaching the justice of the case and of enabling one party to escape from the fraud or injustice of the other." We may, therefore, regard this exception, notwithstanding the plausible objection to it, as firmly established and grafted on this vexed doctrine of the admissibility of parol testimony touching written instruments.

Let us now enquire if this case falls properly within this exception. There cannot be a doubt upon the proofs, that all of the land, comprising both parcels, was bargained and paid for. This rests not upon the testimony of the appellant's son, but upon the explicit admissions of the vendor to two other witnesses in the cause, and yet more strongly on his acknowledgment at the time of making the deed, as implied by his engagement to make the deed for the other parcel at a future time. But he executes his contract of sale only in part; he makes the deed for one parcel of the land only; but accepts the purchase money for both; and upon the false suggestion of some difficulty as to the title, asks to postpone to a future time the making of the deed to the other parcel. It would seem that he was, perhaps, contemplating some evasion of his contract, as justified by his conversation with Broughton, which is detained by the witness, Scesson, in this way: "Broughton said, Mr. Coffey, you sell me all your possession; and Mr. Coffey replied, Yes, all I pay tax for. Mr.

Broughton replied, he could not ask 193 more of any man "than all his possession, or what he paid tax for." He has examined but two witnesses in this cause, and both of them speak solely to this discreditable subterfuge. It is, therefore, clearly inferrible that apart from the

denials of his answers, he seeks to excuse himself by this chicanery.

Here, then, in the language of the eminent author already quoted, is "a fraud and an injustice, from which the party can escape" only by virtue of this exception to the general rule. It is a far stronger case than that of the hire-bond; there, the omission to stipulate in writing for the employment of the slave, while taking the bond for the payment of the hire, was usual and without the suspicion of fraud. The cases may be assimilated, however, by supposing the owner to insist on inserting in the bond the stipulations as to the employment of the slave, and the obligor giving a simple bond for the hire, and upon a false suggestion and for a fraudulent purpose, postponing to a future time the further written assurance required of him; and at last refusing to give it. In such a case, the motive, the propriety, and the justice of giving the injured party the full benefit of this exception to the general rule in the utmost latitude of parol proofs, are far more clearly displayed and justified as the only means of avoiding a fraud. So in this case, and the view I take of it, the exclusion of these parol proofs would not be justified by the course of judicial decisions, however intricate they may be in some parts of this leading doctrine of evidence, and would protect the cheat which was manifestly practiced on the appellant. I cannot, therefore, for these reasons, thus briefly assigned, concur in the affirmance of the decree below.

JOYNES, J. The bill alleges that the plaintiff, Broughton, purchased from the defendant, Coffey, by a verbal contract, a body of land containing four hundred
194 and fifty *acres, at the price of \$1,500, cash; that the defendant conveyed by a deed which is exhibited, a tract containing three hundred and seventy-eight acres, described by metes and bounds, saying that he could not then convey the residue, because there was some question of title or something to arrange first, but promising to convey it subsequently; that upon that understanding and agreement the plaintiff took a deed for the three hundred and seventy-eight acres, and paid the whole purchase money; that the defendant put the plaintiff into possession of the whole land purchased, which he has since held; that the defendant has refused to convey the residue of the land, pretending that he did not sell it; and prays a decree for specific execution. The deed conveys the three hundred and seventy-eight acres for the consideration of \$1,500, making no reference to the residue of the land.

The defendant, in his answer, denies the sale of any land except that conveyed by the deed; denies that the defendant agreed to execute a deed subsequently for any other land; denies that the defendant put the plaintiff in possession of any land except that embraced by the deed; and relies on the Statute of Frauds.

Depositions were taken on both sides.

The evidence contained in these depositions proves that Coffey made a verbal contract with Broughton to sell him the whole of his land, containing about four hundred and fifty acres, for the gross sum of \$1,500, cash. The land lay in one body, though Coffey held three hundred and seventy-eight acres under one title, and the residue, of about seventy acres, under another. I think this evidence is sufficient to outweigh the denial in the answer, as to the original parol contract.

Then as to the deed. On its face, the deed would seem to be a complete execution of the contract. It imports that the \$1,500 were paid in consideration of the three
195 *hundred and seventy-eight acres conveyed, and no reference is made to any other land. If there was no other evidence, we would be bound to hold that the deed expressed the final agreement of the parties, namely, for a sale and conveyance of three hundred and seventy-eight acres, instead of four hundred and fifty acres, as contemplated originally. To show that this was not really so, and that the deed was only designed as a partial execution of the parol contract, the plaintiff examined his son as a witness, who testified that he was present in Mr. Love's office when the money was paid to the defendant by the plaintiff, and that the defendant said he could not convey the seventy acres "that day;" "it was in dispute;" and that the plaintiff told the defendant that he would pay the money that day, and take a deed for the balance of the land at another time. In a subsequent deposition, this witness gives this conversation in substantially the same form, except only that he makes the defendant say that he could not give the plaintiff a deed for the seventy acres, without adding "that day," as in the first deposition. His meaning, however, was probably the same in both depositions. He does not say, in either deposition, that the defendant said he would make a subsequent deed for the seventy acres, or that he made any reply to the remark of the plaintiff, that he could make a deed for the balance of the land at another time. But as this remark showed the understanding and expectation of the plaintiff, and as the defendant expressed no dissent, as far as appears, he ought to be understood as agreeing to convey the seventy acres by subsequent deed. I regard this witness, therefore, as testifying, in effect, that the defendant agreed to make such a deed.

Gunnell, a witness examined by the defendant, testified that while Mr. Love was writing the deed, he heard a conversation
196 between the plaintiff and defendant; that the *plaintiff wanted more land put into the deed; that the defendant said he would not sell more land than he paid tax for; that he (the witness), understood that there was some land which the plaintiff wanted the defendant to put in the deed, which the defendant refused to do; but what land it was he could not say. Another witness examined by the defendant

was present in the office of Mr. Love when the deed was delivered and the money paid, but he does not testify to any conversation between the parties on that occasion.

The testimony of Gunnell affords no support to that of Broughton in regard to the alleged agreement to make a subsequent deed for the seventy acres. And the whole of the parol evidence, supposing it to be admissible, is insufficient to establish, against the express denial of the answer, and the presumption afforded by the deed, that the deed was intended to be only in partial execution of the original parol contract, and that the seventy acres were to be conveyed by a subsequent deed. Taking the pleadings and all the evidence together, the necessary conclusion is, that the final contract between the parties was fully executed by the conveyance of the three hundred and seventy-eight acres, and that there was no agreement by the defendant to make a subsequent deed for the seventy acres. The fact that the answer was proved to be false as to the quantity of land embraced in the original parol contract, did not destroy the weight ascribed to it by law, in respect to other matters, as to which it was not disproved by the requisite amount of evidence. *Fant v. Miller & Mayhew*, 17 Gratt. 187.

But if the parol evidence had been stronger than it is, it was not admissible to prove that the deed was understood by the parties to be only a partial execution of the original parol contract. All previous negotiations were merged in the deed, which
197 can alone be looked to, in the *absence of fraud or mistake, to ascertain the final contract between the parties. 1 Greenleaf Evid. § 275; 4 Cow. Phil. Evid. 1471. Upon its face the deed imported a complete execution of the contract on which it was founded, and in the absence of fraud or mistake, parol evidence cannot be received to show that the parties understood and intended it to be only a partial execution of it. *Howes v. Barker*, 3 John. R. 506; *Falconer v. Garrison*, 1 McCord Const. R. 209. In the former of these cases, Thompson, J., said: "The deed cannot be considered as an execution of the contract in part only. If an execution at all, it must be of the whole contract, and the articles of agreement are a nullity. If so, the testimony offered in support of the plaintiff's action to show that the consideration expressed in the deed was more than ought to have been paid, could be viewed in no other light than as parol evidence repugnant to the written contract." Kent, Ch. J., after saying he had struggled hard to help the plaintiff, added: "But I cannot surmount the impediment of the deed, which the plaintiff has accepted from the defendant, and which contains a specific consideration in money, and the quantity of acres conveyed, with the usual covenant of seisin. Sitting in a court of law, I think I am bound to look to that deed as the highest evidence of the final agreement of the parties, both as to the quantity of the land to be conveyed and

the price to be given for it. If there be a mistake in the deed, the plaintiff must resort to a court of equity," &c.

In this case it is not pretended that there was any mistake in the deed. It conveys precisely what both parties understood it to convey when it was executed. The parol evidence was not admissible on the ground of fraud, because that evidence was itself the only proof of the alleged fraud. *Towner v. Lucas*, 13 Gratt. 705.

The alleged agreement to convey
198 the seventy acres by *a subsequent deed can only be relied on, therefore, as a new and independent contract, and not as part of the original contract remaining unexecuted. But it cannot avail the plaintiff in this view. For—1. It was not in writing. 2. There was no part performance of it. Only one witness testifies that the defendant put the plaintiff into possession of the seventy acres, and his testimony on this point is in direct conflict with the answer, and is not supported by any other evidence.

The bill alleges, that the defendant brought an action of trespass against the plaintiff, in which there was a verdict for the defendant in the action. The bill does not state what was the foundation of the action, but from the connection in which the action is alluded to, it may be inferred that it related to the land in dispute. The bill further alleges, that after the decision of the action of trespass, the defendant proposed to the plaintiff to take half of the seventy acres. The defendant, in his answer makes no further allusion to the action of trespass than to deny that, after the decision of that action, or at any other time, he proposed to the plaintiff to take half of said land. The clerk's memorandum only states that an action of trespass *quare clausum fregit* was brought in January, 1852, and decided by a verdict for the defendant in October, 1853. It shows nothing as to the foundation of the action, or the grounds of the verdict, and does not even state who were the parties. I am unable to see that there is, in all this, anything from which it can be inferred that the plaintiff had been put into possession of the seventy acres. The plaintiff in that action may have failed for the very reason that the defendant had never been in possession of the land, or executed any act of ownership over it.

In every view, therefore, I am of opinion that the case was against the plaintiff, and that his bill was properly
199 *dismissed. He may have been cheated by the defendant, but rules of law, which we cannot set aside, forbid our giving him relief.

I think the decree should be affirmed.

MONCURE, P., concurred in the opinion of Joyner, J.

Decree affirmed.

200 *Woodward, Baldwin & Co. v. Foster.

January Term, 1868, Richmond.

Evidence—Endorsement of Negotiable Paper—Parol Evidence to Vary.—In an action by an endorsee against his immediate endorser, upon a protested bill, parol evidence of an agreement between them, at the time of the endorsement, which would vary the legal liability of the endorser under his endorsement, is inadmissible.

This was an action of debt in the Circuit Court of the city of Richmond, brought by Woodward, Baldwin & Co. against L. W. Glazebrook and Foster & Co. to recover the amount of two bills of \$1,000 each, drawn by Glazebrook by his agent in March, 1862, upon Connolly & Co., of New York, in favor of R. F. Foster & Co., and endorsed by them to the plaintiffs, and protested for non-acceptance. The suit abated as to Glazebrook by his death, and by consent was dismissed as to Enders, and carried on against Foster alone.

The case was tried in May, 1867, and after the plaintiffs had introduced the bills as evidence, and proved the protest and notice, the defendant introduced evidence to prove that, at the time the bills were endorsed and delivered by the defendant Foster to E. P. Smith, the agent of the plaintiffs, it was agreed between Foster and the said agent of the plaintiffs, that Foster should retain in his hands the amount paid him for the bills by said agent, which was the amount expressed upon their face,

***Evidence—Endorsement of Negotiable Paper—Parol Evidence to Vary.**—There is no principle of law better settled than the broad general rule that parol evidence is not admissible to contradict, vary, add to, or alter the terms of a valid written instrument.

See *Crawford v. Jarrett*, 2 Leigh 630; *Hilb v. Peyton*, 22 Gratt. 562; *Sangston v. Gordon*, 22 Gratt. 765; *Martin v. Lewis*, 30 Gratt. 682; *Bonsack v. Woodrum*, 88 Va. 516, 13 S. E. Rep. 994; *Knick v. Knick*, 75 Va. 19; *Hughes v. Tinsley*, 80 Va. 269; *Page v. Belvin*, 88 Va. 991, 14 S. E. Rep. 843; *Bruce v. Slemp*, 82 Va. 352; *Hubble v. Cole*, 85 Va. 90, 7 S. E. Rep. 242; *Hardin v. Kelley*, 89 Va. 332, 15 S. E. Rep. 894; *Holston, etc., Co. v. Campbell*, 89 Va. 396, 16 S. E. Rep. 274; *Richardson v. Planters' Bk.*, 94 Va. 136, 26 S. E. Rep. 413; *Bank v. Walton*, 96 Va. 439, 31 S. E. Rep. 890; *Slaughter v. Smither*, 97 Va. 205, 33 S. E. Rep. 544; *Riverview Land Co. v. Dance*, 98 Va. 245, 36 S. E. Rep. 720; *Catt v. Olivier*, 98 Va. 583, 36 S. E. Rep. 980; *Scott v. N. & W. R. Co.*, 90 Va. 241, 17 S. E. Rep. 882; *Allen v. Crank (Va.)*, 23 S. E. Rep. 772; *Kline v. McLain*, 33 W. Va. 32, 10 S. E. Rep. 11; *Howell v. Behler*, 41 W. Va. 617, 24 S. E. Rep. 649; *Broughton v. Coffey*, 18 Gratt. 184, and *foot-note*; *Miller v. Fletcher*, 27 Gratt. 403, and *foot-note*, where many other cases are collected on this subject. In the great majority of these cases, the principal case is cited as authority on the point.

And this rule of exclusion of a parol agreement, above stated, applies as well to a written instrument whose legal import is clear and definite (as to the rights and liabilities of the parties thereto), as to one where specific stipulations are fully written out. For when the legal import of a contract is

with fifteen per cent. added, and paid in Confederate States treasury notes; and not pay the same over to the drawers of the bills until *it was ascertained that the bills had been accepted and paid by the drawees in New York; and if they should not be accepted and paid by the drawees, upon notice thereof and the return of said bills to Foster, he should refund the money so paid to him for them. And he also introduced evidence to prove that he was a broker, and had no interest in the bills; but was only to receive a commission of two per cent. in case they were paid. There was other evidence, which it is unnecessary to state.

After the evidence was introduced, the plaintiffs moved the court to give to the jury the following instruction, viz:

The court instructs the jury to disregard all parol evidence tending to prove an agreement between the defendant Foster and Smith, the agent of the plaintiffs, before or at the time of the endorsement of the bills of exchange, inconsistent with the contract between the parties, created by the endorsement of said bills of exchange by the said Foster, and the delivery of the same by him to said Smith; and that the contract so created, as evidenced by said bills of exchange with the endorsements thereon, between the said Foster and the plaintiffs by their agent said Smith, was an absolute contract by the said Foster to pay to the said plaintiffs the amount of said bills of exchange with all legal damages

clear and definite, the intention of the parties is for all substantial purposes, as distinctly and fully expressed as if they had written out in words what the law implied. *Colhoun v. Wilson*, 27 Gratt. 646; *Martin v. Lewis*, 30 Gratt. 682, and *foot-note*; *Bank v. Walton*, 96 Va. 437, 31 S. E. Rep. 890; *Riverview Land Co. v. Dance*, 98 Va. 240, 245, 35 S. E. Rep. 720.

This rule, while applicable to all cases of written instruments, applies especially to mercantile instruments. See *Martin v. Lewis*, 30 Gratt. 682; *Bank of U. S. v. Dunn*, 31 U. S. 51, 8 L. Ed. 316, and *note*.

But parol evidence is admissible between the original parties to show that notes were delivered on conditions which have not been complied with, for this does not vary or contradict the notes. *Catt v. Olivier*, 98 Va. 581, 36 S. E. Rep. 980 (6 Va. Law Reg. 465); *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. Rep. 816; *Nash v. Fugate*, 32 Gratt. 610, and *foot-note*; *Solenberger v. Gilbert*, 86 Va. 787, 11 S. E. Rep. 789; *Humphreys v. R. & M. R. R. Co.*, 88 Va. 431, 13 S. E. Rep. 985.

Prof. Burks (in a note to *Bank v. Walton*, 4 Va. Law Reg. 591, 596) expresses the opinion that the case of *Burke v. Dulaney*, 153 U. S. 228, upon which the decision in *Catt v. Olivier* rests, is in direct conflict with the principal case (*Woodward v. Foster*). But, in a note to *Catt v. Olivier*, 6 Va. Law Reg. 465, 470, the opinion is expressed that there is no real conflict between these cases. It is said: "When a written promise by one party is delivered to the other—the latter on his part orally stipulating the terms upon which the instrument is accepted, not inconsistent with the written promise—the admission of parol testimony to establish these terms does not

thereon, provided the said bills should be duly presented to the drawees Connolly & Co., and not paid by them, and duly protested, and due notice of such protest given to said endorser Foster; the value of said bills to be computed according to the value of Confederate notes at the date of said endorsement.

The court refused to give this instruction, and the plaintiff excepted. And the jury having found a verdict in favor of the plaintiffs for \$86.25, a part of the debt in the declaration mentioned, with interest from the 3d of April, 1865, until paid; and the court having rendered a

202 *judgment accordingly, Woodward, Baldwin & Co. applied to this court for a writ of error; which was allowed.

E. Y. Cannon and Griswold, for the appellants.

Howison & Dunlop, for the defendant.

JOYNES, J. This action was brought by Woodward, Baldwin & Co. against Foster & Co. as endorsers of two bills of exchange drawn in Richmond in 1862, upon New York, payable to the order of Foster & Co., and by them endorsed specially to the plaintiffs, and which were dishonored by the drawees. The suit was dismissed as to Foster's partner, and proceeded to a judgment against Foster, to which the plaintiffs, having recovered less than they claimed to be entitled to, obtained a supersedeas.

Upon the trial, the defendant introduced evidence to prove, among other things, that when the bills of exchange were endorsed by Foster and delivered by him to Smith, the agent of the plaintiffs, to whom Foster had sold them, it was agreed between Foster and Smith that Foster should retain in his hands the amount paid to him by Smith for the bills, being the sum expressed on their face, with fifteen per cent. added, which was paid in Confederate States treasury notes; and not pay the same over to the drawer until it should be ascertained that the bills had been paid by the drawees; and

infringe the rule forbidding the introduction of parol testimony to vary a written instrument. The principal case seems clearer if we suppose the notes to have been delivered to the payee, on oral condition that each maker should receive a share of stock in the corporation—a scholarship, or, indeed, any other property or benefit. This condition unfulfilled would clearly be a defense. Every note executed for the purchase of lands or goods, is delivered on some express or implied condition—*e. g.* that the payee shall make good his warranty of title or quality, etc. To take a concrete case, if A executes a note to B, he cannot set up a contemporaneous parol agreement that B will not hold him liable on the note. He may prove, however, either that there was no consideration, or that the note was executed as the purchase price of a certain horse, sold with certain warranties, and, that there was an express or implied condition that the note was not to be paid, in whole or in part, on breach of this condition.

"The principle which gives the maker his defense in the case last illustrated, is generally treated,

that, in case they should not be paid, Foster should, upon notice thereof and the return of the bills to him, refund the money to Smith; that this arrangement was made because it was uncertain whether the bills would be paid; that Foster was a broker, and had no interest in the bills, but was only to receive a commission of two per cent. as compensation for services as broker, in case the bills were paid.

The counsel for the plaintiffs moved the court to instruct the jury to disregard all the parol evidence tending to 203 *prove an agreement between Foster and Smith, before or at the time of the endorsement of the bills, inconsistent with the contract created by the endorsement of the bills by Foster and the delivery of them to Smith, and that the contract evidenced by the said bills and the endorsements thereon was an absolute contract by Foster to pay to the plaintiffs the amount of said bills, with all legal damages, provided they should be duly presented, dishonored and protested, and notice thereof given to Foster; the value of the amount called for by said bills to be computed according to the value of Confederate notes at the date of the endorsements. The court refused to give this instruction. The propriety of this refusal is the point for decision. The only question raised in the argument in this court is, whether it was admissible for the defendant to prove the parol agreement between himself and Smith at the time of the endorsement and delivery of the bills. This is the only question we are expected to decide; the counsel for the defendant having declined to raise any question arising out of the war which was pending between the United States and the Confederate States at the time these transactions took place.

The legal import of Foster's endorsement of the bills was, that he transferred them to the plaintiffs, and assumed upon himself the ordinary liabilities of an endorser of such bills. This legal intentment as to

notas a delivery of the note on condition, but as a failure of consideration, partial or total. Indeed, the breach of condition upon which the instrument is delivered, is nothing else than a failure of consideration. The payee having failed to perform the condition as promised—or if the performance does not rest with him, the condition being unfulfilled—the consideration for the maker's promise fails.

"In the principal case, therefore, instead of resting the decision on the principle of conditional delivery, it might have been placed on the ground of failure of consideration. The ground upon which the court placed it, however, is the accepted classification."

By section 68 of the Negotiable Instrument Law it is enacted "as respects one another, endorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise." This act would seem therefore to be intended to change the law as laid down in the principal case. See 4 Va. Law Reg. 145, 506.

Foster's liability is not repealed or impaired by the facts that he was a broker, that he had no interest in the bills, and that he was only to receive a commission for services as broker in case the bills were paid. It is not the usage of brokers to endorse all the bills they sell. Why did Foster endorse the bills at all, unless it was to give them credit by his name? Why were they not drawn payable to the order of the drawer, as is usually done when the bill is to be sold in the market, upon the credit of the drawer alone? Foster's

204 *endorsement was not necessary to carry into effect the agreement as to his holding the proceeds. See Goupy & al. v. Harden & als., 7 Taunt. R. 159, 2 Eng. C. L. R. 58.

The evidence in relation to the cotemporaneous parol agreement tended to prove, that Foster was not to be liable as endorser, but was to be liable only as bailee of the sum paid to him for the bills, which sum he was to refund to Smith or to pay over to the drawer, accordingly as the bills might be paid or dishonored by the drawees. This evidence, therefore, evidently tended to vary and contradict the legal import of the endorsement. It did so as much as if the bills had belonged to Foster himself. The instruction asked was predicated on that view, and by refusing it the court virtually decided that it was no objection to the evidence; that it tended to vary or contradict the contract imported by the endorsement, and this has not been disputed in the argument.

If the contract of Foster had been written out in words, this evidence would have been inadmissible upon the well established and familiar principle, that evidence of a contemporaneous parol agreement is not admissible to contradict or vary that which is contained in a written instrument. 1 Greenleaf Evid. §§ 277, 281, 282; Towner v. Lucas' ex'or, 13 Gratt. 703; Allen v. Furbish, 4 Gray R. 504. And such evidence could not be received on the ground that it would be a fraud to insist on the written contract, in violation of the parol agreement, because the evidence of the parol agreement is itself the only evidence of fraud. Towner v. Lucas' ex'or. These general principles are of the utmost importance in the administration of justice. Without them, there would be no certainty in written contracts, and no safety in the most formal transactions. They ought not to be frittered away by nice distinctions to meet the hardships, real or supposed, of particular cases.

205 *These general principles were not controverted in the argument, but it was insisted that they have no application to contracts, the terms of which are not written out in words, but are implied by law. And it was contended accordingly, that where an endorsement is in blank, or where, as in this case, its express terms import a transfer of the paper to the endorsee, and are silent as to anything more, it is competent for the endorser, in an action

against him by his immediate endorsee, to prove the special agreement on which the endorsement was made, whatever it may be, and thus to vary or contradict the ordinary legal import of the endorsement. The following authorities were cited in support of this view: Hill v. Ely, 5 Serg. & Rawle R. 363; Barker v. Prentiss, 6 Mass. R. 430; Twogood ex parte, 19 Ves. R. 229; Mehetin v. Barnet, Coxe R. 86; Field v. Biddle, 1 Yeate's R. 122. Other cases of like effect are collated in 4 Cowen Phil. Evid. 1473. The counsel for the plaintiffs cited Watson v. Hunt, 6 Gratt. 633; and Towner v. Lucas' ex'or, 13 Gratt. 705.

There is no just ground in principle for the distinction thus contended for. When the legal import of a contract is clear and definite, the intention of the parties is, for all substantial purposes, as distinctly and as fully expressed, as if they had written out in words what the law implies. It is immaterial how much or how little is expressed in words, if the law attaches to what is expressed a clear and definite import. Though the writing consists only of a signature, as in the case of an endorsement in blank, yet where the law attaches to it a clear, unequivocal and definite import, the contract imported by it can no more be varied or contradicted by evidence of a cotemporaneous parol agreement, than if the whole contract had been fully written out in words. The mischiefs of ad-

206 mitting parol *evidence would be the same, in such cases, as if the terms implied by law had been expressed.

In conformity with these views, the rule which excludes evidence of a cotemporaneous parol agreement to contradict or vary a contract in writing, is applied in England to the case of an endorsement in blank, as may be seen from the cases of Hoane v. Graham, 3 Camp. R. 57; and Free v. Hawkins, 8 Taunt. R. 92, (4 Eng. C. L. R. 31). It is applied also to the case of an acceptor, the special terms of whose contracts, as in the case of an endorser, are not expressed in words, but are supplied by legal construction and intentment. Basant v. Cross, 10 Com. B. R. 895, (70 Eng. C. L. R.); Adams v. Wordley, 1 Mees. & Welsb. R. 374; Acc. Cowles v. Townsend, 31 Alab. R. 133.

In Pike v. Street, 1 Mood. & Walk. R. 226, (22 Eng. C. L. R. 299,) tried before Lord Tenterden at Nisi Prius, the action was brought by the endorsee of a bill of exchange against his immediate endorser. The defence was, that though the plaintiff gave value to the defendant, it was upon a verbal agreement that he should sue the acceptor only, and that he should not sue the defendant as endorser. Lord Tenterden held, that such an agreement, if proved, would be a good bar to the action. This case was cited by counsel in Foster v. Jolly, 1 Crompt. Mees. & Rose. R. 703, as an authority to show, that evidence of a cotemporaneous parol agreement might be given to vary the written contract of an endorser. But Parke, B., said that that case fell within

the class in which the consideration is contradicted; the evidence went to show that there was no consideration as between the plaintiff and the defendant. Whether this observation was or was not justified by the facts of the case, it indicates the ground upon which alone, in the opinion of a

207 Judge of the greatest *learning and eminence, the opinion of Lord Tenterden can be sustained. The general rule is thus stated by Mr. Justice Byles, in his work on Bills 77, and is applicable to all the parties to a bill of exchange: "No verbal agreement can take effect if cotemporaneous with the making of the instrument; for that would be to allow verbal evidence to vary a written contract. 'Every bill or note,' says Parke, J., 'imports two things: value paid, and an engagement to pay the amount on certain specified terms. Evidence is admissible to deny the receipt of value, but not to vary the engagement.' " So it has been held that between the immediate parties, evidence may be given of a cotemporaneous parol agreement, consistent with the written contract; as, for example, that the bill was endorsed and handed over for a particular purpose, as for collection, without giving to the trustee the usual rights of an endorsee; *Manley v. Boycot*, 2 El. & Bl. R. 46, (75 Eng. C. L. R.); or that the bill was transferred as an escrow, or upon an express condition, which has not been complied with. *Bell v. Lord Ingestre*, 12 Queen's Bench R. 317, (64 English C. L. R. 10), *Ricketts v. Pendleton*, 14 Maryl. R. 320. See also *Wallis v. Littell*, 11 Com. Bench R. 369, (103 Eng. C. L. R.), and cases cited. In short, such cases are subject to the ordinary rules applicable to the admission of parol evidence in reference to written contracts. Under these rules, it is always competent to show a want of consideration or fraud, as between the immediate parties, in order to defeat the contract. 1 Greenl. Evid. § 284. So evidence of the relations of the parties, and of the circumstances under which a written contract was made, may be given in order to explain the intention when not plainly expressed. 1 Greenl. Evid. § 477; *Crawford v. Jannett*, 2 Leigh 630; *Nash v. Towne*, 5 Wall. U. S. R. 689. And this rule, while applicable to all written instruments, applies especially to mercantile *instruments. *Moore v. Holt*, 208 10 Gratt. 284; *Bainbridge v. Wade*, 16 Queen's Bench R. 89 (71 Eng. C. L. R.); *Humphrey v. Dale*, 7 El. & Bl. R. 266 (90 Eng. C. L. R.). See *Broom's Legal Maxims*, 465-477.

In *Bank of United States v. Dunn*, 6 Peters' R. 51, the action was brought against Dunn as endorser of a note made by Scott, payable to Dunn, and endorsed by him, and by one Carr. The defendant offered Carr as a witness, who testified that before he endorsed the note he had a conversation with Scott, the maker, who told him that a pledge of stock had been, or would be, made to secure the ultimate payment of the note, and that there would be

no risk in endorsing it; that he then went to the bank, and saw the president and cashier, from whom he understood that the names of two endorsers residing in Washington were required on the note as a matter of form; and that he would incur no risk in endorsing it; that he communicated both conversations to Dunn, and persuaded him to endorse the note, representing to him that he would run no risk, as the note was secured by a pledge of stock; that the impression he received from Scott and from the president and cashier was, that the endorsers would be held liable only in the event of deficiency after the pledge of stock had been first resorted to; and that he and Dunn endorsed the note under this belief, and without any consideration.

The Supreme Court held, that this evidence was improperly received. Mr. Justice McLean, delivering the opinion of the court, said: "On the part of the defendant's counsel it is contended, that between parties and privies to an instrument not under seal, a want of consideration in whole or in part may be shown. That the endorsement in question was made in blank; and that it is competent for the defendant to prove under what circumstances it was made; that if an assurance were given 209 at the time of *the endorsement that the names of the defendant and Carr were only required as a matter of form, and that a guarantee had been given for the payment of the note, so as to save the endorsers from responsibility, it may be proved under the rule which permits the promisor to go into the consideration of a note or bill between the original parties.

"In support of this position authorities are read from 5 Serg. & Rawle 363, and 4 Wash. C. C. Rep. 480. In the latter case, Mr. Justice Washington says: 'The reasons which forbid the admission of parol evidence to alter or explain written agreements and other instruments do not apply to those contracts implied by operation of law, such as that which the law implies in respect to the endorser of a note of hand. The evidence of the agreement made between the plaintiffs and defendants, whereby the latter were to be discharged on the happening of a particular event, was therefore properly admitted.'

"The decision in 5 Serg. & Rawle was on a question somewhat analogous to the one under consideration, except in the present case there is no allegation of fraud, and the decision in that case was made to turn in part at least on that ground.

"In Pennsylvania there is no court of chancery, and it is known that the courts in that State admit parol proof to affect written contracts to a greater extent than is sanctioned in the States where a chancery jurisdiction is exercised. The rule has been differently settled in this court."

* * * * *

"The liability of parties to a bill of exchange or promissory note had been fixed on certain principles, which are essential to the credit and circulation of such paper.

These principles originated in the convenience of commercial transactions, and cannot now be departed from.

"The facts stated by the witness
210 Carr are in direct *contradiction to the obligations implied from the endorsement of the defendant. By his endorsement he promised to pay the note at maturity, if the drawer should fail to pay it. The only condition on which this promise was made was that a demand should be made of the drawer when the note should become due, and a notice given to the defendant of its dishonor. But the facts stated by the witness would tend to show that no such promise was made. Does not this contradict the instrument? and would not the precedent tend to shake, if not destroy, the credit of commercial paper."

In *Brown v. Wiley & al.*, 20 How. U. S. R. 442, in an action by the payee of a bill against the drawer, the defendant offered evidence to prove that it was expressly agreed by the agent of the plaintiffs, when the bill was delivered to him, that it should not be presented for acceptance until other bills drawn on the same parties in favor of the plaintiffs had been provided for by the defendant by placing funds in the hands of the drawees, who had agreed to accept the last bill after they should receive funds to meet the others, and that the bill would not have been delivered to the agent of the plaintiffs if he had not agreed to hold it up. The Supreme Court held that the evidence was properly rejected.

It was argued, that the evidence offered did not contradict or vary any of the terms of the bill, but only proved an agreement collateral to the written contract and contemporaneous with it, leaving its terms intact, but limiting the right which the law gives of presenting the bill at any time before the day of payment. Mr. Justice Grier, delivering the opinion of the court, said: "Where the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties. This is not only a positive rule of the common law, but it is a
211 general principle in the construction

*of contracts. Some precedents to the contrary may be found in some of our States, originating in hard cases, but they are generally overruled by the same tribunals from which they are emanated, on experiences of the evil consequences flowing from a relaxation of the rule. There is no ambiguity in this case which needs explanation. By the face of the bill the owner of it had a right to demand acceptance immediately, and to protest it for non-acceptance. The proof of a parol contract that it should not be presentable till a distant, uncertain and undefined period, tended to alter and vary, in a very material degree, its operation and effect."

In *Warren v. Wheeler*, 8 Metc. R. 97, a written contract to pay for goods, on which the action was founded, expressed no time of payment, so that, by legal construction, the payment was to be made on demand.

It was held by the Supreme Court of Massachusetts, that the defendant could not give evidence of a contemporaneous parol agreement that payment should be made at a subsequent time, which had not arrived when the action was commenced. In *Howe v. Merrill*, 5 Cush. R. 80, the same principle was applied to the case of an endorsement in blank. The name of a party appeared on a note as second endorser, in regular form, and it was held that he could not, by parol evidence of an agreement to that effect, be converted into a guarantor. Shaw, C. J., said: "It is no more competent to alter and vary the legal effect of a written instrument by parol evidence, than to alter and change its express terms." The same was held in reference to the contract of an endorser in *Prescott Bank v. Caverly*, 7 Gray R. 217, and in *Bigelow v. Colton*, 13 Ibid. 309. In *Essex Bank v. Edmonds*, 12 Gray R. 273, a person, not the payee, wrote his name on the back of a negotiable promissory note before delivery, the legal

212 *import of which was held to be, that he was liable as promisor, and not as endorser. And it was held, that evidence of contemporaneous parol agreement was not admissible to change the character of the liability. Under certain circumstances, which appear not to be well defined, the endorsement of a negotiable note by a person other than the payee is regarded in Massachusetts as having no fixed and certain legal import, and accordingly, in such cases, parol evidence is allowed to show the actual agreement. Ibid, and cases cited. See *Rey & al. v. Simpson*, 22 How. U. S. R. 341.

In *Thompson v. Ketcham*, 8 John. R. 190, the promissory note, on which the action was brought, specified no time of payment, so that, by legal construction and intentment, it was payable immediately. It was held, that parol evidence was not admissible to contradict this legal intentment by showing that a different time of payment was agreed upon. In *La Farge v. Rickert*, 5 Wend. R. 187, there was a written contract to deliver certain portable articles to the plaintiff, but no place of delivery was specified. It was held that, by construction of law, the place of delivery was the residence of the plaintiff, and that evidence was not admissible to prove a contemporaneous agreement fixing a different place of delivery. The court said: "The written contract of the parties, therefore, according to the established rules of construction, having settled their rights and duties as to the place at which these articles were to be delivered, it was improper to admit parol evidence of their declarations before or at the time of the giving of the receipt, to show that a different place had been agreed upon. The written contract was the only legal evidence as to the intentions of the parties up to the time it was executed. All previous arrangements were merged in that. A written contract

213 *cannot be varied by parol, and where the legal construction and effect of

an instrument are well settled, it is varying the instrument to show that the parties intended something else, as much as it would be to prove that the terms used were not in accordance with the previous agreement." The same principle is applied in New York to the case of an endorsement in blank. And no distinction is made in the cases of what are called "irregular endorsements," (by a person other than the payee), because, according to the late decisions in that State, these have a certain, definite and precise import. *Bank of Albion v. Smith*, 27 Barb. R. 489, and cases cited; *Spier v. Gilmore*, 1 Comst. R. 321; *Brown v. Curtis*, 2 *Ibid* 225.

The same doctrine had been applied to endorsements in blank by the courts of other States. Many of the cases are collected in 2 *Parsons on Notes and Bills* 520. See also *Barry v. Moore*, 3 N. Hamp. R. 132; *Hightower v. Ivy*, 2 Porter's R. 308; *Heaverin v. Donnell*, 7 *Smedes & Marsh*. R. 244; *Park v. Thomas*, 13 *Ib.* 11; *Heath v. Van Cott*, 9 *Wisconsin* R. 516.

The case of *Watson v. Hurt*, 6 Gratt. 633, proceeded on the same principle. That was the case of an endorsement in blank by a person other than the payee, which was held to import a guaranty of payment, according to the terms of the note on which the endorsement was made. It was held, that the contract thus imported could not be varied by evidence of a contemporaneous parol agreement that the endorser was to be bound on different terms as to the time of the payment.

In *Renner v. Bank of Columbia*, 9 Wheat. R. 591, evidence of a local custom was admitted to explain the contract of the endorser as to the days of grace. And as between an endorser and his immediate endorsee, it has sometimes been held, that evidence may be received of a
214 *parol agreement, at the time of the endorsement, to dispense with demand or notice. *Brent's ex'or v. Bank of Metropolis*, 1 *Peter's* R. 89; *Story Prom. Notes*, § 148.

The case in 9 *Wheaton* is an application, or was understood and intended to be, of a familiar rule in reference to mercantile contracts, that they are to be construed with reference to known and established usages. The soundness of the other class of cases has been questioned. They have been thought to conflict with the principle that the legal import of an endorsement cannot be varied by parol evidence. *Stubbs v. Goodall*, 4 *Georgia* R. 106; *Bank of Albion v. Smith*, 27 Barb. R. 489. But it is not necessary for me to express any opinion on this subject.

I do not think it necessary to examine in detail the cases cited by the counsel for the defendant. Some of them are undoubtedly inconsistent with the cases to which I have referred, and must be considered as overruled by them.

I am of opinion that the judgment should be reversed.

The other judges concurred in the opinion of Joynes, J.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the said Circuit Court erred in refusing to give to the jury the instruction moved by the plaintiffs in error. Therefore it is considered by the court, that the said judgment be reversed and annulled; and that the plaintiffs in error recover against the defendant in error their costs by them expended in the prosecution of their suit of supersedeas aforesaid here. And the cause is remanded to the said Circuit Court for a new trial to be had therein, upon which the said instruction shall be given to the jury, if it shall be again asked upon
215 *a like state of facts. But this order is to be without prejudice to the question whether the defendant Foster is or is not liable on his endorsement for more than the amount of the bills in Confederate notes, according to the value of such notes at the date of the endorsement, as stated in said instruction; upon which question it is not necessary, in this case, to express an opinion.

Which is ordered to be certified to said Circuit Court.

216 *Charron & Co. v. Boswell & al.

January Term, 1868, Richmond.

1. *Fieri Facias*—Upon What a Lien—Commencement of—How Long Continues.—A *fieri facias* placed in the hands of an officer for execution is a legal lien under ch. 188, § 3 of the Code, upon all the personal property and choses in action of the debtor, from the time it goes into the hands of the officer, except in the cases stated in said section. This lien continues after the return of the execution "no effects," and has priority over a subsequent execution lien under the same law; even though there has been a proceeding by suggestion under the junior sooner than under the senior execution; and this though the executions issued from different courts.†

2. Same—Same—Priority of Liens—Case at Bar.—An order having been made upon the suggestion

**Fieri Facias*—Upon What a Lien—Commencement of—How Long Continues.—For the proposition that, a *f. fa.* placed in the hands of the sheriff is a legal lien, under ch. 188, sec. 3 of Code of 1849, upon all of the personal property and choses in action of the debtor, from the time it goes into the hands of the officer, with exception therein mentioned, the principal case is cited and followed in the following cases: *Frayser v. R. & A. R. R. Co.*, 81 Va. 303; *Hicks v. Roanoke Brick Co.*, 94 Va. 749, 27 S. E. Rep. 596; *Grandstaff v. Ridgely*, *Hampton & Co.*, 30 Gratt. 15; *Trevillian v. Guerrant*, 31 Gratt. 527; *Werdenbaugh v. Reid*, 20 W. Va. 600; 2 Va. Law Reg. 707. See also, *Evans v. Greenhow*, 15 Gratt. 153; *Purveyor v. Taylor*, 12 Gratt. 401; Code of 1873, ch. 190, sec. 3 and 4; Code of 1887, sec. 3601; Code of W. Va. Ch. 140.

†See the statute copied in JUDGE MONCURE'S opinion.

under the junior execution, directing a chose in action not yet due, to be delivered by the garnishee to the sheriff, and directing him to collect the amount when due, and after paying off a prior claim upon it, to pay the plaintiff his debt out of the proceeds; the creditor in the senior execution may proceed by petition filed in the court in which the order was made, and in that proceeding, to have the order corrected; or he may file his bill in equity to have it done.

This was a bill filed in the Circuit Court of the city of Richmond by Boswell & Dorsett against J. B. Charron & Co. and others.

This case involves a contest between execution creditors of a common debtor for priority of satisfaction out of the proceeds of a chose in action of the debtor, on which both of the contestants claim a lien
217 under chapter 188, sec. 3* of the Code, page 777. The appellees Boswell & Dorsett obtained a judgment against the common debtor Winch in the Hustings Court of the city of Richmond, on the 4th of April, 1866, for \$626.94, with interests and costs as therein mentioned, on which they sued out a writ of fieri facias, dated the 6th of April, 1866, returnable to the first Monday in June following; which was delivered to the sergeant of the said city to be executed on the 7th of April, 1866, and was afterwards returned by him "no effects found."

The appellants J. B. Charron & Co. obtained a judgment against the same debtor in the Circuit Court of the city of Richmond, on the 21st of May, 1866, for \$2,340.75, with interests and costs as therein mentioned, on which they sued out a writ of fieri facias, dated on the same day, returnable to the first Monday in July following; which was delivered to the sheriff of said city to be executed, and was afterwards returned by him "no effects found."

On the day of the date of the last mentioned fieri facias, and no doubt after it had been delivered to the sheriff, though the time of such delivery is not endorsed on the writ, nor anywhere expressly stated in the record, on a suggestion by the appellants that, by reason of the lien of their said writ of fieri facias, there was a liability on W. C. Johnston and Francis Johnston, a summons was sued out of the clerk's office of the said Circuit Court against said persons to answer such suggestion, returnable to the first day of the next regular term of the court. On the same day on which the summons was sued out, to wit, the 21st day of May, 1866, it was executed on the garnishees. And at the next term of the court, to wit, on the 22d day of July, 1866, the garnishee W. C. Johnston, on his examination on oath, disclosed that he and Francis

Johnston held a bond executed by
218 J. L. Carrington and *A. J. Ford, dated the 16th day of August, 1865, payable to the defendant Winch three years after date, for \$4,000, bearing interest from date, and that there was due to them from the said defendant the sum of \$2,893.

Thereupon the court, on the motion of the appellants, and with the assent of the said W. C. and F. Johnston, and Harrison, Goddin & Apperson, in whose possession the said bond then was, ordered it to be delivered to the sheriff of the city, who was required to take possession of the same, collect the amount thereof when due, and after paying thereout to the said Harrison, Goddin & Apperson the said sum of \$2,893 due to the said W. C. and F. Johnston by the said Winch, to pay over to the appellants the residue in part discharge of the principal money, interests and costs recovered by them against said Winch by their judgment aforesaid.

Afterwards, to wit, in January, 1867, the appellees Boswell & Dorsett, the senior judgment creditors of Winch, exhibited their bill in the said Circuit Court against the said Winch, W. C. and F. Johnston, Harrison, Goddin & Apperson, J. B. Charron & Co. the appellants, and Carrington & Ford, in which bill they state all the facts in regard to the judgments obtained and writs of fieri facias sued out and returned, suggestion, summons to answer the same, and judgment thereon as aforesaid, copies of all which are filed as exhibits with the bill; say they are advised that they have a prior lien to that of the appellants J. B. Charron & Co. upon the amount of the said bond by reason of the priority of their writ of fieri facias aforesaid; and pray that the said order of the Circuit Court be rescinded and so far revoked as to permit the payment of their said judgment out of the proceeds of the said bond; that the sheriff of said city be directed, after the payment of the sum of \$2,893 to Harrison, Goddin & Apperson in satisfaction of

219 the claim of W. C. and *F. Johnston against Winch as aforesaid, to pay to the complainants the amount of their said judgment; that all proper accounts may be ordered; and for general relief.

In May, 1867, the appellants filed their answer, in which they aver, that the execution upon their judgment was issued, and the said order of the 2d of July, 1866, upon their suggestion was obtained, without any knowledge or notice whatever on their part of the judgment and execution previously obtained and issued against Winch by the complainants; that the only information they have on the subject has been derived from the statements of the bill since it was filed, and they submit that their equities are equal to the complainants' in respect to the said residue of the said debt, and that by the said order made upon their suggestion they have a legal right thereto in part satisfaction of their said judgment and execution.

On the 1st of June, 1867, the cause came on to be heard on the bill taken for confessed as to all of the defendants except the appellants; and on the answer of the appellants with general replication thereto and the exhibits filed, on consideration whereof the court decreed, that so much of the order made on the 2d day of July, 1866, in the

proceedings on the garnishee process aforesaid, as directed the sheriff of the city of Richmond to pay to the appellants the surplus of the bond of Carrington & Ford, after payment of the debts of W. C. and F. Johnston, be enjoined and that the sheriff be restrained from executing the same; and further decreed, that the said sheriff should, after payment of the said debt of the Johnstons with their costs in the said proceedings, pay to the appellees Boswell & Dorsett the amount of their judgment against said Winch and their costs of suit, and pay the surplus, if any, to the appellants in part of their judgment against the said Winch; and report his proceedings therein to the court.

220 *From this decree J. B. Charron & Co. applied for and obtained an appeal to this court.

Roberts and N. Howard, for the appellants.

Johnston & Williams, for the appellees.

MONCURE, P., after stating the case, proceeded:

The question we have to decide on this appeal is, which of the contesting claimants are entitled to priority, the senior or the junior execution creditors.

In the first place, I think a court of equity has jurisdiction of the case. The controversy might, no doubt, have been raised and decided in the suggestion proceeding, upon a petition filed by the senior execution creditors, even after the order of the second day of July, 1866, was made. But the subject can as well, if not better, be disposed of in a chancery proceeding, such as was instituted in this case, making all persons concerned parties to the suit, and having the rights of all adjusted and determined. The cases of *Erskine v. Staley*, 12 Leigh 406, and *Moore, &c. v. Holt*, 10 Gratt. 284, afford ample authority, if any were wanting, of the jurisdiction of equity in such a case. But the jurisdiction was admitted by the counsel for the appellants, or one of them at least, in the course of the argument.

I am also of opinion, that there is no good ground of objection to the form of the bill which is substantially sufficient, and that the sheriff was not a necessary party; though he might have been made a defendant, and it might have been prudent to have made him such. The decree appealed from is merely interlocutory, and he may be made a party, if necessary, after the cause is remanded. The sheriff seems not to have been a party in *Erskine v. Staley*; nor does it appear that the receiver 221 who held the *fund which was in controversy in *Moore v. Holt* was a party in that case.

Both of the contestants claim a lien upon the fund in controversy under the same law, to wit, section 3 of chapter 188 of the Code. Without the right which that law gives, neither of them have any claim to the fund. It was a chose in action of the common debtor, which could not be levied

on under chapter 187 of the Code. Before the Code of 1849 such an interest could have been reached only by suing out a ca. sa. and compelling the debtor to take the oath of insolvency. But by the second section of chapter 188 of that Code the writ of ca. sa. was abolished, (with some exceptions not affecting this case,) and the next succeeding section provided what was designed, in part at least, as a substitute for the remedy which had been afforded by the abolished writ. That section is in these words:

"§ 3. Every writ of fieri facias hereafter issued shall, in addition to the effect which it has under chapter 187, be a lien from the time that it is delivered to a sheriff or other officer to be executed, upon all the personal estate of, or to which the judgment debtor is possessed or entitled, (although not levied on, nor capable of being levied on, under that chapter,) except in the case of a husband or parent, such things as are exempt from distress or levy by the 33d and 34th sections of chapter 49, and except that as against an assignee of any such estate for valuable consideration, or a person making a payment to the judgment debtor, the lien by virtue of this section shall be valid only from the time that he has notice thereof. This section shall not impair a lien acquired by an execution creditor under chapter 187."

It seems to me that there ought to be no doubt as to the true meaning of the Legislature in the section just quoted. It expressly declares that every fieri facias 222 thereafter *issued shall be a lien, from the time that it is delivered to the officer to be executed, upon all the personal estate, &c., except, &c. Now here is an express legal lien, given to the execution creditor, upon all the debtor's personal estate; and if there had been no exception expressed in the law, this lien would have been good even against an assignee for value and without notice. It follows that the lien is good against everybody who cannot bring himself within one of the exceptions enumerated in the section; that is, he must show: 1. That he is a husband or parent, and that the things on which the lien is claimed are such as are exempt from distress or levy by the 33d and 34th sections of chapter 49; or, 2. That he is an assignee of the subject for valuable consideration, and without notice; or, 3. If the subject on which the lien is claimed be a debt due by him to the defendant in the execution, that he paid the debt without notice of the lien; or, 4. That he has himself acquired a lien on the subject as an execution creditor, under chapter 187. These are all the exceptions enumerated in the statute, and it is out of the power and province of the court to supply any other. If none had been there, the court could have made none; and it can no more add to what are there. Be the law wise or unwise, it is enough for us to say, *ita lex scripta est*.

The appellants do not bring themselves within any of the exceptions, and are en-

titled only to the lien which the third section gives them. But as the lien of the appellees, given by the same section, is prior in time, so it must be prior in right. It is not pretended that there was any fraud, or collusion, or even negligence, on the part of the appellees. It is not pretended that the whole amount of their judgment is not justly due. Immediately after obtaining their judgment they sued out execution thereon, which was returned "no effects;" and in little more than a month after the

223 was *in full force in the hands of the sergeant, the appellants, who in the meantime had obtained their judgment, sued out execution thereon, and on the same day filed their suggestion. They were more fortunate, it seems, than the appellees in finding out a debt due to the common debtor, and promptly proceeded to subject it to the lien of their execution. So far as their debtor had property in it when the operation of their lien commenced, they had a right to subject it. But it was subject at that time to the prior lien of the appellees; and to the extent to which it would be required for the satisfaction of that prior lien, the property did not belong to the common debtor, and was not subject to the junior lien of the appellants.

The appellants, aware of the importance, if not necessity, of bringing themselves within one of the exceptions enumerated in the third section, made an effort to show that they are assignees for valuable consideration, and without notice. But the effort, though ingenious, was unsuccessful. Such an assignment could only be made by the common debtor, and there was no semblance of any assignment by him. The garnishees had no right to make an assignment for him, and they did not undertake to do so. They only consented that the court, in the enforcement of the appellants' supposed execution lien, should put the bond in the hands of its officer for collection, in order that the proceeds, when collected, might be applied, first to the payment of their claim, and then to the part payment of the appellants' judgment, which was at that time supposed to be the only other lien upon the fund.

But the appellants insist that, by their proceedings on the suggestion, they acquired a specific lien on the fund in controversy, which entitles them to a preference over what they call the general lien of the appellees.

Now this view is wholly inconsistent with the purpose and effect of the proceedings on the suggestion. Those *proceedings do not give any lien at all, 224 general or specific. They are merely a means provided by law for the enforcement of a legal lien which already exists. "On a suggestion by the judgment creditor, that by reason of the lien of his writ of fieri facias there is a liability on any person other than the judgment debtor," &c. These are the words of the 11th section of chapter 188, which gives the remedy. The

only liability then which there is to be enforced by this proceeding is, a liability arising under section three of the same chapter. And as in this case, there was a prior liability by reason of the lien of the appellees' writ of fieri facias, the proceedings by suggestion instituted by the appellants could only be in subordination to that prior lien.

These proceedings by suggestion are likened by the counsel of the appellants, in their argument, to the case where two writs of fieri facias, in favor of several plaintiffs against the same defendant, come to the hands of different officers at different times for execution, and the one last coming to hand is first served; in which case, it seems, the service is good, upon the principle declared by Lord Ellenborough in *Payne v. Drewe*, 4 East. 523, 545, "that where there are several authorities, equally competent to bind the goods of the party when executed by the proper officer, that they shall be considered as effectually and for all purposes bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed." And in support of this view several other cases were cited, viz.: *Tabb v. Harris*, 4 Bibb's R. 29; *Kilby v. Haggin*, 3 J. J. Mar. R. 208; *Million v. Commonwealth*, 1 B. Mon. R. 310; *Bourne v. Hacher*, 11 Id. 23. The counsel argue that a suggestion under the statute in regard to a chose in action is analogous to the levy of an execution on tangible goods, and

225 ought to have the same effect in giving priority *to a junior over a senior execution. But the analogy does not hold good. The principle announced in *Payne v. Drewe*, so far as it applies to a writ of fieri facias, depends entirely upon the peculiar nature of the lien of that writ as it existed at common law or under the statute of 29 Charles 2, ch. 3, § 16. Such lien was conditional only, and if not consummated by an actual levy before the return day of the writ, it altogether ceased to exist. It was so imperfect without such levy that a creditor might withdraw his execution against his principal debtor from the hands of the officers without impairing the liability of a surety for the debt. *Humphrey v. Hitt*, 6 Gratt. 509, and the cases therein cited. It was a mere result of the capacity to levy the execution. This lien is very different from that which is given by section 3 of chapter 188 of the Code. That is an express legal lien, not conditional, but absolute; not limited to the time during which the execution has to run, but continuing until the right of the judgment creditor to levy a new execution on his judgment ceases, or is suspended by a forthcoming bond being given and forfeited, or by a supersedeas or other legal process.

It is in its nature more like the lien for which, in part, it was intended as a substitute, and which a creditor formerly acquired when his debtor took the oath of insolvency. All the estate of the debtor, whether

named in his schedule or not, or wherever situate, was vested by law in the sheriff, for the benefit of the creditor; and this title was good, even against an assignee for value and without notice. The lien given by the 3d section of chapter 188 extends only to personal estate, (the judgment being a lien from its date on all the real estate of the debtor under chapter 186,) is subject to certain exceptions engrafted upon it to avoid inconveniences which would otherwise have resulted from the lien.

226 But to that extent, *and subject to those exceptions, it is as perfect and operative during its existence as was the lien to which it was, in part, a substitute.

The counsel for the appellants refer to the case of *Foreman v. Loyd, &c.*, 2 Leigh 284, as tending to sustain their view, but I do not think it can have that effect. In that case several creditors had recovered judgments against N, and sued out writs of ca sa, upon which he was taken and charged in execution; then F recovered judgment against the same debtor, and sued out an elegit, on which his lands were extended, and a moiety delivered to F; and then the debtor was regularly discharged from custody under the writs of ca sa as an insolvent debtor, putting in his schedule the whole of the lands which had been extended under F's elegit. It was held, that the liens of the writs of ca sa executed, given by the statute 1 Rev. Code of 1819, ch. 134, § 10, did not overreach and avoid the extent under F's elegit. The question had been differently decided in *Jackson v. Heiskell*, 1 Leigh 257, which was heard, on full and able argument by Messrs. Leigh and Johnson on opposite sides, before a court of three judges, consisting of Cabell, Green and Carr, whose decision was unanimous. Afterwards, the question was reconsidered in a full court, on the same argument, and decided otherwise in *Foreman v. Loyd, &c.*, as before stated. Judge Cabell changed his opinion, and concurred with Judges Brooke and Coalter in deciding that case. Judges Green and Carr adhered to their former opinions. Judge Carr, in re-affirming his opinion, made these remarks, which are appropriate to the present occasion: "The law, however harsh, however unwise, is, to my understanding, expressed in terms too plain to be changed by construction, or judicial action in any form." I do not mean to say that, in my opinion, the question was not correctly decided in *Foreman v. Loyd, &c.*; and at all *events that case settled the law. But certainly the question decided in that case (as to the true construction of the 10th section of chapter 134 of the Code of 1819) was very different from the one involved in this, and that case can, therefore, afford no support to the view of the appellants.

I think the case of *Puryear v. Taylor*, 12 Gratt. 401, is decisive of this case; and I would have considered it as scarcely necessary to do more than refer to it to sustain the decree of the court below, but for the fact that the correctness of that decision

was assailed in the argument of the learned counsel for the appellants. In that case it was held by all the judges present, (Allen, P., alone being absent,) first, that a *feri facias* is a lien from the time it goes into the hands of the officer to be executed, upon all the personal estate of the debtor, including debts due to him, with the exception stated in the statute; and this lien continues after the return day of the execution; and only ceases when the right to levy the execution, or to levy a new execution upon the judgment, ceases or is suspended by a forthcoming bond being given and forfeited, or by a supersedeas or other legal process. See Code ch. 188, §§ 3 and 4. And, secondly, that the lien of a *feri facias* of prior date has priority over an attachment of subsequent date. The counsel for the appellants seem to admit the correctness of the first branch of this decision, that is as to the continuing nature of this lien of the *feri facias* after the return day; and at all events admit that that question was fully argued by counsel and considered by the court in the case, and therefore that the decision, to that extent, ought to be regarded as a binding authority. But they insist, that the question secondly decided, to wit, as to the priority of the lien of a *fi. fa.* of prior date over an attachment of subsequent date, received little or no notice in the argument of counsel, or in the opinion of Judge Samuels, which was con-

228 curred in by the rest of the court; *that it was erroneously decided; and that the decision, therefore, ought not to affect this case. The question was expressly noticed, both in the argument of the case and in the opinion which was delivered. The argument, I suppose, was not very fully reported; but Mr. Patton, for the appellant, is reported to have said on this question: "There is certainly no reason, in justice or sound policy, why the lien of an attachment should be preferred to the lien of an execution. The attaching creditor is not an assignee for value. There are good reasons why such an assignee, without notice, should be protected; and the act protects him. And indeed the act expressly protects all those who have any right to protection. The attaching creditor has none." There is no express notice of this question in the reported argument of Messrs. Rhodes & Macfarland for the appellee; but from their reference to the case of *Payne v. Drewe*, I would infer that they did, in fact, notice it. We cannot suppose that they overlooked the question, though they may have considered that there was no good ground for contesting it, especially if they should be wrong in their view that the new lien given by the statute to the *fi. fa.* was not "a continuing, indefinite lien." In the opinion delivered by Judge Samuels, the conflicting liens of the *feri facias* and attachment are compared, and preference accorded to the former. "These liens," says the Judge, "are both given by statute, and are merely legal. It is perfectly obvious that Puryear's lien, being first in

point of time, must take the precedence of Taylor's." I think that the question was not only argued and considered in that case, but that the decision is correct, as well upon that question as upon the other. In the case of Evans' trustee v. Greenhow, &c., 15 Gratt. 153, in which the court again had occasion to consider the subject of this execution lien, all the judges were present, including the president, and all concurred in the opinion therein delivered.

229 *Considering it, then, as res adjudicata, and rightly so, that this execution lien is a legal lien which continues after the return day of the execution, and has priority over an attachment subsequently levied, it seems to follow, as a necessary consequence, that it has priority over a subsequent execution lien under the same law, even though there has been a proceeding by suggestion under the junior sooner than under the senior execution.

I have examined the cases cited by the counsel for the appellants from the English reports, in regard to the statutes of Victoria subjecting chases in action to liability under execution and providing means for enforcing such liability; but I do not think they have any material bearing upon this case, involving as they do the construction of laws wholly different in their terms from that we now have under consideration. Those cases are Watts & Wife v. Porter, 77 Eng. C. L. R. 743; Holmes v. Tutton, 85 Id. 65; Hirsh v. Coates, 86 Id. 757; Turner v. Jones, 1 Hurlst. & Norm. R. 878.

The counsel also referred us to several articles published in the "Quarterly Law Journal" for 1857 and 1858, in regard to the chapters of the Code concerning executions and the decision of this court in Puryear v. Taylor. One of these articles is attributed, and no doubt correctly, to one of the revisors, the late lamented Mr. Patton, and as might well be expected from the great learning and ability of that distinguished gentleman, and from his active participation in framing the Code, his article sheds much light on the subject. It is to be found in the "Quarterly Law Journal" for 1858, pp. 1-14.

In conclusion, it may not be out of place to remark, that while the law we have been construing has been the subject of violent attack and of much conflict of opinion, it does not devolve on us to vindicate its wisdom and policy, but only to construe it and give it effect. It may be said,

230 *however, that when in 1849 the revisors, in obedience to the demand of public opinion, proposed to abolish imprisonment for debt, and to provide ample means in lieu thereof, for subjecting the debtor's whole estate to execution, they undertook a work of very great difficulty; and it was naturally to be expected that there would, of necessity, be defects in their work which would require amendment. It is the business of the Legislature to amend these defects as they are devolved by time and experience. It is a significant fact, however, that though this great change in the

law was made in 1849, and has since been the subject of such violent attack and of so much discussion, it has not yet been amended by the Legislature in any material respect.

Upon the whole, I am of opinion to affirm the decree of the Circuit Court.

The other judges concurred in the opinion of Moncure, P.

Decree affirmed.

231

*Mettert's Adm'r v. Hagan.

January Term, 1868, Richmond.

Chancery Practice—Deeds—Case at Bar.—M. in his lifetime, conveyed by deed to H. M's interest in the estate of J deceased, upon the consideration, as expressed in the deed, of \$1,000. After the death of M, H files his bill to recover the said interest; and M's administrator resists it, on the ground that M was incapable from drink of making a contract, and that the deed was obtained by the fraud of H, and that H gave no consideration for it. The evidence touching M's competency being contradictory, and there being some proof that M had confirmed the deed after its execution.

Held:

1. **Same—Issue Out of Chancery—Proper.**—An issue should be directed to ascertain: 1st. Whether the deed had been procured by fraud; and, 2d. If procured by fraud, whether it had afterwards been confirmed by M, without coercion or restraint, when he was competent to act.
2. **Deeds—Consideration.**—If it had not been procured by fraud, or if it had been confirmed by M without coercion and when he was competent, H is entitled to a decree for M's interest in the estate of J, without regard to the value of the consideration paid therefor.
3. **Chancery Practice—Answer in Lieu of Cross-Bill.**—Though according to the strict rules of plead-

***Issue Out of Chancery—Question of Judicial Discretion.**—In Powell v. Batson, 4 W. Va. 617, the court said: "That the chancellor has a discretionary authority to direct, or to decline to direct, an issue to try any material fact put in issue by the pleadings in the cause, is not doubted, and the doctrine is well settled by the authorities. Such discretion, however, it is equally well established, is a sound or legal discretion, and its improper exercise, either in directing or declining to direct an issue, may be reviewed and corrected by the appellate court. Wise v. Lamb, 9 Grattan 294; Mettert's Administrator v. Hagan, 18 Grattan 231."

See further the principal case cited in Fishburne v. Ferguson, 84 Va. 102, 4 S. E. Rep. 575; Steptoe v. Pollard, 30 Gratt. 702. See also, on this point, Beverley v. Walden, 20 Gratt. 147, and *foot-note*; Magill v. Manson, 20 Gratt. 527, and *foot-note*; Hord v. Colbert, 28 Gratt. 49, and *foot-note*.

See generally, monographic note on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 473.

†**Chancery Pleading—Answer in Lieu of Cross-Bill.**—Mr. Minor (4 Min. Inst. [3d Ed.] 1380) says: An answer has sometimes been treated as a cross-bill, in order to enable the court to do complete justice; and still more readily, as a petition from persons interested, to be admitted as defendants to the origi-

ing, a bill or cross-bill should have been filed to set aside the deed, yet the answer of M's administrator may, for that purpose, be treated as a cross-bill, so as to enable the court to do ample justice in the cause.

In August, 1866, John Hagan filed his bill in the Circuit Court of the city of Richmond against the administrator of George W.

232 Mettert deceased, and others, in which *he stated, that in July, 1859, George W. Mettert, by deed which was exhibited with the bill, conveyed to the plaintiff his interest in the estate of Dr. John H. Mettert deceased. That this estate had been sold and invested under the discretion of the court in two suits pending therein. And he asked that the share of said estate to which George W. Mettert was entitled as heir and distributee of Dr. Mettert might be decreed to him. The deed purports to convey the interest of G. W. Mettert in the estate of Dr. J. E. Mettert, in consideration of \$1,000.

George W. Mettert's administrator answered the bill. He charged that the deed from his intestate to the plaintiff had been procured by the fraud of the plaintiff. That Mettert was at the time of making the deed, and had been for years previous, and continued up to the time of his death, from excessive intemperance, incapable of making a valid contract; that his intellect, naturally weak, had been so impaired by his excesses as that he was little better than a drivelling idiot. That Hagan had taken advantage of his condition; had induced him to stay at his house, and had there plied him with liquor until he obtained the said deed from him. That Hagan never gave any consideration for the deed, which conveyed an interest worth at the time near \$6,000; and though it had been impaired by the war, was still worth upwards of \$3,000. The defendant therefore asks,

nal bill, and to be allowed to defend their rights. (*Mettert v. Hagan*, 18 Gratt. 231; *Sayers v. Wall*, 26 Gratt. 364; *Piedmont & Arlington Ins. Co. v. Maury*, 75 Va. 514; *Preston v. Heiskell*, 32 Gratt. 61; *Cralle v. Cralle*, 79 Va. 182; *Adkins v. Edwards*, 83 Va. 300, 2 S. E. Rep. 435.)"

As further authority on this point, see *Tate v. Vance*, 27 Gratt. 571, and *foot-note*, where there is a collection of cases on this subject; and see the principal case cited in *Kraker v. Shields*, 20 Gratt. 307; *Kendrick v. Whitney*, 28 Gratt. 654; *Ragland v. Broadnax*, 29 Gratt. 422; *Wayland v. Crank*, 79 Va. 604; *Sturm v. Fleming*, 22 W. Va. 412; *Cunningham v. Hedrick*, 23 W. Va. 591; *Lively v. Winton*, 30 W. Va. 562, 4 S. E. Rep. 456; *Leonard v. Smith*, 34 W. Va. 447, 12 S. E. Rep. 481; *Douglas v. Laird*, 37 W. Va. 708, 17 S. E. Rep. 194; *Paxton v. Paxton*, 38 W. Va. 624, 18 S. E. Rep. 768.

Same—Substance and Not Form Regarded.—In *Martin v. Smith*, 25 W. Va. 583, the court said: "In this state and in Virginia, it has been held that a literal compliance with forms is not required by courts of equity; they regard substance rather than mere form, and so mould and treat pleadings as to attain the justice of the case. Under this rule, a petition for a rehearing has been treated as a bill of review when the facts made it necessary to so regard it,

that the deed may be declared null and void, for the fraud in its procurement and the incapacity of the grantor to transact business; and that the interest of G. W. Mettert in the estate of J. H. Mettert may be decreed to the defendant.

A number of witnesses were examined, both by the plaintiff and the defendant, as to the condition of George W. Mettert about the time of the contract. Some of these witnesses stated he never was sober 233 about that time, and *for some time previous, and that he had not capacity to transact business. Others said that he was sometimes sober, and was able to contract.

There was some proof of his staying at Hagan's house for a time in the year 1859.

The cause came on to be heard on the 3d of May, 1867, when the court expressed the opinion, that the defence set up in the answer was not sustained by the proofs, and decreed that the interest of George W. Mettert in the estate of John H. Mettert should be paid to Hagan. From this decree, George W. Mettert's administrator applied to this court for an appeal, which was allowed.

Johnson & Guigon, for the appellant.

N. Howard and Roberts, for the appellee.

JOYNES, J., delivered the opinion of the court:

The court is of opinion, that the said Circuit Court erred in rendering a decree in favor of the appellee Hagan, without first causing issues to be tried by a jury as hereinafter directed. Therefore it is decreed and ordered, that the said decree be reversed and annulled, and that the appellee Hagan pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here.

And this court proceeding to pronounce

and a notice to correct a decree on bill taken for confessed has been treated as a petition for a rehearing. *Kendrick v. Whitney*, 28 Gratt. 646. A bill of review has been treated as an original bill, or a petition in the nature of an original bill. *Hill v. Bowyer*, 18 Gratt. 346; *Mettert v. Hagan*, *Id.* 231; *Sturm v. Fleming*, 22 W. Va. 404; *Riggs v. Armstrong*, 23 *Id.* 760."

Same—Bill Treated as Cross-Bill and Answer.—In *Gregg v. Sloan*, 76 Va. 501, the court said: "In such a case, the bill filed by the trustees (which was sworn to) may be treated as an answer by way of defence to Gregg's bill, and at the same time as a cross-bill, asserting the claim of the complainants to counter relief in the same cause. For, so dealing with the proceedings, we find a striking precedent in the somewhat analogous case of *Kyle's Ex'or v. Kyle*, 1 Gratt. 528, wherein the court gave to the bill 'the double function of an answer to the original bill, and a cross-bill impeaching the title of the plaintiff and the proceedings in the original suit.' See also, *Mettert's Adm'r v. Hagan*, 18 Gratt. 231, 234; *Cralle and Others v. Meem & Others*, 8 Gratt. 406, 531.

See generally, monographic note on "Answers" appended to *Tate v. Vance*, 27 Gratt. 571.

such decree as the said Circuit Court ought to have pronounced, it is further decreed and ordered, that a jury be empanelled at the bar of the said Circuit Court, on the chancery side thereof, to try the following issues:

1. Whether the deed in the proceedings mentioned from George W. Mettert to John Hagan was or was not obtained by fraud.

2. Whether, in case the said deed was so obtained by fraud, the same was subsequently confirmed by the said Mettert by his answer to the bill of Mrs. Kyle, 234 or otherwise, *the said Mettert intending thereby to ratify and give effect to the said deed, being fully aware of his right to avoid the same, and being competent to bind himself, and free from all coercion, restraint or undue influence.

3. In case the said deed was so obtained by fraud, and was not so subsequently confirmed, what was the value in money of the consideration, if any, paid or delivered by the said Hagan to the said Mettert for the interest of said Mettert conveyed by said deed. Upon the trial of which issues the said Hagan shall be entitled to open and conclude.

And the court is of opinion, that if it shall be ascertained that the said deed was not obtained by fraud; or, having been obtained by fraud, was subsequently confirmed as aforesaid, then the same should be held valid without regard to the value of the consideration paid or delivered therefor.

And the court is further of opinion, that though, according to the strict rules of pleading, the said deed could not be annulled and set aside without a bill or cross-bill filed for that purpose by said Mettert's administrator, the answer of said Mettert's administrator may, for that purpose, be treated as a cross-bill, so as to enable the court to do complete justice in this cause; and that if it shall be ascertained that the said deed was obtained by fraud, and was not subsequently confirmed as aforesaid, the same should be set aside and annulled, upon the payment to the said Hagan of the value of the consideration paid or delivered therefor by him, with interest thereon, for the re-payment whereof the said deed should be held as a security.

And the cause is remanded to the said Circuit Court for further proceedings to be had therein in conformity with the foregoing opinion and decree. Which is ordered to be certified, &c.

Decree reversed.

235 *Ballard & als. v. Whitlock.

January Term, 1867, Richmond.

1. **Forthcoming Bonds—Time of Delivery of Property.**

—A forthcoming bond, with condition to deliver property taken in execution, on a day of sale occurring after the return day, is valid.

2. **Same—Judgment On—Error—Correction in Lower Court.**

—A judgment and award of execution upon a forfeited forthcoming bond, having been entered

by default, upon a day prior to that to which notice was given, the court in which the judgment and award of execution was rendered has jurisdiction on the motion of the plaintiff to set aside the judgment and quash the execution, upon reasonable notice to the defendants. Code, ch. 181, § 5; ch. 187, § 23.

3. **Same—Same—Notice—Case at Bar.***—The plaintiff having given a second notice to the obligors in the forthcoming bond, for a judgment and award of execution thereon, and they appearing and objecting to the rendering of the judgment and award of execution asked, the court may at the same time quash the first judgment and execution, and render another judgment and award of execution on the bond. And the obligors being present by their counsel, they had reasonable notice of the motion to quash.

4. **Judgments—Set Aside—Effect on Execution Already Issued.**—When a judgment is set aside, the execution which has issued upon it falls with it, without any express order to quash the execution.

A forthcoming bond given by John P. Ballard as principal, and Thos. E. Ballard and J. B. Watkins as sureties, on an execution which issued from the clerk's office of the Circuit Court of the city of Richmond, in the name of Charles E. Whitlock against the said John P. Ballard, having been forfeited, notice that a motion would be 236 made on the 3d day of July, 1867, for a judgment and award of execution on the bond, was served on two of the obligors, J. P. Ballard and J. B. Watkins. By a singular mistake, judgment was rendered on the forthcoming bond against these two obligors on the first instead of the third day of July, 1867; it being stated in the judgment that the plaintiff came by his attorneys, and it appearing by the return of the sheriff, that the defendants, John P. Ballard and Joel Watkins, had had legal notice of the motion, they were solemnly called but came not; and so the judgment was entered by default. On the 3d of July, 1867, on the motion of the plaintiff and for reasons appearing to the court, it was ordered that an execution be awarded forthwith on the said judgment rendered on the 1st day of the same month. Afterwards, to wit: on the 11th day of the same month, the plaintiff, having discovered his mistake in obtaining judgment on the 1st instead of the 3d of the month as aforesaid, issued a new notice that a motion would be made on the 1st day of August, 1867, for a judgment and award of execution on the said bond, which notice was served on all

***Notice—Defects in—Objections in Appellate Court.**—The principal case is cited in *Dillard v. Thornton*, 29 Gratt. 392, and *S. V. R. Co. v. Miller*, 80 Va. 828, as authorizing the proposition that defects in notice or service of notice cannot be taken advantage of for the first time in the appellate court. See also, *foot-note* to *Dillard v. Thornton*, 29 Gratt. 392.

Process—Defects in—How Waived.—This subject is discussed in a *foot-note* to *Harvey v. Skipwith*, 16 Gratt. 410.

See generally, monographic *note* on "Statutory Bonds" appended to *Goolsby v. Strother*, 21 Gratt. 107.

three defendants. On the day named in the notice, an order was made setting aside the former judgment entered on the 1st day of July as aforesaid, and quashing the execution issued thereon; and a judgment was rendered on the bond against all three of the obligors. These proceedings of the 1st day of August, 1867, appear upon the record as follows: "And now at this day, to wit," &c. "Charles E. Whitlock, plaintiff, against John P. Ballard and Joel B. Watkins, defendants. Motion on a bond taken for the forthcoming and delivery of property, on the day and at the place of sale. This day came the parties by their attorneys, and for reasons appearing to the court, it is ordered that the judgment entered herein on the 1st day of July last, at the present term of this court, be set
237 aside, the same having *been irregularly entered; and it is further ordered that the execution issued on said judgment be quashed.

"And at the same day, to wit," &c. "Chas. E. Whitlock, plaintiff, against John P. Ballard, Thomas E. Ballard and Joel B. Watkins, defendants. Motion on a bond taken for the forthcoming and delivery of property, on the day and at the place of sale. This day came again the parties by their attorneys, and it appearing by the return of the sheriff, that the defendants have had legal notice of this motion, they were solemnly called. Whereupon it is considered by the court that the plaintiff recover against the defendants," &c. "Memo. To an opinion of the court this day given against the defendants, they by their counsel excepted, and leave is given them until the 10th day of August, 1867, to file their bill of exceptions thereto."

Accordingly, on that day a bill of exceptions was tendered by the defendants, and signed and sealed by the court, which states in effect that the plaintiff moved the court for a judgment on the bond, and thereupon offered in evidence the bond (being the same on which the court entered judgment against the said J. P. Ballard and J. B. Watkins on the 1st day of July, 1867, which judgment was set aside by the court on the 1st day of August, 1867), the execution on which the bond was taken, and the notices both to the 3d of July and the 1st of August, 1867, with the endorsements thereon, which execution, notices and endorsements are inserted in the record; and moved the court to enter the order setting aside the judgment rendered on the 1st day of July, 1867, and quashing the execution issued thereon as aforesaid, which motion the defendants, J. P. Ballard and J. B. Watkins, by their counsel, objected to; but the court overruled the objection and entered the said order, and rendered
238 judgment on the bond, according to the motion of the plaintiff. To *which opinion of the court the defendants, Ballard and Watkins, by their counsel, excepted.

To the judgment rendered on the 1st day

of August, 1867, the defendants applied for and obtained a writ of supersedeas.

Lyons, for the appellants.

Macfarland and N. P. Howard and Roberts, for the appellee.

MONCURE, P., after stating the case, proceeded as follows: Four errors are assigned in the judgment, but as the last two are in effect but repetitions of the first and second respectively, or at all events may be disposed of in disposing of them, the latter only need be noticed. They are:

1st. The execution upon the first judgment expired before the day named in the bond for the delivery of the property; the sheriff, therefore, could not legally receive it on that day, and the bond was consequently void, and no judgment could legally be rendered upon it.

2dly. The court, having rendered one judgment upon the bond, could not set aside that judgment without notice to the defendants, nor could it quash the execution without such notice.

In regard to the first error assigned, it will not be necessary to say much. The sheriff could legally receive the property on the day of sale named in the forthcoming bond, though that day was after the return day of the execution, and the bond was not, therefore, void. The execution of a writ of fieri facias is an entire thing, and having been commenced but not completed by the sheriff to whom it is directed before the return day, it is his duty to complete the execution afterwards. 1 Rob. Pr. old ed.
529, 530, 532; Dix v. Evans, 3 Munf.
239 308; Wheaton v. *Sexton's lessee, 4
Wheat. R. 503; 2 Tuck. Com. 362, 370.

He may sell after the return day of the writ, even after he is out of office, and without a writ of venditioni exponas. Sewell on Sheriff 253, and cases cited in note (x); 46 Law Library 194. The writ commands him to cause the money therein mentioned to be made of the goods and chattels of the defendant. It is his duty, if the money be not paid, to levy the writ on the goods and chattels of the defendant, or so much thereof as may be necessary, and sell them for its satisfaction. He cannot levy the writ after the return day, but he may do so at any time on or before that day after it comes to his hands for execution. Code ch. 170, § 2, p. 706. It often happens that, after making a levy, he has not time to make a sale before the return day. No such sale can be made without at least ten days' previous notice. Code ch. 49, § 37, p. 286. And if the goods and chattels levied on be slaves, mules, work-oxen or horses, they are required by the next section (38, p. 287), to be sold at the courthouse of the county or corporation, and on the first day of the term of the court thereof next succeeding that at which they may be advertised, except where the parties shall, at or before the time for advertising the same, in writing, authorize the officer to dispense with the provisions of this section; in which case the sale shall be according to the preceding section.

Thus the day of sale may be a month or more after the return day of the writ. And if the defendant give a forthcoming bond, as he generally may, under the Code ch. 189, § 1, p. 780, the condition of it is for the forthcoming of the property at the day and place of sale, whether that day be before or after the return day of the writ. In either case, he has a right to perform the condition of his bond by having the property forthcoming accordingly, and the sheriff is bound to receive it.

In regard to the second error assigned. The first judgment rendered on the forthcoming bond was clearly erroneous, having been rendered before the day named in the notice, without the consent of the defendants, or any appearance by or for them. They might have had it reversed by a proceeding in error commenced at any time within the term of limitation prescribed by law in such cases. As they had that right, and might avail themselves of it, the plaintiff could not rely upon the judgment, though apparently in his favor, unless the defendants would release all errors in it, in which case the plaintiff would have no cause to complain of it, and would of course be satisfied. The defendants did not release such errors, and the plaintiff had no reason to believe that they would do so. He was, therefore, aggrieved by the judgment which stood in his way; and he had a right to have it set aside and removed out of his way by a proceeding in error instituted by himself. The judgment being by default, the court which rendered it had jurisdiction to set it aside, and to do so on motion, under the Code ch. 181, § 5. If the judgment was properly set aside, the execution thereon of course fell with it, and would have so fallen without an express order to quash the execution. Of course the court might make such an order, and the Code ch. 187, § 23, p. 776, expressly affirms the right of the court on motion to do so, if such affirmation were necessary.

The court, therefore, had jurisdiction to make the order of the 1st day of August, 1867, setting aside the said judgment and quashing the execution thereon. To be sure the statute requires notice to be given to the adverse party, as well in a proceeding to reverse a judgment under ch. 181, § 5, as in a proceeding to quash an execution under ch. 187, § 23; but the notice required in either case is reasonable notice only, and not notice for a certain period of time. It appears, in this case, that the defendants had notice of the motion to set aside the judgment and quash the execution, having appeared by their attorney upon that motion; and it does not appear that it was not reasonable notice, nor that any objection was made to it because it was not reasonable, or on any other ground. Had it been objected to because it was not reasonable, doubtless an opportunity would have been afforded the defendants, if necessary, by a continuance of the motion, or by requiring a new notice, to make any defence they might have had to the motion.

But it is difficult to conceive what defence they could have made to it; and the assertion of such a defence would seem of necessity to involve a release of errors in the judgment. Had they offered to give such a release, the plaintiff, as was well said by his counsel in the argument of this case, would no doubt have asked the court to overrule his own motion. The defendants had their choice, to release the errors in the first judgment and let it stand, and thus defeat the motion for another judgment, at least against the defendants J. P. Ballard and J. B. Watkins, against whom only the first judgment was rendered; or to let that judgment be set aside, and make their defence, if they had any, on the motion for another judgment, of which motion they had due legal notice. They did let the first judgment be set aside, or at least they do not appear to have made any defence against the motion to set it aside, and it was accordingly set aside "for reasons appearing to the court," though it is stated in the order that the parties appeared by their attorneys. But the defendants made no defence to the motion for another judgment, except upon the ground that the former judgment had been rendered, though it had been set aside as aforesaid. They made no other defence, doubtless because they had no other to make; but wished to avail themselves of the proceedings which had occurred in regard to the former judgment, not "because it is a valid judgment and ought to stand, but merely for the purpose of delay."

I have not reviewed in detail the many authorities cited and commented upon the learned counsel for the defendant in error, because I thought it unnecessary to do so for the decision of this case. They seem to sustain the positions in support of which they were cited. As—1st. That the notice for the second motion was good and valid, notwithstanding the existence of an invalid and illegal judgment previously entered on the same bond. 1 Chit. Pl. 7th Am. ed. pp. 523-4; Green v. Watts, 1 Ld. Ray. R. 274; Knight's case, 2 Id. 1014; S. C. 1 Salk. 329; Croswell v. Byrnes, 9 John. R. 287. 290; Dyer 32a, pl. 5, 6; Jenk. Cent. 74 pl. 40; 4 Leigh 58; Archer v. Ward, 9 Gratt. 622. 2dly. That a writ of error "may be brought by the plaintiff to reverse his own judgment, if erroneous or given for a less sum than he has a right to demand in order to enable him to bring another action." 2 Wms. Saund. 101f, citing Johnson v. Jebb, 3 Burr. R. 1772. 3dly. That if the plaintiffs in error have sustained no injury by the want of notice, and could not possibly have sustained any, they certainly are not entitled to reverse upon that ground the order setting aside the judgment and quashing the execution. Preston v. Harvey, 2 Hen. & Mun. 55; 64, 5; 66, 7; Pitman v. Breckinridge, &c., 3 Gratt. 127; Crawford v. Morris, 5 Id. 90; Hughes v. Stickney, 13 Wend. R. 280; and, 4thly. That the defendants in the Circuit Court, by appearing (as their own bill of exceptions

shows they did) in opposition to the motion to set aside the erroneous judgment and quash the execution upon it, without making any objection to that motion upon the ground of failure to give them notice of it, must be held to have waived the notice, and cannot now be heard to make the objection. Ayres v. Lewellin, 3 Leigh 609; Poling v. Johnson, 2 Rob. R. 285; Pulliam, 243 *&c., v. Aler, 15 Gratt. 54; Muire v. Falconer, &c., 10 Id. 12.

In the foregoing opinion I have not adverted to the fact that the order setting aside the first judgment was made during the same term of the court, because having been made after the 15th day of the term, and after an order had been made awarding an execution on the judgment, it might be contended that the term, in effect, was ended as to that judgment when the order was made to set it aside, according to the decision of this court in Enders' ex'ors v. Burch, 15 Gratt. 64. Nor have I noticed what was said in the argument against the correctness of that decision. I have not deemed it necessary to do so, because, conceding that the order setting aside the first judgment was made at a different term of the court, I still think it was properly made.

I am of opinion that there is no error in the judgment, and that it be affirmed.

The other judges concurred in the opinion of Moncure, P.

Judgment affirmed.

244 *Taylor v. Stearns & als.*

January Term, 1868, Richmond.

Deeds of Trust—Time and Terms of Sale of Obligation of Contract—Stay Law.—A deed of trust to secure a debt, which provides for the time and terms of sale, upon the failure of the grantor to pay the debt, is of the obligation of the contract, and the

*Judicial Sales—Terms.—The principal case, Fultz v. Davis, 26 Gratt. 908, 918, and Wood v. Krebbs, 33 Gratt. 685, 694, are cited in Pairo v. Bethell, 75 Va. 834, as authority for the proposition that, in a sale by the court under a deed of trust, mortgage, etc., in which the terms of sale has been agreed on by the parties, there is no discretion left the court as to the terms of sale, but the contract of the parties must govern. See also, foot-note to Wood v. Krebbs, 33 Gratt. 685.

Constitutional Law—Impairing the Obligation of Contract.—As to the interpretation of the provision of the state and federal constitutions which forbids the state to impair by legislation the obligation of contract, several cases cite the principal case as authority.

In Antoni v. Wright, 22 Gratt. 858, the court said: "That provision of the State and Federal constitutions which forbids the state to impair by legislation the obligation of contracts, has received mature consideration by this court in the recent cases of Taylor v. Stearns, 18 Gratt. 244; and in the Homestead Cases to be reported in 22 Gratt. 266. In delivering the unanimous opinion of the court in the last mentioned cases, JUDGE CHRISTIAN says: 'The inviolability of contracts, public and private, is

act of March 2, 1866, to stay the collection of debts for a limited period, which forbids sales under deeds of trust until the 1st of January, 1868, is, in relation to such deeds of trust, unconstitutional.

By deed bearing date the 19th of September, 1860, G. A. W. Taylor conveyed to James M. Taylor and John Enders a house and lot at the corner of Clay and Tenth streets, in the city of Richmond, which John M. Gregory had conveyed to Taylor, to secure the payment of thirteen thousand two hundred and ninety-nine dollars and fifty-five cents, due by ten negotiable notes bearing even dates with said deed, and payable each at six months after the next preceding; it being for the balance of the purchase money of the house and lot. The trusts were as follows:

In the event that default shall be made in the payment of either of the above mentioned notes, as they become due and payable, then the trustees or either of them, on being required so to do by the said John M. Gregory, his executors, administrators or assigns, shall sell the property hereby conveyed. And it is covenanted and agreed between the parties aforesaid, that in case of a sale, the same shall be made after first advertising the time, place

245 *and terms thereof for fifteen days in some newspaper published in the city of Richmond, and upon the following terms, to wit: For cash as to so much of the proceeds as may be necessary to defray the expenses of executing this trust, the fees for drawing and recording this deed, if then unpaid; and to discharge the amount of money, principal, interest and charges then payable upon the said notes; and if at the time of such sale any of said notes shall not have become due and payable, and the purchase money be sufficient, such part or parts of the said purchase money as will be sufficient to pay off and discharge

the foundation of all social progress, and the cornerstone of all the forms of civilized society, wherever an enlightened jurisprudence prevails; and we do not think he has attached an undue importance to this great principle. It must be preserved."

Again, in Garland v. Brown, 23 Gratt. 177, "It is not our purpose to enter upon the discussion of the question so often considered, as to what constitutes the obligation of a contract, or to what extent the remedy may be varied or modified without impairing the obligation. The distinction between the obligation and the remedy has been long and well established; but it must be conceded that the line is somewhat shadowy. Any discussion of the general question, however, would be wholly out of place here, after the recent able and exhaustive opinions of JUDGE CHRISTIAN. In the Homestead cases, and of JUDGE RIVES, in Taylor v. Stearns, 18 Gratt. 244; in which cases all the authorities are reviewed."

The principal case was also cited on this subject in Wash., A. & G. R. Co. v. Alex. & W. R. Co., 19 Gratt. 624; Bank v. McVeigh, 20 Gratt. 466; Homestead Cases, 22 Gratt. 287; Roberts v. Cocke, 28 Gratt. 216, 217.

such remaining note or notes shall be made payable at such time or times as the said remaining note or notes will become due; the payment of which part shall be properly secured, &c.

The first four of the notes secured by this deed were paid to Gregory; and he afterwards transferred the remainder of them to Franklin Stearns.

In 1866, the trustees, James M. Taylor and Enders, at the request of Stearns, advertised in the Richmond Times, the said house and lot for sale on the premises on Wednesday, the 4th of May, 1866, on the terms of cash for so much as will be necessary to pay said notes and expenses of sale; the balance, &c. G. A. W. Taylor thereupon applied by bill to the Judge of the Circuit Court of the city of Richmond for an injunction to stop the sale, on the ground that the General Assembly, at the session of 1865-6, had passed an act, providing that there should not be any sales under deeds of trust for the payment of money (except in certain specified cases, of which this was not one,) until the 1st day of January, 1868.

The injunction was granted; and at the next May term of the court Stearns, upon notice to the plaintiff, moved the court to dissolve it; but the motion was continued from time to time until January, 1867. In the meantime, at the June rules, the

246 trustees and Stearns filed their answers; to which the plaintiff replied generally; and thereupon, on motion of the plaintiff by counsel, the cause was set for hearing.

The trustees, in their answer, disclaim all interest except as trustees; and Stearns insisted that the act relied on by the plaintiff in forbidding a sale under the deed of trust in this case was a violation of that provision of the constitutions of Virginia and of the United States which forbid a State to pass any law impairing the obligation of contracts.

On the 17th day of January, 1867, the cause came on to be heard upon the bill, &c., and upon the motion of the defendant Stearns theretofore made to dissolve the injunction; when the injunction was dissolved, and the bill dismissed with costs. And thereupon the plaintiff applied to this court for an appeal; which was allowed.

The case was elaborately argued in this court by Steger & Sands and Lyons, for the appellant, and by Young and Nance & Williams, for the appellee. The argument on behalf of the appellee is sufficiently stated in the opinion of Judge Rives, and need not be repeated.

For the appellant it was insisted: 1st. That the act was not unconstitutional, because it was retrospective. *Baughner v. Nelson*, 9 Gill's R. 299; *Goshen v. Stonington*, 4 Conn. R. 209, 220; *Tucker v. Harris*, 13 Georgia R. 1; *Foster & als. v. The Essex Bank*, 16 Mass. R. 245; *The People v. Livingston*, 6 Wend. R. 527; *Williams v. County Commissioners*, 35 Maine 345; *Hampton v. Commonwealth*, 7 Harris Pa.

R. 329; *Butler v. Palmer*, 1 Hill's N. Y. 324; *Stocking v. Hunt*, 3 Denio's R. 274.

2. Again, it is insisted on, that the obligation of the contract is impaired by the suspension of the sale, even for a limited period. The practice of eminent chancellors may be invoked in aid of the 247 propriety of such suspension. *It is matter of every day occurrence for equity courts, once having gained control over a trust deed, to prescribe in their decrees terms of sale different from those contained in the deed. They feel in duty bound to order such a sale as will best promote the interests of the parties. The variation in the terms of sale may give an extension of credit beyond the time of suspension provided for in the act complained of; and yet was such a decree ever reversed and set aside because it impaired the obligation of the contract? Were not, in fact, the rights of all parties better preserved and protected by it?

The violation of the constitution must be clear to justify judicial interference with a statute. It is not contended that judges have no right to interfere when the law is unconstitutional, and when the question of its unconstitutionality comes directly before the court. But before pronouncing a law unconstitutional, the court must see that it is in plain, clear violation of the organic law. In a doubtful case effect ought to be given to the statute. See *Opinion of Verplanck, Bennett v. Boggs*, 1 Bald. R. 74, 75. The Supreme Court in *Bronson v. Kinzie*, 1 How. U. S. R. 311, ran counter to the rule, that the unconstitutionality of a law ought not to be decided unless the question comes directly before the court. In that case, whether the law of Illinois complained of was constitutional or not, the appellant ought to have succeeded; and so all the court said. After saying this, it was clearly an obiter dictum to go farther and declare the Illinois statute unconstitutional. Judge McLean takes this view in his dissenting opinion, 1 How. U. S. R. 323, and he is followed by Sedgwick. Sedgwick expressed his "regret that in *Bronson v. Kinzie*, as in *Sturges v. Crowninshield* and the Dartmouth College case, the Supreme Court felt themselves at liberty to go beyond the case before them, and to express

an opinion in regard to other questions of great moment, but not necessarily in judgment." He continues: "The rule which confines judicial decisions to the very matter before the tribunal is important in all cases, but in regard to constitutional questions its magnitude cannot easily be overestimated." Sedg. Stat. 651, note.

Bronson v. Kinzie, 1 How. U. S. R. 311, thus commented on as passing unnecessarily upon the constitutionality of the Illinois law, was relied on by the defendant in the Circuit Court. *Bronson v. Kinzie* was not argued for the statute. This is a significant fact. But if its authority was unquestioned, is it like the present case? In that case a trust deed was not involved

as here; and it will not be easy for the defendant to produce a single case like the present, in which a trust deed (a creature of equity, and subject especially to equity control,) is concerned. On examination the court will find other and great dissimilarities between that case and the present. The first to which we invite attention is this, that in *Bronson v. Kinzie*, after a sale, the statute complained of proposed to continue the estate of the mortgagor in the property sold. In other words, the statute proposed to say that the property should be sold and not sold at the same time. It proposed to say that the equitable estate of the mortgagor should not be extinguished, when the very act of sale extinguished it. There is nothing like this in the present statute. When a sale is made under the Virginia act, it is proposed to make it a good sale against all the world. The Illinois statute not only operated as a suspension of the remedy by sale, but continued to say that after sale it should not be sold if the mortgagor came forward to redeem. The analogy between the Illinois statute and the Virginia statute would be more apparent if the Illinois statute had declared that there should be no decree for a sale under a twelvemonth; but this it did not do. Would such a provision have been

249 declared unconstitutional? *The answer may be found to this question on reference to *Holloway v. Sherman*, 12 Iowa R. 282; *Coosa River Steam Co. v. Barclay*, 30 Alab. R. 120; *Wood v. Child*, 20 Ill. R. 209; *Newkirk v. Chapron*, 17 Ill. 344, and specially, *Iverson v. Shorter*, 9 Alab. 713. A second difference between this case and *Bronson v. Kinzie* is this, that in *Bronson v. Kinzie* the Illinois statute provided that there should be no sale unless the land brought two-thirds its value—a value set upon it by two or three householders selected under the law. This was a contingent indefinite suspension of the power of sale, and was liable to objections as serious as those affecting the first mentioned difference above referred to. There is nothing like this in the Virginia statute. When a sale is made under the Virginia act, the property is to be sold for what it will bring; and hence the greater necessity for a sale at a time when the monetary affairs of the country will justify the expectation of a fair price. What real similarity is there between the two cases? Here is simply a suspension of the remedy by sale. In *Bronson v. Kinzie* there was, in the first instance, a destruction of the sale after its being made at the option of the mortgagor; and, in the second instance, a complete annihilation of that power, if the property should not bring two-thirds of what two householders said it was worth. *Bronson v. Kinzie*, thus shown to be inapplicable to this case, has not been sanctioned by many of the State supreme courts. In *Chadwick v. Moore*, 8 Watts & Serg. R. 49, the statute complained of suspended sales on executions for a year, unless two-thirds of the appraised value was realized. It was held

that this statute was not unconstitutional. And although in *Bailey v. Gentry*, 1 Miss. R. 164, the act of the Legislature granting a stay of execution for two years and a half, unless the plaintiff or his agent endorsed that property at two-thirds its value, would be taken in satisfaction, was held unconstitutional; yet **Chadwick v. Moore*, ubi supra, is supported by numerous decisions. See *Grimball v. Ross*, Charl. 175; *Heyward v. Judd*, 4 Minnesota R. 483; *Stone v. Bassett*, 4 Id. 298; *Newton v. Tibbatts*, 2 Eng. R. 150; *Bronson v. Newberry*, 2 Doug. Mich. R. 38; *Rockwell v. Hubbell's adm'r*, 2 Id. 197. See also, *Baumbach v. Bade*, 9 Wisc. R. 559, and *Starkweather v. Hawes*, 10 Wisc. R. 125, 126. Of *Bailey v. Gentry*, 1 Miss. R. 164, it may be remarked, that the act tendering to the execution plaintiff the option either to take property, i. e., property other than money, at two-thirds its value, was a legislative act, tendering an amendment of the contract to the creditor under penalty of two-and-a-half years delay. This was clearly beyond legislative power. The legislature has no right to make or amend contracts for the citizen, but it may say, as it has often said, how such contracts may be proceeded on, and it may say, as it has often said, that unless proceeded on within a reasonable time fixed by itself, the rights under it are at an end; and it may say, as it has often said, that the power to proceed against a debtor's person to enforce the performance of his contract shall cease. Before passing from this comment on *Bronson v. Kinzie*, it ought to be remarked that this case arose, as other cases before the United States Supreme Court, between citizens of different States, and the court decided it with reference to the United States constitution. To say the least, it may well be doubted whether this decision and other decisions of the United States Supreme Court, thus based on the Federal constitution alone, and affecting the rights between citizens of different States, even though such decisions were in cases similar to this, should be regarded as authoritative and binding in the present case. This is not a case between citizens of different States, for the protection of whom, as citizens of different States, the article in the Federal constitution was designed, but it is a 251 case *between citizens of the same State of Virginia, and the question is, whether the constitution of Virginia has been violated, or any article of the Federal constitution designed for the protection of one State inter sese. As pertinent to this remark, and enforcing the justness of the distinction here drawn, the court is referred to *Owings v. Speed*, 5 Wheat. R. 420, and to the language of *Sedgwick*, when speaking of the limitations of the Federal courts. That writer says: "The States may pass retrospective laws, however unjust; may pass acts of a judicial nature; may pass acts divesting vested rights; may violate express provisions of their own constitutions—acts of these classes, however objection-

able, are not within the scope of the re-stription of the Federal constitution, and give no right of appeal from the decisions of the State tribunals." Sedg. Stat. 639. This being true, at the utmost the decisions of the Supreme Court of the United States in *Bronson v. Kinzie*, and similar cases, are not authoritative and binding decisions upon this court in the present case; but are simply persuasive. Whether they ought to persuade the court in the present case to declare the statute of Virginia unconstitutional, when the Virginia act differs so widely from the cases in which these decisions were rendered, and when, as has already been shown, so many of the supreme courts of the several States have decided otherwise, is a question which this court must determine for itself.

McCracken v. Hayward, 2 How. U. S. R. 61, and *Howard v. Bugbee*, 24 How. U. S. R. 461, following *Bronson v. Kinzie*, are liable to the objections just urged in reference to *Bronson v. Kinzie*. The first contained the clauses concerning redemption after a sale, and no sale unless two-thirds of the value were realized. The second, *Howard v. Bugbee*, contained the clause giving right of redemption two years after a sale. There is no need for further comment here.

252 **Green v. Biddle*, 8 Wheat. R. 1, unquestionably settles, that the act complained of was a violation of the provision of the Federal constitution. But what is there of likeness between that case and the present? Acts of the Legislature of Kentucky exempting occupants without title from liability for waste, and compelling the true owner to pay for the improvements put on the land by the occupant even during the pendency of the suit, were held in that case to be in contravention of the compact between Virginia and Kentucky, and were held to be unconstitutional. What possible resemblance is there between that case and this?

The rule established is, that a contract shall not be impaired; but an act changing the mode of proceedings for relief; an act suspending for a period of nine months relief in the foreclosure of a mortgage, *Holloway v. Sherman*, 12 Iowa R. 282; an act taking away from a landlord the power of distress, though that power be embraced in the agreement, *Conkey v. Hart*, 14 N. Y. (4 Kernan) 22, have been held not to impair a contract, and not to be in violation of the constitution. Some of the cases talk loosely about changing the time of performance, but the meaning of this is clearly not extended to the manner of enforcing the contract. No one has ever rightly doubted the constitutionality of the replevin or of the forthcoming bond, and the consequent suspension of right to collect, though the contract is acknowledged to be in full force, and the courts are actually in process of enforcing it. This remark is made with knowledge of the cases of *Blair, &c. v. Williams*, 4 Lit. (Ken.) R. 34, and *Grayson v. Lilly*, 7 B. Monr. R. 6. In these cases,

it is true the extension of the right of replevin from three months to two years was held unconstitutional; but there is no reconciling these cases with *Butler v. Palmer*, 1 Hill; *Hampton v. Commonwealth*, 7 253 *Harris* 329, and *Williams v. *County Commissioners*, 35 Maine 345. The Supreme Court of Kentucky, in the two cases cited, *Blair v. Williams* and *Grayson v. Lilly*, is at variance with the highest courts of New York, Pennsylvania and Maine. On principle, as declared by some of the cases, the Kentucky decisions are wrong. These authorities say it is clear that the contract is not impaired when the action of the Legislature is not on the contract, but on the mode of enforcing it. A contract to pay rent, and a remedy by distress for its collection, are two distinct things. A contract by trust deed securing a debt, and the remedy in case of failure to pay, by selling and paying over the proceeds to the secured creditor, are two different and distinct things. As to what is said about making the remedy a part of the contract, which is referred to in some of the cases, can it be that the distinction is well taken? If the law of remedy is *ex necessitate rei* incorporated into the contract, does the fact that the remedy is specially mentioned in the contract alter the rights of the parties, or abridge the power of the Legislature? This seems unreasonable. But were it so, this case presents a case in which the defendant seeks to obtain payment under the trust deed, not by virtue of its provisions, for the trust deed does not provide for the payment to him, but seeks to obtain payment by virtue of the act of the Legislature prescribing that in such cases payment shall be made.

In *Green v. Biddle*, we have seen what was the character of the acts of which Judge Washington was speaking when he said: "That it is no answer that the acts of Kentucky now in question are regulations of the remedy and not of the right to the lands." And farther: "If these acts so change the nature and extent of the existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights 254 and *interests." It has been already seen that *Green v. Biddle* was an entirely different case from this. Has any case been found, can any case be found, in which such language has been held in relation to the postponement of a sale under a trust deed? Let the present case be looked at in the light of the remark of Judge Washington in *Green v. Biddle*, above cited. Does the extension of the time of sale materially impair the rights and interests of this creditor? The facts as developed by the record are notorious. The defendant lived in Richmond city during the war, when this city was under the actual control of the Confederate government. Whatever may have been his wishes, he was compelled to render allegiance to that government. He was compelled to use the only

currency then in existence in Richmond city. He bought with that currency and sold for it. He stated in his answer that he had no faith in the currency. He was solicitous, therefore, as a matter of course to part with it. He bought the notes in this case with it. He does not say this in these exact terms in his answer, but he does say that he gave a check on the bank for it; and the banks were paying nothing but Confederate money. He bought then this debt against the plaintiff with Confederate money. The debt consisted of notes yet to fall due at the time of his purchase. They were carefully kept from bank, the place of payment. The plaintiff was anxious to pay, but could not find his creditor nor the notes. The notes were secure in the creditor's possession, and so remained for nearly three years, without a demand of payment, or, indeed a permission of payment. During these three years, the creditor had virtually enjoined and restrained the payment of his own debt. He knew the debtor could pay in nothing but Confederate money; there was nothing else then to pay with, and he carefully eschewed the collection of the claim. The debtor
255 could not sell his property *under the trust deed; the creditor would not.

On the 3d of April, 1865, the Federal forces occupied Richmond city; and within eight days after the fall of Richmond, at the farthest, when there was universal poverty, destitution and distress; when the richest men in the community, because of the destruction of the currency, could not raise five hundred or a thousand dollars, the defendant, who had slept on his rights for years, suddenly awoke from his slumbers and demanded "his pound of flesh." By this time several thousand dollars had become due, and the creditor demands it under penalty of selling his property. The Legislature of Virginia steps in and interferes to prevent the wrong, declares that in a time of great public distress, on account of the destruction of the currency and the universal prevailing want, it would be a ruinous sacrifice of property to force it into market, and provides that sales under trust deeds shall not be made until January 1st, 1868, and the question for the consideration of the court is this: "Is this act of the Legislature of Virginia a violation of the constitution? Does it impair the obligation of contracts?"

There can be no doubt as to the bona fides of the legislation. It is not legislation similar to the Yazoo grants. There can be as little doubt that the Legislature, in both of its branches embracing some of the ablest and wisest men in Virginia, saw the great necessity and the uprightness and moral integrity of such legislation. They did not design to inflict injury, but to prevent it; they did not design to defraud creditors, but to protect them; not to protect one at the expense of the rest, but to protect them all by enacting that the property of debtors should be sold at such time as would ensure a fair value. The defend-

ant insists that it is a great wrong, almost an outrage, to suspend the collection of his debt for a few months, to interfere, as
256 he says, with the natural results *of the contract he has made. Is it a greater wrong that he should be delayed in the collection of his money a few months, or that the plaintiff's property should be taken from him at half its real worth? The letter of the contract, insists the defendant, reads that the property must be sold, whether it bring one-half its value, or the third of it. The appellant does not so read the letter of the contract, but if its letter read that way, its spirit is altogether different. Every contract must be construed rationally, and the intent of the contracting parties, according to the reasonable intentment of the contract, is to be carried out. But is it true that no regard whatever is to be had to the time at which property is to be sold other than that expressly mentioned in the "bond?" Is it not true that courts of equity, independent of express statutes, interfere to prevent great wrong, even when the letter of the deed demands a sale by prohibiting a sale? And if courts of equity may do that in individual special cases, without incurring the charge of impairing the obligation of contracts, why may not the Legislature, whose business it is *jus facere*, seeing a great public necessity, and that great oppression and wrong will ensue from sales of land at a crisis like this, declare that such wrong shall be prevented by positive and general legislation? The principle is the same in both cases; the only difference is, that it is more widely applied in the one case than in the other.

But the appellee says, that the suspension of the power of sale is a destruction of his right. Not at all. The right is all the while recognized and in *proprio vigore*. It is a vested right. He has a lawful and just claim to his money. The property of the appellant is under incumbrance. He is himself bound for its payment. But the defendant, in the language of the court in *Foster v. The Essex Bank*, 16 Mass. R. 245, has not "a vested right to do wrong."

He has not the moral nor the equitable
257 right *to sell the appellant's property in a time of great public monetary distress for half price.

The suspension of the power of sale under a trust deed no more impairs the right of the creditor than the suspending the power of the sale under a *fieri facias* by the execution of a forthcoming bond. The right to immediate collection is suspended in both cases. The results are identical; at least, they are identical when in both cases the security is ample. Why, then, urge against the Virginia act its unconstitutionality because it suspends the collection of the debt, when confessedly the law authorizing the giving of a forthcoming bond is constitutional, which produces the identical effect?

If the distinction, made in some of the cases between impairing the right and changing the remedy, is a sound one, the

appellant may justly insist that trust deeds are the creatures of equity tribunals, that the rights of beneficiaries in the trust owe their origin to the wisdom and the discretion of those courts, and that the power of sale is as much a part of the remedy (the power of sale for the benefit of the creditor) as the power to enforce specific performance of a contract of sale of realty is. There is neither reason nor justice in saying that one who holds the appellant's note for \$5,000 shall be compelled to wait for his money at the pleasure of the legislative will, while the creditor of an equal or less extent is permitted, by public sale, to sacrifice his property at half price, and there is no power in the Legislature to prevent it.

What is impairing the obligation of the contract? Our opponent answers, "by changing the time and manner of its performance." He is quoting the language of Justice McLean in *Bronson v. Kinzie*. Justice McLean dissented in that case, and this sentence is extracted from his opinion. To change the time and manner of performing a contract is not always to
258 impair its obligation. Time is often changed without incurring such a charge. The appellant, for example, executes his negotiable note at thirty days. He promises to pay thirty days after its date a certain sum. The face of the contract, its letter, says one thing. The law changes it, and says another and a different thing. He is to pay thirty-three, not thirty, days after its date. Again, the thirty-third day occurs on Sunday, or the 4th July, or the 1st January, or the 25th December; the law declares that payment must be made on the thirty-second day. So, too, in relation to the manner of performance; that may be changed without necessarily impairing the obligation of the contract. The appellant contracts in 1863 to pay one hundred dollars, meaning one hundred Confederate dollars. Would any court listen patiently to him if he sought now to discharge his obligation, to perform his contract, by paying one hundred Confederate dollars? The Legislature has changed the manner of performing the contract. He is now to pay in currency the worth of the Confederate dollars when the contract was made. Is this changing of the manner an impairing of the obligation of the contract? Is it not the rather giving it force and effect?

The Circuit Judge quotes approvingly the decision in *Bumgardner v. Circuit Court of Howard county*, 4 Miss. R. 50. The decision can hardly be sustained on authority. Of *Bailey v. Gentry*, 1 Miss. R. 164, it has been already stated that it is in direct conflict with *Chadrick v. Moore*, 8 Watts & Serg. and other cases before cited. *Blair v. Williams*, 4 Litt. went off on a point altogether different from that arising under the Virginia statute. It was like *Bronson v. Kinzie* in one of the particulars in which *Bronson v. Kinzie* is distinguished from the present. Under the penalty of two years' delay, the Legislature tendered to the

creditor a change of his contract. A law made in good faith exempting property from distress *or levy which was not before exempt, has been held repeatedly to be constitutional. See on this point *Conkey v. Hart*, 14 N. Y. 22; *Reed v. Penrose*, 2 Grant. (Penn.) 472.

Has the obligation of the contract in controversy here been impaired by the Virginia statute? The distinction between "obligation" and "remedy," if well taken, it is insisted, is material and important in this case, for remedy does not merely include the actual assertion of rights in the courts of the country, but includes also matters in pais. Thus to advertise property for sale under an execution is a part of the remedy; the length and manner of the advertisement is a part of the remedy. To take down property offered for sale for want of bidders is a part of the remedy. To distrain for goods under a lease, even though the lease in terms provides for the distress, is a part of the remedy, and, as has been seen, may be modified by legislation retrospective in its operation.

Why is not the power of sale by a trustee, for the purpose of paying the proceeds of sale to a beneficiary. (whose rights are the creatures of equity in affording remedies to those really interested and not nominally,) also a part of the remedy?

It is not exactly stated in the opinion of the Circuit Judge, in what special items the present statute of Virginia has offended against the rules he has laid down as ascertaining a law to be unconstitutional. One of those rules to which he adverts is, that a legislative act "cannot suspend all remedies existing at the time the contract was made, because these remedies form a part of the contract, and are an essential ingredient in it." This is not the case here. So far as the present controversy is concerned, the single suspension of the power of sale under a trust deed for a limited time is involved. This is but one remedy out

of many, not all the remedies for the
260 enforcement *of the contract. The creditor here can sue at law; the stay law does not prevent him. The creditor may invoke the aid of equity, if the debtor were improperly dealing with the property under encumbrance; the stay law does not inhibit such a suit. The Circuit Judge errs in the statement, that the deed authorized the trustee, out of the money raised by sale, to "pay to the creditor the amount due on the notes with interest." That is the language of the Code of Virginia, chap. 117, sec. 6, not of the deed. The Circuit Judge says that "the principle to be deduced from the decisions is, that the Legislature may alter whatever belongs to the remedy merely, provided the alteration does not impair the obligation of the contract." This language seems scarcely consistent with the statement afterwards made, that "these remedies form a part of the contract, are an essential ingredient of it." If this be so, it would seem impossible to alter the remedy, without at the same time impair-

ing or changing the contract. Either the one or the other position must be abandoned; they do not stand together. To reconcile these contraries, may not this be the true line: "Whenever it is the purpose of the Legislature so to deal with the subject of contracts as to impair them, whether by improperly changing the mode of asserting rights under them, or by changing their terms and spirit, such legislation is in contravention of the constitution. Whenever, in good faith, the Legislature deals with the subject of contracts, so as not to impair but to preserve the rights of all parties thereto in all their entirety, such legislation is constitutional, even though the immediate enjoyment of the fruits of the contract be postponed." Time sometimes is of the essence of the contract; at other times not so. Whenever it is of the essence of the contract, to abridge or extend the time of performance is to impair its obligation. But in ascer-

261 taining the time of performance, the letter of the contract *is not to be adhered to in contravention of its spirit. These principles are few and simple, and the appellant is willing that his cause may be determined by their application. Was it the design and true purpose of the appellant that his property should be sold while the cannon of the Federal forces were thundering at the gates of Richmond? Did his beneficiary, Judge Gregory, mean by taking his deed that, in case of failure to pay the notes, the property should be sold at his option at all events, without regard to circumstances? Was it understood, agreed, contracted, that though a terrible civil war should intervene, flagrante bello, before the thunder of artillery had scarcely ceased, while the currency of the country was utterly destroyed, and when there was universal monetary distress, a sale should be made of the property conveyed to the ruinous loss of the appellant? An emphatic negative should be given to these questions. Yet to say that a statute which interposes to prevent such a wrong, to avert such a hardship, is impairing the obligation of the contract and unconstitutional, is to give countenance to this unreasonable interpretation of the appellant's deed; is to say, in other words, that come what will, at all hazards, the property is to be sold at the option of the creditor, whatever the loss, whatever the ruin to the debtor. After all, the appellant urges the true question for the solution of the court is this, whether the statute of Virginia complained of is in good faith an exercise of legislative power not to perpetrate a wrong, but to prevent it; and if the latter, he submits whether it affect the remedy or the contract itself, it is not in violation of the constitutional provision against impairing the obligation of contracts.

Was the act in good faith? The appellant, in answer to the question, contents himself with a simple reference to the preamble of the statute, and to what has already been said.

262 *Before concluding, it is proper also to refer the court to what is said by the legislative committee defending the action of the Legislature in passing the law; also to the American Law Register 1863-4, pp. 93, 107; 1865-6, pp. 83-94, and the following cases:

Classification of cases in which stay laws have been held constitutional.—Acts abolishing distress for rent, though expressly provided for in the lease—Taking away the right of a creditor to sequester the property of his debtor—Abolishing imprisonment for debt—Changing or modifying the remedy—Staying executions—Abolishing courts—Confining creditor to one remedy—Retrospective registry acts—Repealing extraordinary remedy—all held to be constitutional.

2 Grant. (Penn. R.) 472, Reed v. Penrose; 30 Alab. R. 120, Coosa River St. Co. v. Barclay; 20 Illinois R. 209, Wood v. Child; 14 N. Y. R. (4 Kernan) 22, Conkey v. Hart; 17 Illinois R. 344, Newkirk v. Chapron; 1 Wisconsin R. 26, Lightfoot v. Cole; 3 Kernan R. (N. Y.) 299, Van Ranssalaer v. Snyder; 4 Texas R. 470, De Cordova v. Galveston; 36 Maine R. (1 Heath) 9, Colby v. Dennis; 3 Selden R. (N. Y.) 500, Donnelly v. Corbett; 13 Geo. R. 1, Tucker v. Harris; 9 Gill. R. 299, Baugher v. Nelson; 1 Maryland Ch. Decis. 66, Wilson v. Hardesty; 2 English R. 150, Newton v. Tibbatts; 2 Douglass R. 38, Bronson v. Newberry; 3 Denio R. 274, Stocking v. Hunt; 4 Gilm. R. 221, Bruce v. Schuyler; 8 Smedes & Marsh. R. 9, Com. Bank v. Chambers; 1 McLean R. 528, Gray v. Monroe; 4 Humph. R. 13, Woodfin v. Hooper; 6 Blackf. R. 373, Fisher v. Lacky; 1 Alab. R. 312, Rathbone v. Bradford; 2 Alab. R. 401, Bartlett v. Long; 4 Wheat. R. 122, Sturges v. Crowninshield; 12 Wheat. R. 370, Mason v. Haile; 47 Maine R. 91, Kingly v. Cousins.

263 *Mortgage stay laws held constitutional:

9 Wisconsin R. 125, 126; Charl. R. 175, Grimball v. Ross; 12 Iowa R. (4 Withers) 282, Holloway v. Sherman; 4 Minnesota R. 298, Stone v. Bassett; 4 Minnesota R. 483, Haywood v. Judd; 5 Minnesota R. 277, Freeborn v. Pettibone; 9 Alab. R. 713, Iverson v. Shorter.

Acts changing the statute of limitations—Changing existing rules of evidence—Prescribing new rules of evidence and of judicial procedure—held constitutional:

1 How. U. S. R. 311; 2 How. U. S. R. 608; 3 Peters R. 290; 28 Miss. R. 361; 4 Wheat. R. 206; 8 Mass. R. 429; 5 Pick. R. 26; 22 Pick. R. 431; 9 How. U. S. R. 527; 8 Id. 331; 16 Id. 369; 2 Minnesota R. 241; 13 Georgia R. 306; 7 Georgia R. 163; 1 Morris R. 59.

Acts exempting certain property from execution held constitutional:

2 Minnesota R. 89; 1 How. U. S. R. 311; 1 Kernan R. (N. Y.) 281; 2 Douglass R. 197.

RIVES, J. The questions that have been

made in this case, and discussed at such length, grow out of a deed of trust which the appellant gave on the 19th September, 1860, on his house and lot in the city of Richmond, then recently purchased and conveyed to him by deed of the same date, to secure the unpaid purchase money, for which he had executed ten negotiable notes, falling due at successive intervals of six months, and thus extending from March the 22d, 1861, to September 22d, 1865. The first four of these notes were paid; the remaining six were passed in January, 1862, for value to the appellee Franklin Stearns, who afterwards, in view of the rapid depreciation of the Confederate currency, refrained from any demand of payment till the restoration of Federal authority, and the consequent return of Federal money. *After waiting with the appellant for the space of a year thereafter, and six months after the last note became due, he required the trustees to sell. Accordingly, they advertised the property for sale on the 4th day of May, 1866. To prevent this sale, the appellant filed his bill, accompanied by copies of said trust deed and said advertisement as exhibits A and B, and averring, that "said sale was, under the circumstances, inequitable, unjust and illegal." No other reason was assigned for this assertion except this, namely: "At the last session of the Legislature of Virginia, the General Assembly of Virginia, impressed with a sense of the hardship which would result from the forced sales of property, resulting in unjust and ruinous sacrifice, expressly enacted that there should not be any sales under deeds of trust for the payment of money (except in certain specified cases, of which this is not one,) until the 1st day of January, 1868." The bill concluded with a prayer for an injunction against the sale, which was awarded on the 24th of April, and the subpoena executed on defendants on 1st May, 1866.

On the 4th of June, 1866, the defendants filed their several answers; the trustees denying for themselves any knowledge of the allegations of the bill, and all interest in the suit, except as mere trustees; and the appellee Stearns, responding to what he terms "the only material allegation in the bill, namely, the act of the General Assembly forbidding sales under trust deeds until the 1st of January, 1868, takes issue upon that law as void under the constitution of Virginia and the constitution of the United States. Previous to the filing of these answers, to wit, on the 2d June, 1866, a motion was first made to dissolve; and was successively continued till the final hearing on the 17th day of January, 1867, which resulted in the dissolution of the injunction and the dismissal of the bill.

But, in the meantime, when the answers were filed *on 4th of June, 1866, a general replication was entered thereto on behalf of the plaintiff, and on his motion, by counsel, the cause was set for hearing.

I have been thus minute and explicit in tracing the successive stages of this cause that I might more clearly dispose of two preliminary objections to this decree, that seem to have been advanced for the first time in this court. The first of these is predicated of the fact that the court had possession of the case simply on the motion to dissolve, and overlooks the prior and material entry, by which the plaintiff had set down the cause for hearing. But if it be conceded that there is a defect of clerical form and regularity, in which this prior entry has been ignored, and the cause brought on apparently to a hearing on a motion to dissolve, it is assuredly such a matter as it behooved the party affected thereby to notice in the court below, where it admitted of easy correction, and is not an error of substance, to be availed of on appeal.

The second of these objections applies to the lack of explicitness in the terms of the advertisement; and we are asked to view it now in the light of authorities upon the invalidity of sales made in disregard of the terms of the power. But it is a sufficient answer to say that no such question or issue has been made in this case. This advertisement is made an exhibit with the bill; no intimation of its insufficiency or illegality escapes the complainant; he does not allege there, as he now does here, that the advertisement should state the notes and the amounts due, so as to notify and prepare bidders for the sale. The bill itself discloses his full knowledge on that subject, and his ability to protect himself and his friends from being ensnared by the vagueness of the notice. It is, therefore, too late to start this objection for the first time in this court. However such an objection might weigh in the event of a sale and actual damage resulting from an insufficient advertisement of its terms, it is wholly inapplicable to a case like the present, where the object of the bill is to prevent a sale on grounds wholly irrespective of the advertisement. Such objections are virtually waived or abandoned by the appellant in the mode in which he has chosen to conduct and manage his cause, and cannot now be availed of in this court.

Having thus disposed of these assignments of error, we are brought to the investigation of the single question in this cause. On this alone it was argued, heard and decided below. No excuse, however ingeniously suggested, exists to avoid it here. It must be met under the pleadings and the decree. It is a question of magnitude, not only because of its consequences to the parties and its bearings upon the community at large, but more especially because of the delicate and responsible nature of the function required of this court. True, it is not a question of dimensions corresponding with the extensive range of the argument. It has been discussed as if involving all the provisions of the act of March 2, 1866. No special attention was

given to the particular clause of the act embracing sales under deeds of trust; nor any enquiry made to distinguish it from the suspension of judicial process under the same act. Both in the argument here, and the opinion of the court below, these provisions of the act were, for the most part, confounded, and assumed to rest upon the same ground; or, at any rate, if the discrimination was incidentally suggested, it was not developed with that clearness and precision to display the impropriety or avoid the necessity of pronouncing on the constitutionality of the whole law. Had more attention been paid to this distinction, and greater pains taken to treat this particular enactment separately and apart from other parts of the statute not involved in this controversy, I venture to suggest it would have greatly abridged the argument, and *involved far less of the metaphysical refinements and speculations, that have confused the opinions of the courts on the difference between obligation and remedy of contracts to such a degree as to leave the doctrine on that point in a most unsatisfactory state of uncertainty and perplexity. It is, however, the manifest duty of this court to confine itself to the issue made by the pleadings; and to abstain from expressions or intimations of opinion which would be extra-judicial, and might be deemed a departure from the reserve usual on such occasions.

Our enquiries must, therefore, be confined to that clause of the statute forbidding sales under deeds of trust until the 1st of January, 1868, which period was extended by a subsequent act to the 1st of January, 1869. This throws out of our consideration the vexed question of the authority of the Legislature over judicial process and remedies to enforce contracts, and will limit our investigations to the plainer doctrine of legislative action upon the obligation, as contra-distinguished from the remedy arising out of contracts. This position, however, I shall seek to put in a clearer light in a subsequent part of this investigation; for the present, I desire to preclude all or any expectation of my being betrayed into any opinion upon such parts of this statute as are in no wise involved in this controversy; and to express my belief that a satisfactory decision of this cause can be reached without embarrassing ourselves with the intricate and conflicting views to which I have alluded, and without undertaking to decide the constitutionality or unconstitutionality of the whole statute.

It has been remarked upon as a curious circumstance, that the framers of the constitution, in laying down barriers against legislative invasions of private rights, should have omitted to provide any positive guarantee or specific protection; should have attached no sanction or penalty, 268 *and been silent as to the mode in which the fact of violation was to be established or the prohibition enforced. Sedgwick on Stat. and Const. Law, p. 477. But it would seem that the nullity of a law

repugnant to the constitution was enough to maintain this bulwark against legislative encroachments. A resort to the courts must be had to test the validity or assert the supremacy of laws; and the interests of persons affected by them furnish an active motive and an imperious necessity for such a resort. In this way, the judiciary takes cognizance of such cases, and is clothed with authority to prevent the ministerial officers of justice from obeying an act of the Legislature transcending its prescribed powers, and for that reason void. Hence, it is now well settled, that it falls within the peculiar province of the judiciary to protect the citizen against all infractions of the constitution touching his rights; and no higher protection or guarantee, it seems to me, could be given than is found in the practical administration of justice under the restraints of the constitution and the solemn sanctions of an official oath to support it. While, therefore, a due respect to the Legislature exacts of the judiciary the cautious rule, which it has always professed and acted on, of exerting its high prerogative of denouncing a law as unconstitutional only in clear cases, and of resolving all doubts in favor of the law, nevertheless it would be a culpable surrender of its independent judgment and co-ordinate authority if it could be led by motives of deference or delicacy on the one hand, or the fears of responsibility on the other, to find shifts or excuses for denying the protection which the fundamental law of the land ordains to private rights against legislative violations. I would magnify, rather than underrate, the respect due from this court to the Assembly, whose laws it administers; that sentiment, however, inspires no blind and servile homage; it exacts only 269 that respectful consideration *which, while conceding the full measure of deference to be paid to the Legislature, leaves to this court absolute freedom of deliberation upon its acts when brought under its review.

These considerations are much enhanced in this case by the caution and deliberation which marked the passage of this act. If any part of it be repugnant to those constitutions, which the members of the Assembly as well as ourselves are bound to observe, it was because of no inadvertence on their part, nor of any failure to examine the grave challenge of their competency in the premises. The able and ingenious reports by which this law was advocated, proceeded from a committee comprising the highest legal talent of the State, and who advanced a new theory for the justification of the law. The preamble of the act itself attests the direct and special consideration which the Assembly gave to the questions we are about to examine. It recites, that "while this General Assembly recognize their imperative duty to respect and obey the constitutional provisions which prohibit the enactment of any law impairing the obligation of contracts, they believe that, when construed with reference to the

objects of those provisions, and in the light of principles recognized and acted upon by the courts of justice at the time of the adoption of the constitution of the United States, as well as before and since that time, those provisions do not forbid them from granting a temporary suspension of remedies in such a state of things as the present, in order to prevent the cruel and ruinous results which would ensue without such interposition, and especially as it only requires that creditors, while their right to ultimate payment is held inviolable, shall submit to a course to which they might well be constrained by the instincts of natural justice and humanity."

No doubt, therefore, exists that the 270 Assembly duly considered *and decided for themselves this constitutional question, and that the passage of the law is to be taken as their judgment that there is nothing in it in conflict with the constitution of the United States or the constitution of this State. This fact truly admonishes us to the greater caution in our deliberations and the closer scrutiny into our reasonings; but it cannot exonerate us from the duty of following our convictions where, by the constitution, public interests and private rights are made to abide our independent judgments in the last resort.

The first step in our enquiries should be, to acquire a clear and definite idea of the constitutional prohibition. Its insertion in the constitution of the United States was to preserve a uniform sanctity of contracts in all the States. How it came, in almost the same language, to find a place in the State constitutions is not so clear. It appears in the Federal constitution as a restriction upon the States, which would seem to supersede the necessity of a similar provision by the States. But doubtless the principle had been canonized as a fundamental guarantee of private rights, and along with the interdict upon bills of attainder and ex post facto laws been ranged among the indisputable maxims of individual right and liberty, and the essential barrier for their protection against the invasions of the Legislature. It was first introduced into the constitution of this State at its revision and amendment in 1829-30, and was reported among the provisions of the legislative department by Mr. Madison, who had borne so conspicuous a part in the formation and adoption of the Federal constitution. Our constitution, as well as the constitutions of a large majority of the States, adopts the language of the constitution of the United States, namely, "any law impairing the obligation of contracts." In Ohio, Indiana and Illinois, the term "obligation" is substituted by "validity," and in Kentucky and

271 Pennsylvania *dropped, so as to leave the clause, "any law impairing contracts." However varied in phraseology, it is substantially the same provision, and aims at the accomplishment of the same object. In *Ogden v. Saunders*, 12

Wheat. R. 256, Justice Washington seeks to establish "a distinction between a law which impairs a contract and one which impairs its obligation." This case, indeed, abounds with subtle reasonings and metaphysical refinements, which are rather curious than practical; but it is sufficient for our purpose to treat this language as designed to secure the inviolability of contracts. This is denied by none. The attempts that have been made through the resources of a learned etymology to explain this phrase seem to have darkened the sense, and to have given rise to the charge of obscurity. There is no use in straining after an occult meaning. Its plain import to the common understanding is more reliable and far better than the subtleties of scholastic derivation. Chief Justice Marshall has well and summarily disposed of all these refinements by tersely declaring: "It would seem difficult to substitute words which are more intelligible or less liable to misconstruction." *Sturges v. Crowninshield*, 4 Wheat. R. 122, 197. He further adds: "The law binds him to perform his undertaking; and this is, of course, the obligation of his contract." The same idea is conveyed in apt words by Justice Curtis in *Curran v. State of Arkansas*, 15 How. U. S. R. 304: "The obligation of a contract in the sense in which these words are used in the constitution is that duty of performing it, which is recognized and enforced by the laws." These definitions of course exclude the obligation growing out of the moral and natural law, as resting upon the sanctions of conscience and the universal governing principles of our nature and being. The former is beyond the reach of the human law-giver; and the latter, while

272 still controlling the intercourse *of nations, is substituted in society by civil or municipal law. Still, our contracts are sensibly influenced by considerations pertaining to their moral or natural obligation on the one hand, and their legal obligation on the other. Thas, in our dealings, what a different value do we attach to the pecuniary obligation of a man of probity, punctuality and means, and of another, doubtful in his circumstances and careless of his engagements? In the former case, there will be no thought of a day in court or the services of a sheriff; in the latter, it would be imprudent to reckon upon payment save at the end of the law; so that it is not without reason that Justice Johnson (*Ogden v. Saunders*) contended, that "the obligation of contracts will be found to be measured neither by the moral law alone, nor by the universal law, nor by the laws of society alone, but by a combination of the three; an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the emergencies of society by positive law." *Story on Const.* § 1378.

Let us now advance another step in this enquiry, and consider what is meant by the

term "impairing." To this end, it will be useful to advert briefly to the history of this constitutional provision, and the mischiefs which led to it. In reply to the question, what were the laws in the mind of the framers of this provision? Judge Marshall (*Sturges v. Crowninshield*, 4 Wheat. R. 122, 204,) said: "They were such as grew out of the general distress following the war. Paper money was issued; worthless lands and other property of no use to the creditor were made a tender, and the time of payment stipulated in the contract was extended by law." In his *Life of Washington*, the state of parties upon these measures is thus graphically sketched: "The discontents and uneasiness arising, in a great measure, from the embar-

273 rassments *in which a great number of individuals were involved continued to become more extensive. At length, two great parties were formed in every State, which were distinctly marked, and which pursued distinct objects with systematic arrangement. The one struggled with unabated zeal for the exact observance of public and private engagements. The distresses of individuals were, they thought, to be only alleviated by industry and frugality; not by the relaxation of the laws or a sacrifice of the rights of others. The other party marked out for itself a more indulgent course. Viewing with extreme tenderness the case of the debtor, their efforts were unceasingly directed to his relief. To exact a faithful compliance with contracts was, in their opinion, a measure too harsh to be insisted on, and was one which the people would not bear. They were uniformly in favor of relaxing the administration of justice and of affording facilities for the payment of debts, or of suspending their collection and of remitting taxes. In many States the parties last mentioned constituted a decided majority of the people, and in all of them it was very powerful. The emission of paper money; the delay of legal proceedings, and the suspension of the collection of taxes, were the fruits of their rule wherever they were completely dominant." Mr. Madison's testimony is to the same effect: "In the internal administration of the States, a violation of contracts had become familiar in the form of depreciated paper made a legal tender; of property substituted for money; of instalment laws, and of the occlusion of courts of justice, although evident that all such interferences affected the rights of other States, relatively creditors, as well as citizen creditors within the States." In the State of North Carolina, smarting under this extreme policy of relief, this prohibition of the constitution was specially advocated by a member of the convention, on the ground that a sister

274 State *could not again do what they had heretofore done—"make pine barren acts to discharge their debts; declare that our citizens shall be paid in sterile, inarable lands at an extravagant price; pass instalment laws, procrastinating the

payment of debts due from their citizens for years."

This contemporaneous history of the legislation out of which this restriction grew, and these declarations of framers of the constitution, conclusively prove that this clause was designed to interdict to the States all legislative interference with contracts, such as had so disastrously relaxed the morals, interrupted the commerce, and disturbed the harmony of the States. For obvious reasons, no attempt was made to enumerate cases within this prohibition; but its terms so comprehensive as clearly to embrace the antecedent mischiefs, to which it was specially directed, as well as to provide against future evils of the same kind. The Supreme Court of the United States has, in a long series of decisions, announced their conclusion "that any law which enlarges, abridges or in any manner changes the intentions of the parties, resulting from the stipulations in the contract, necessarily impairs it. The manner or degree in which this change is effected can in no respect influence the conclusion; for whether the law affect the validity, the construction, the duration, the discharge or the evidence of the contract, it impairs the obligation, though it may not do so to the same extent in all the supposed cases. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes; imposing conditions not expressed in the contract; or dispensing with the performance of those which are a part of the contract, however minute or apparently immaterial in their effect, impairs its obligation." *Ogden v. Saunders*, 12 Wheat. R. 213, 327; *Green v. Biddle*, 8 Wheat. R. 1, 84. In some of the judicial expositions of this clause, it is to be regretted

275 *that an incautious qualification of this term "impairing" has crept into the language of the courts, for which I can find no warrant. In that branch of the doctrine, which I shall have no occasion to examine, touching the distinction between obligation and remedy, it is frequently said that the latter may be changed so that it does not materially impair the former. This epithet is vague, uncertain and calculated to confuse and mislead. A better guide is afforded us by Justice Woodbury, in *Planters' Bank v. Sharp & al.*, 6 How. U. S. R. 301, 327, where he says: "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the constitution, to be impaired at all. This is not a question of degree, or manner, or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force."

The final term of this prohibitory clause requires neither explanation nor comment. The meaning of "contract" is well understood, and is not open to disputation. It is only necessary to add, that it applies to all contracts, whether verbal or written, express or implied, executory or executed, whether between individuals, corporations, States and individuals, or between separate

States. It may as well exist in the form of a grant, public or private, as of mutual undertakings. Whatsoever its character may be, it is secure from all legislative control or modification; and the public faith is solemnly pledged, under all circumstances and in spite of all temptations, to uphold its integrity.

In these comments on this clause of the constitution, I have ventured on no principle which is not conceded in all the cases in which this restriction has been judicially considered. I am not aware of any authority against the positions I have taken; nor have I so far run counter, in any respect,

to the common concessions of the op-
276 posing *counsel in this case. And yet I shall apply no other doctrine to the solution of our present enquiries. The variance and the difficulty will, doubtless, occur in determining the state of facts, to which this conceded law shall be applied. Nor does it seem to me there can be any serious discrepancy of views in the ascertainment of the real nature and effect of the contract in this case. Had it pleased the parties to confine their dealings to the conveyance of the tenement on the one hand, and the taking of the negotiable notes on the other, a very different question would exist as to the means of enforcing payment and as to legislative control over such remedies. In such an event it would have been in the contemplation of the parties that satisfaction, if not voluntary, could only be coerced by a resort to the courts. But the parties did not stop at this point. The vendor had not the security he wished. A supplementary, though distinct contract was entered into. It consists of the deed of trust of the 19th September, 1860. It has the dignity and solemnity of a sealed instrument. The appellant thereby conveys to Jas. M. Taylor and John Enders (trustees) his house and lot in trust to secure to John M. Gregory the payment of the sum of \$13,299.55, due by ten negotiable notes, drawn by the grantor and payable to said Gregory, with the following stipulation, viz: "In the event that default shall be made in the payment of either of the above mentioned notes as they become due and payable, then the trustees, or either of them, on being required so to do by the said John M. Gregory, his executors, administrators or assigns, shall sell the property hereby conveyed. And it is covenanted and agreed between the parties aforesaid, that in case of a sale, the same shall be made after first advertising the time, place and terms thereof for fifteen days in some newspaper published in the city of Rich-

mond, and upon the following terms,
277 to wit: For cash as to so much *of the proceeds as may be necessary to defray the expenses of executing this trust, the fees for drawing and recording this deed, if then unpaid, and to discharge the amount of money, principal, interest and charges, then payable upon the said notes; and if at the time of such sale any of said notes shall not have become due and paya-

ble, and the purchase money be sufficient, such part or parts of the said purchase money as will be sufficient to pay off and discharge such remaining note or notes shall be made payable at such time or times as the said remaining note or notes will become due, the payment of which part or parts shall be properly secured; and if there be any residue of said purchase money, the same shall be made payable at such time, and be secured in such manner, as the said George A. W. Taylor, his executors, administrators or assigns shall prescribe and direct; or in case of his or their failure to give such direction, at such time and in such manner as the said trustees or either of them shall think fit." Here it will be seen that the debtor, who now prays the benefit of the stay law, had contracted with his creditor and his assigns for all the means and conditions whereby payment was to be made, by a sale of the property. The deed established all the agencies for the execution of the trust. Unlike a mortgage, it contemplated no day in court for foreclosure or redemption; nor sale under the direction and terms of the court, and by its officers. But its design was to avoid the processes of the law, and to confide to impartial agents summary means of realizing the objects of the trust. Had the parties, by the nature of their agreement, as in case of a mortgage, been thrown upon the courts for redress, they might have been amenable to the control, which the Legislature possesses over judicial remedies; but when they have, by their own stipulations and for very obvious reasons, sought to preclude

themselves from such a resort, the
278 debtor cannot "avail himself of this suspension of sale without altering the terms of his contract and violating the intentions with which it was entered into. What is a deed of trust? It is a form of security which has, in our practice, superseded the mortgage, and doubtless for the very reason that it does not require the intervention of the courts. The introduction of trustees as impartial agents of the creditor and debtor, admits of a convenient, cheap and speedy execution of the trust, and involves none of the expenses and delays attendant upon mortgages.

At an early period it met with some resistance from the court and the bar, though feeble and ineffectual. It was depreciated as an engine of oppression in the hands of the creditor. It was denounced as a pocket-judgment. Where the creditor was trustee, it lost its peculiar character, and was treated as a mortgage. Upon the false assumption that the trustee was but the agent of the creditor, it was urged in argument upon the court in the case of *Moss v. Norvell*, 3 Munf. 170, that deeds of trust were nothing but mortgages, and could only be enforced by will in equity. But this pretension of counsel seems to have received no countenance from the court. It is now a favorite security for the payment of money, closely interwoven with the transactions of business, and firmly established by the practice

of the county and the sanction of the courts. It has, doubtless, aided credit, facilitated the collection of debts, and saved to the debtor the costs of legal proceedings. But if its convenience and advantages were less, and its evils outweighed these, there would be nothing in such considerations to loosen the bonds which the debtor has chosen to put upon himself. It is eminently a self-executing contract. All the instrumentalities are appointed by it for its final discharge according to the declared intentions of the parties. The deed now before

us is Taylor's contract that, upon default, a sale of his *property shall be had, under prescribed terms, for the

payment of the creditor or his assigns, &c. The trustees and creditor are purchasers for value. The latter has the privilege of requiring the former, under the stipulated terms and conditions, to make his money by a sale; and the grantor in the deed has obliged himself thereto by his own deliberate covenants. How, then, can that sale, when properly ordered, be suspended for a fixed term, without violating the intentions of the parties and destroying the obligations of their contract? Shall it be said that a sale is a remedy, that may be likened to legal process, and as such liable to be changed and modified by the Legislature? If so, there is at least this material difference, that it is a remedy of the party's own appointment, and the very essence of his contract. It cannot be segregated from it and treated as an extrinsic remedy within the pale of legislative jurisdiction. Strip from a deed of trust this feature of sale, and it is meaningless. It loses its characteristic and vital principle. The whole deed is one entire contract, all whose covenants are inseparable, and have a common relation and bearing upon the main central design of the instrument, namely, the enforcement of the trust in pais without suit at law or in equity. But suppose this version is wrong, and that you may separate it into—1. A lien for the security of the debt; and 2. A remedy for its collection. I am still at a loss for any real, substantial analogy to the judicial remedies, which are exempted, in a certain sense and with certain qualifications, from this prohibitory clause. The one arises out of the contract itself; the others are the offspring of the legislative will, and pertain to the judicial system of the State. From this analysis of this instrument, I infer with confidence that there is no foundation for the argument of the appellant's counsel, that this deed is not a contract, but nothing but a

remedy, in the meaning of that controverted *and indeterminate doctrine as to the limits of legislative power over remedies as distinguished from the obligation of contracts. The authorities that were cited in support of this position—as that the recital in a deed of trust does not change the dignity of a debt thereby secured, and that there are well established principles of equitable jurisdiction over the execution of such deeds—do not tend to

prove that these instruments are regarded or treated as remedies, and divested of the attributes of contracts. It is very true, as remarked by Justice Johnson in *Ogden v. Saunders*, that “in an advanced state of society, all contracts of men receive a relative and not a positive interpretation. The State construes them, the State applies them, the State controls them, and the State decides how far the social exercise of the rights which they give over each party can be justly asserted.” This jurisdiction, therefore, attaches to them as contracts; and it is a mistake to suppose that such judicial cognizance is at all predicated of them as remedies, or justified on any such pretext.

Here, by the special terms of the deed, and according to the intention of the parties, the sale should have taken place as advertised, on the 4th May, 1866; but the law steps in and postpones it by one act to 1st January, 1868, and by another to 1st January, 1869. Does not this intervention plainly defeat the agreement of the parties and the obligation of the contract? It was admitted in argument, that if the Legislature had undertaken to protract the maturity of the notes and the happening of the default, it would have been a usurpation of authority and an infraction of the constitution; is it less so when the law arrests the parties, and withholds them, or either of them, from reaping the fruit of their agreement for a sale? If a material stipulation be defeated, it surely could not be said with any plausibility that the obligation

*of the contract was not impaired in the meaning of this restriction.

I have thus endeavored to show that this case is a peculiar one, does not involve the intricate doctrine relating to legislative changes of judicial proceedings and processes, mesne and final, and should be decided by a practical interpretation of the constitution, and the ordinary rules of reasoning. The authority of adjudicated cases can only be brought to our aid through analogy, and the application of the reasonings employed in them. Nevertheless, it is well to examine how far the positions I have taken are fortified by authority. The case of *Pool v. Young*, 7 Monr. R. 588, is very pertinent to this case. It was there made a question, whether the relief laws of Kentucky, giving an indulgence of two years unless bank paper was received in payment, and forbidding a sale for less than three-fourths of the appraised value, could defeat the stipulations of a prior mortgage, empowering the mortgagee, on default of payment, to sell the estate for ready money; and it was held that the chancellor was bound to specifically enforce the contract by a sale for cash in hand, whether those statutes were regarded as constitutional or not; and further, that such stipulations of the parties fixing the remedy for a breach of their contract must govern the chancellor as the law of the case. The reasoning of the court is so apposite to our present investigations, that I

cannot refrain from submitting the following copious extract from it: "If this case was not one peculiarly circumstanced, (as it really is), it would be sufficient for us to refer to the cases of *Lapsley v. Brashear* and *Blair v. Williams*, 4 Litt. R. 34-47, to prove that, according to the settled course of decision in this court, the plaintiff in error would not be entitled to the credit of two years secured by the act of Assembly,

because that the act in this respect is 282 in contravention of "the constitution of the United States. But it is not necessary to rest on these decisions. They show that the bare understanding that the contract, when made under existing law, includes that law in its composition, precludes the operation of such an act; but here there is no necessity of implying such an understanding, for there is an express agreement between the parties regulating and fixing the remedy between them in the mortgage, if the estate should be sold for the purpose of raising the money due. Nor is it necessary to enquire, whether the act requiring estates to be valued, and if they should not bring three-fourths of that value, directing them not to be sold at all, comes within the principles recognized in *Blair, &c., v. Williams* and *Lapsley v. Brashear*, and is therefore unconstitutional so far as it operates upon contracts made before its passage. For the stipulation of the parties in this instance meets that case, and excludes the application of the valuation act. In the condition to this mortgage is the following express stipulation: 'If the said Pool shall neglect or refuse to pay any or all of the sums aforesaid as they become due to the said Young, then said Young may, by giving twenty days' notice at the public houses in the town of Winchester, in writing, proceed to sell to the highest bidder, for ready money, from time to time, so much of said land as will meet all deficiency of consideration money, with interest and all costs; and the balance, after all is paid, shall be paid over to said Pool.' Now it will be seen that applying the act of indulgence by a sale for two years, unless bank paper was taken, or the valuation act either, will expressly and essentially alter and change these stipulations between the parties. Either of these acts incorporated with and bearing upon their contract would make it read that, instead of selling for ready money, Young should sell for bank paper at a credit of three months, and for money at the end of two

283 *years; and if the property should not sell for three-fourths of its appraised value in the opinion of commissioners appointed for that purpose, he should not sell at all. To admit a subsequent act of the Legislature thus to modify and essentially vary the written stipulations of the parties, would concede to the Legislature a power to make a new contract and destroy the old altogether—a power not assumed by the letter of the act itself, for it only professes to operate on general remedies. The stipulation of the parties applies to the

remedy and regulates it; fixes its terms and its credit and what is to be taken in payment, and provides for an unconditional sale without any fixed value, except so much ready money as the estate would bring. It was competent for the parties to make such a contract. There was no law forbidding it when it was made. It was then both fair and legal. How, then, can a Legislature change the words, sense and substance of the agreement? It is true that Young did not himself attempt to execute this stipulation without the aid of a court of equity; but this was to the benefit of his adversary, who now complains," &c.

This extract demonstrates that that case is an authority directly in point, and was decided by the course of reasoning which I have pursued. Applying its doctrine here, I am authorized to contend that this act of March 2, 1866, makes a virtual interpolation in the contract, by which it adds a new condition, suspending the sale beyond the period of default as fixed by the parties.

I have also found another case, very closely approximating this, as far as I can judge by the abstracts of it. I regret I have not access to the report of it, and must content myself with a brief statement of it, as derived from treatises upon this subject. It is a decision from Pennsylvania, and is thus quoted in the *American Law Register* 1863-4, N. S. p. 107: "Where the par- 284 ties to a *contract expressly include in it the legal remedy by which it is to be enforced, the Legislature cannot pass any law to change the remedial process agreed upon. The defendant having expressly waived all stay of execution, an act giving a stay in all such cases was held unconstitutional as to such contract." *Billmeyer v. Evans*, 4 Wright's R. 324. It is somewhat more fully stated in the recent treatise of Metcalf on Contracts, p. 334, as follows: "A statute of Pennsylvania granted a stay of execution under certain conditions on all judgments or debts upon which stay of execution had been or might be waived by the debtor in any original obligation or contract upon which judgment had been or might thereafter be obtained. In a case in which debtors, by a sealed instrument, authorized an entry of judgment against them, 'without any stay of execution after the day of payment,' it was held that this was a release of their right to a stay of execution, and became a part of their contract, and that the Legislature could not constitutionally authorize a stay of execution beyond the limit of that contract." S. C. 40 Pennsylvania State R. 324.

It seems to me that the parties here, by agreeing upon agencies exterior to the courts for final satisfaction, as effectually precluded any interference therewith by law as if they had expressly bound themselves not to take advantage of any subsequent legislation in conflict with their express understanding. The case would not be at all stronger if the parties, by reference to past or anticipated legislation, had stipulated that it should in no wise

affect their agreement. They had a constitutional guarantee for the exemption of their contract from legislative infraction; and a positive covenant on their part to that end would have been merely supererogatory, and would have imparted no additional sanction to the contract. It is on

285 this ground I invoke the authority of that case to sustain the *views I have advanced. I am further sustained in this position by the language of the Supreme Court in *McCracken v. Hayward*, 2 How. U. S. R. 608: "If the defendant," says Justice Baldwin, "had made such an agreement as to authorize a sale of his property, which should be levied on by the sheriff, for such price as should be bid for it at a fair public sale on reasonable notice, it would have conferred on the plaintiff a right which the constitution made inviolable; and it can make no difference whether such right is conferred by the terms or the law of the contract."

In seeking for a practical test to ascertain whether a law pertains to the remedy or obligation of a contract, I have not found a better one than is furnished in a case cited and relied on by the appellant's counsel—*Morse v. Gould & als.*, 1 Ken. R. 281. In that case, an act exempting certain property from sale on execution for debts contracted prior to its passage, was held to be constitutional because it modifies the remedy, and neither destroys it nor substantially impairs its efficiency. Denio, J., in delivering the opinion of the court, points to this as a guide to determine the action of the law upon the obligation: "The most obvious method by which a contract may be impaired by legislation would be the alteration of some of its terms or provisions, so that, assuming the validity of the law, the parties would be relieved from something which they had contracted to do, or would be obliged to do something which the contract did not originally require." Adopting this test, is there any question that Taylor is relieved by this law from the sale of his property, for which he had covenanted, and Gregory's assignee obliged to wait for his money beyond the time agreed upon?

The deed of trust, as I have shown, is so peculiar to this State that the foregoing are the most striking illustrations

286 *and confirmations of my views that

I have found among the numerous adjudications on the subject that I have examined. But this instrument is so nearly akin to a mortgage, differing only in the intervention of trustees, and its capacity to be executed without suit, we may consider it as ruled by the leading case of *Bronson v. Kinzie*, 1 How. U. S. R. 311. It was there held, that a State law passed subsequently to the execution of a mortgage, which declares that the equitable estate of the mortgagor shall not be extinguished for twelve months after a sale under a decree in chancery, and which prevents any sale unless two-thirds of the amount at which the property has been

valued by appraisers shall be bid therefor, is within the clause of the constitution of the United States prohibiting a State from passing a law impairing the obligation of contracts.

There was a peculiar feature in this mortgage, whereby the mortgagee, on default of payment, was authorized to enter on the premises and sell them at public auction, and to retain out of the money thus raised the amount due, and to pay the overplus, if any, to the mortgagor. This might seem to approach more nearly to the case of our trust deed; but inasmuch as a court of equity would view with jealousy the action of the creditor in such a position, and intervene on a reasonable pretext to restrain him from damaging his debtor, this feature of the contract was only incidentally noticed. It is thus treated in the opinion of the court: "In the case before us, the conflict of these laws with the obligations of the contract is made the more evident by an express covenant contained in the instrument itself, whereby the mortgagee, in default of payment, was authorized to enter on the premises and sell them at public auction, and to retain out of the money thus raised the amount due, and to pay the overplus, if any, to the mortgagor. The

287 difference between the right annexed by law and that given by this covenant consists in this, that in the former case, the right of sale must be exercised under the directions of the court of chancery upon such terms as it shall prescribe, and the sale made by an agent of the court; in the latter, the sale is to be made by the party himself. But even under this covenant, the sale made by the party is so far subject to the supervision of the court that it will be set aside and a new ordered, if reasonable notice is not given, or if the proceedings be regarded in any respect as contrary to equity and justice. There is, therefore, in truth, but little material difference between the rights of the mortgagee, with or without this covenant. The distinction consists rather in the form of the remedy than in the substantial right," &c. But I submit, had the sale been devolved, as under our trust deed, upon a disinterested third party, regarded as the agent of both debtor and creditor, this covenant would have been deemed by the court deciding this case, if not conclusive of it, at least far more significant and decisive. But the gist of this decision was the incompetency of the Legislature to enlarge the estate of a mortgagor after decree of foreclosure, or to clog the sale with conditions that might suspend or defeat it. This, too, was where the remedies sprung from the courts, and were necessarily ordained by the Legislature; and in this respect, it was materially dissimilar from the case at bar, where the parties had instituted their own remedies by private contract and had avoided all recourse to law.

The principle of this decision was extended to the case of an execution in *McCracken v. Hayward*, 2 How. U. S. R. 608.

It was decided in that case, that a law of Illinois, forbidding a sale under execution unless the property brought two-thirds of its valuation according to the opinion of three householders, was unconstitutional and void. These two cases have been

288 followed and approved by a *long series of decisions of the Supreme Court. *Gantly's lessees v. Ewing*, 3 How. U. S. R. 707; *Planters' Bank v. Sharp*, 6 How. U. S. R. 301; *Curran v. State of Arkansas*, 15 How. U. S. R. 319; *Howard v. Bubgee*, 24 How. U. S. R. 461; *Hawthorne v. Califf*, 2 Wall. U. S. R. 10. From these authorities, and nearly in their language, I deduce the settled rule of that court to be this: That wherever a subsequent law affects to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence any law which, in its operation, amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution; and wherever a sale is required by the terms or law of a contract, no law can obstruct or clog it with new conditions without affecting the obligation of the contract; for it can be enforced only by a sale, and the prevention of such sale is a denial of a right. We are bound by these decisions in the interpretation of the constitution of the United States, and need not go further for authority. But the preponderance of authority from the courts of our sister States is to the same effect. *State v. Carew*, 13 Richardson R. 498; (*Ex parte G. F. Pollard and Ex parte M. L. Woods*, from Alabama, and the decision of Judge Yerger of Mississippi, in *Sadler v. Whittington, &c.*, affirmed by the High Court of Errors, reported in newspapers) *Jones v. Crittenden*, 1 Car. Law Repository 385; *Townsend v. Townsend*, Peck R. 1; *Lapsley v. Brashear*, 4 Litt. R. 47, and *Blair v. Williams*, Id. 34. The cases of *McCormick v. Rousck*, 3 Am. L. Reg. N. S. 93 (Iowa); *Mede v. Hand*, (Dist. Ct. of Kansas) 5 Am. L. Reg. 82, and *Baumbach v. Bade*, 9 Wisconsin R. 559, all proceed upon the distinction between remedy and obligation, which I have shown

289 to be irrelevant to the case in *hand; and concede the authority of *Bronson v. Kinzie & als.* In like manner, the case of *Chadwick v. Moore*, 8 Watts & Serg. R. 49, so much relied on by the appellant's counsel, proceeds upon the same ground. Chief Justice Gibson sustains the constitutionality of a Pennsylvania statute suspending for a year a sale under execution where two-thirds of the appraised value was not bid, on the ground that the suspension was for a limited time, and distinguishes it from *McCracken v. Hayward*, because the statute of Illinois had no such limitation; its denial of execution was perpetual, except on terms not originally contemplated; and, therefore, it not merely impeded the remedy, but changed the condition of the right. There was a peculiar

consideration, however, which swayed the mind of this able judge, and was stated by him in these words: "The case is by no means a clear one, and as the decision of it involves the validity of other acts of the same stamp, it is worthy of being brought before the Supreme Court of the nation. To put the case in train for that, it would be necessary for us to sustain the statute at all events; for the appellate jurisdiction of that court extends no further than to cases in which the judgment is in favor of the legislation or authority, to which the Federal constitution or an act of Congress is supposed to be repugnant; in other words, it extends no further than is necessary to maintain the supremacy of Federal legislation."

I have thus reviewed and cited the leading decisions, Federal and State, upon the doctrines I have been discussing, and I cannot but regard that the decided weight of authority is on the side of the appellee in this controversy. But another view of this subject has been submitted in the two reports of the House Committee of Courts of Justice, one of which constitutes a part of this record; and the other was given us in the argument. They are an authoritative exposition of the views of the

290 *Legislature in the passage of this stay law, and therefore demand a special notice. Their theory, as I have already said, is original, and is not found in any of the numerous adjudications upon this subject. It puts the legitimacy of such legislation upon analogy to the authority of courts of law and equity to restrain the creditor in his remedies in certain given cases; as for instance, where a sheriff is required to return, "no sale for want of bidders;" where between vendors and purchasers, "time is not of the essence of the contract;" where courts of equity intervene to arrest a sale till the amount and priorities of rival incumbrances are settled, and a cloud of title removed, and to set aside sales for inadequacy of price, to reopen biddings, &c.—in all which cases the creditor is delayed. It is contended, that "it would be an anomaly to leave the courts free, by what is mere judicial legislation, to impair the obligation of contracts in this feature of time, and yet to deny this power within the same proper limits of principle to the legitimate possessors of all legislative power, the Legislatures themselves. To enact this stay in the collection of debts is, says the committee, "but doing that broadcast where a broadcast necessity exists, which the judiciary would do substantially in the individual cases as they came before it;" and further, on this principle of legislative power, "to do broadcast what courts do in individual cases," the committee seek to justify this stay in the collection of debts "by these examples of the extent to which judicial tribunals will delay creditors and suspend their legal remedies to prevent a sacrifice of the debtor's property." This is a literal and concise statement of the plausible and ingenious defence that has

been made of this law by this able committee. With entire respect and deference to them, I must be permitted to say that, in my opinion, there are three distinct fallacies in this reasoning, any one of which would subvert it:

291 *First—It is not true, according to my humble conception, that the jurisdiction or action of the courts in these cases at all deserves the character imputed to it, of “mere judicial legislation to impair the obligation of contracts in this feature of time.” So far as I know, it has never been placed on that ground. It existed, as the committee acknowledges, when the constitution was adopted, and “must have been familiar to its framers.” No effort was made to restrain it; and hence the inference is irresistible, that no grievance of the sort was imputed to the courts. I have heretofore endeavored to show that this judicial cognizance is predicated in all cases of the faculty of the courts to administer the remedies which the State ordains; and that all contracts are, through necessity, (to use the language of Justice Johnson in *Ogden v. Saunders*, already quoted), “construed, applied and controlled by the State,” through the medium of its courts. The principles of equity, as administered from the earliest period, will arrest the literal enforcement of a contract, when from the causes assigned—as for a cloud of title, or conflict of encumbrances, &c.—it becomes unconscionable, and is subversive of the true intentions of the parties. And this, I must say, is the first time I have heard this wholesome jurisdiction of the courts characterized as “judicial legislation to impair the obligation of contracts in this matter of time.”

Secondly—It is not true, that because the courts can administer such relief in certain prescribed cases, the Legislature can be justified by the analogy to assume a wider range by law. It would seem that the fact that the courts can relieve in such cases, instead of justifying the Legislature in such a questionable policy, would be a strong motive to restrain such legislation. Inasmuch as some of these cases of hardship are relievable by the courts, the mischief apprehended by the law-makers would, to that extent, be abridged. But the judicial

292 and legislative *functions are, in truth, too dissimilar to justify such an analogy; the courts act upon individual cases and upon proofs and pleadings; the inhibition upon the Legislature proceeds, in a great measure, from its incapacity to act in the premises otherwise than broadcast.

Thirdly—It cannot be said, with propriety, “that the Legislature may, where the necessity for such interference exists, do broadcast what courts do in individual cases.” The very contrary is true. If the assertion was narrowed to the claim to compass by law what courts do in individual cases, the most careless enquirer would be startled by such a pretension, and by the actual obliteration it occasions, of the dividing line between these departments of

the government. But the offence is greater when this pretension is so enlarged as to embrace the alleged power to “do broadcast what the courts do in individual cases.” It might seem enough to object that the action of the Legislature can never correspond with the action of the courts. The latter act in modes unknown to the former; and it would be highly improper, if not a usurpation, for the Legislature to attempt to do what “the courts do in individual cases.” But what propriety is there in saying that the Assembly is doing only broadcast by a universal suspension of remedies what the courts do in specified instances? In the one case, relief is given because of peculiar circumstances, which will not allow a mere literal fulfillment of a contract to the oppression of one party, and against the presumed pretensions of both; and in the other, no attention is bestowed upon such circumstances but a broadcast dispensation, given to all for a limited time from the obligation of their contracts. For these reasons, I find myself unable to concur with the committee in their conclusions, so far as they involve the limited enquiry I have made into his particular provision affecting sales under deeds of trust.

293 *I have now examined the question before us in all the aspects and upon all the arguments of counsel that it is material to consider. The conclusion to which my reasoning conducts is too apparent to be announced. It only remains for me to notice a consideration that was pressed upon us with much feeling by the counsel, who concluded the argument for the appellant; and I do this to disclaim any insensibility on my part, or that of my associates on this bench, to this appeal. I mean the allusion that was made to the distresses that might ensue upon a decision against this law, unless counteracted here, as it had been elsewhere, by the military authorities. That appeal has not been without its legitimate influence upon us. It has subverted the only proper purpose for which it could have been designed, and that was, to persuade us to the fullest scrutiny, the most patient investigation, and the most careful reflection touching every branch of this important enquiry. Farther than this, it could not avail with this tribunal. No matter what consequences may follow, nor what action may be taken by the military authorities in our present unsettled state, the apprehension of them can not, and ought not to, deter us from the fearless discharge of our responsible duties. But it should not be forgotten, that there are opposite evils of perhaps greater magnitude than those which have been so feelingly depicted and deprecated. It has already been seen how these high constitutional sanctions of private right have no other means of vindication but by the judiciary. Is it not, then, worth while to consider on this side of the question what deplorable calamities, moral and political, might attend the surrender of this last bulwark by its sworn defenders through a subserviency to tem-

porary interest or passions; or a timid disposition to sacrifice convictions to motives of expediency? No greater or more enduring misfortune, it seems to me, could befall a people, blessed with a constitutional form of government, than a sacrifice of any 294 of its fundamental guaranties by that department of its service which, by the nature of its organization and functions, has ever been counted on to uphold with a stern inflexibility private rights and public morals. Great as might be the sufferings growing out of a judicial sentence against this law, and wide-spread as might be the ruin of individuals and the sacrifice of property under it, they are not, for one moment, to be compared with the evils likely to attend the demoralizing example of a judiciary seeking, however covertly, popular favor by some skillfully disguised compromise of its highest and most imperious duty—that of disdaining every pretext, however plausible, and withstanding every temptation, however strong, to betray, in the slightest particular, the requirements of the State and Federal constitutions. Such a spectacle of weakness and subserviency upon the bench, if it did not shock, would incurably deprave public sentiment; destroy confidence in the administration of the laws; spread corruption through other branches of the public service, and fearfully depress the hopes of the friends of constitutional freedom. And it really seems to me it would only be due to that gracious order of Providence, which overrules evil for good, if these pernicious effects should, indeed, stop here, and not descend to every walk of life and all orders of men, spreading abroad the contagion of dishonesty, weakening respect for law, corrupting the commerce and debauching the morals of society. In view, therefore, of all the considerations that bear upon this case, and the responsibilities that grow out of it, I am constrained, though with diffidence, to follow my clear and undoubting convictions, which lead me to affirm the decree below.

The other judges concurred in the opinion of Rives, J.

Decree affirmed.

295 *Anderson v. The Commonwealth.

January Term, 1868, Richmond.

1. **Taxation—Assessment Act—Embraces Express Companies.**—The § 93 of the act of February 15th, 1866, for the assessment of taxes, embraces express companies chartered by the State of Virginia; and the present stockholders are personally liable for taxes due to the Commonwealth from the company incurred while they were stockholders.

2. **Same—Same—Personal Liability of Stockholders.**—Though the charter of an express company did not make the stockholders personally liable for the debts of the company, the said assessment act passed subsequent to the charter, has so far modified the charter as to make them personally liable.

3. **Same—Same—Effect on Charter of Express Company.**—The charter reserving to the General Assembly the power to modify or repeal the charter, this was effectually done by the act for the assessment of taxes; and it is not in violation of § 16, article IV. of the constitution.

4. **Same—Same—Primary Liability of Stockholders.**—**QUESTIONS:** Whether § 93 of the said assessment act, makes the stockholders of an express company liable for taxes due from the company primarily, or only as guarantors?

In January, 1867, the Auditor of Public Accounts gave a notice to Charles W. Purcell and Joseph R. Anderson, that on the 12th of February, 1867, he would move the Circuit Court of the city of Richmond for a judgment against them for five hundred and sixteen dollars and seventy-two cents; that being the amount of one per cent. of the gross receipts of the National Express and Transportation Company for doing 296 business in this State, from *the 1st of January, 1866, to the 1st of September of the same year; and the amount due to the Commonwealth from the said company for taxes on their business; and for which they, the said Purcell and Anderson, were personally liable as stockholders in the company.

The case came on to be heard on the 29th of November, 1867, when the court rendered a judgment in favor of Purcell, and against Anderson, for the amount claimed, with interest and costs; and he thereupon obtained a writ of error to the judgment from a judge of this court.

The bill of exceptions taken by Anderson to the judgment of this court, stated the facts. The only proof that Anderson was a stockholder of the company at the time these taxes fell due, was a letter of his introduced by the Commonwealth, addressed to the Auditor upon receiving the notice, in which he says: "I deny my liability to pay the debts of the company. Nor can I see why I, who have paid every dollar of the requisitions made upon me, or any other one or two stockholders, should be singled out for persecution." A question was made in this court whether there was proof that the taxes had not been paid by the company; but this court was of opinion, that this sufficiently appeared from the evidence of Poitiaux, who had been the cashier of the company, when they should have been paid.

N. Howard and Macfarland, for the appellant.

The Attorney General, for the Commonwealth.

JOYNES, J. The first ground taken in the petition is that the 93d section of the assessment act of 1866, on which this case

*The principal case was cited in *Bank v. McVeigh*, 20 Gratt. 478; *Va., etc., Co. v. Crozer Iron Co.*, 30 Va. 132, 17 S. E. Rep. 806; *Railroad Co. v. Transportation Co.*, 25 W. Va. 371.

See generally, monographic note on "Stock and Stockholders" appended to *Osborne v. Osborne*, 24 Gratt. 392.

depends, was not intended by the Legislature to apply to express companies incorporated by this State.

I do not think this position can be maintained. The language is general, and
297 without restriction. It purports *to embrace "every express company."

The 14th section of the act imposing taxes passed at the same session, imposes a tax of one per cent. on the gross earnings of "every express company," to be ascertained and paid in the mode prescribed by the 93d section of the assessment act; section 15 imposes a tax on the dividends of "savings bank and insurance companies incorporated by this State;" section 16 imposes a tax on "foreign insurance companies;" section 17 imposes a tax on banks "incorporated by this State." The 93d section of the assessment act, like the 14th section of the act imposing taxes, applies to "every express company;" the 94th applies to savings banks and insurance companies "incorporated by this State;" and the 95th applies to insurance companies "not incorporated by this State." Thus it appears that when a distinction was intended between companies incorporated by this State and other companies of like kind, either in respect to the mode of taxation, or in respect to the mode of assessment and collection, the distinction was made in express terms.

The 14th section of the act imposing taxes and the 93d section of the assessment, act, refer to each other, and are parts of the same system. Every express company is taxed by the former, and every such company so taxed is required by the latter to make reports to the Auditor of its gross earnings, and to pay the tax, at the time and in the mode prescribed. Every such company is made liable to a penalty for failure to report its earnings and to pay the tax. And the stockholders of every such company are made personally liable for the tax and for the penalty. We have no more authority for supposing that the Legislature intended to exempt any express company from any one of these provisions, more than from any other one. All were to be taxed, and the taxes of all were to be collected in the same way. We cannot

298 interpolate exceptions *founded on inference and conjecture, where the intention of the Legislature is expressed in clear and unambiguous terms.

If the National Express Company was not embraced by the 93d section of the assessment act, I do not see how it could be held to be embraced by the 14th section of the act imposing taxes. If it was not embraced by the latter section, then, if taxed at all, it must have been taxed on its capital under section 58 of the assessment act, as contended in the argument. The result of this would be, to subject an infant enterprise, established under authority of this State, and doing little business, to much more onerous taxation than was imposed on others which had been long established. It would be taxed on its entire capital wherever em-

ployed, while they would be taxed only on their earnings from business done in this State. If this company was embraced by section 14 of the act imposing taxes, and was not embraced by section 93 of the assessment act, then a tax was imposed, and no means were provided for ascertaining its amount or enforcing its payment.

It has been strongly urged upon us, that to hold that the National Express Company was embraced by the 93d section of the assessment act, would impute to the Legislature a singular inconstancy of purpose, since it had only two months before granted a character to that company, in which no personal liability was imposed on the stockholders, amending a former charter, by which such a liability was imposed. And it was contended that no good reason can be assigned why such a discrimination should have been made between the stockholders of a domestic express company and those of other domestic corporations.

It is enough to say, in reply to these suggestions, that such was the pleasure of the Legislature. *Stet pro ratione voluntas*. At most, these suggestions could only weigh in turning the scale, if the intention was doubtful.

299 *But I do not see the force of either suggestion. The act incorporating the National Express Company was passed on the 12th December, just one week after the commencement of the session, and no doubt long before the assessment bill had been considered, or even prepared. The policy of holding the stockholders of such companies personally liable for the taxes imposed on them, had, as we were told in the argument, prevailed under an act passed by the Legislature which sat in Richmond in 1863, and which continued un repealed to the end of the war; and the Legislature reserved the right to alter the charter at pleasure. When it came to pass the assessment act, it applied to this express company, and to all others, the policy that had previously prevailed. There was one obvious reason for providing a special security for the taxes of such companies. They do their business by means of railroads and steamboats belonging to others, having very little visible property of their own. The expediency of such a provision seems to be illustrated by the present case.

It was further contended that the imposition of such a personal liability on the stockholders, when the legal effect of the charter was to exempt them from any personal liability for debts of the company, was a violation of the contract between the stockholders and the State.

By the last clause of the charter, it was made subject to modification or repeal, at the pleasure of the General Assembly. *Sess. Acts 1865-6*, p. 381. The stockholders, by accepting the charter, assented to that reservation as a constituent part of their contract. *Crease v. Babcock*, 23 Pick. R. 334; *Durfee v. Old Colony and Fall River R. R. Co.*, 5 Allen's R. 230. And it has been expressly held, that the Legislature

may, by virtue of such a reservation, provide by a subsequent statute, that stockholders shall be personally liable for all debts of the corporation *incurred after its passage. *Stanley v. Stanley*, 26 Maine R. 191; *Sherman v. Smith*, 1 Black's U. S. R. 587. Stockholders who become such, or continue to be such, after such a liability has been imposed, must be understood as agreeing to incur it. In this case, the act imposing the personal liability was passed on the 15th day of February, 1866, and the first payment of taxes for which the plaintiff in error was held liable, became due on the 15th day of March, 1866. In the case in 26 Maine, the objection was taken, as it was in this case, that the reserved power of amendment must be exercised by a special act for that purpose, and that the liability of the stockholders could not be altered by a general law; but it did not prevail. In the case in 1 Black, the personal liability was imposed by the constitution of the State, and by a general law applicable to all banks.

I do not think that the provision in question is obnoxious to the objection, that it virtually amends the act incorporating the National Express Company, and violates the provision on the subject of amendments contained in section 16, article IV, of the constitution. That section is as follows: "No law shall embrace more than one object, which shall be expressed in its title; nor shall any law be revived or amended by reference to its title; but the act revived or the section amended shall be re-enacted and published at length." In this case, no section or provision of the act of incorporation was amended. A new provision was made, imposing a liability, as to which that act was silent. The new provision operated to overrule the legal effect of the former law, but it changed none of its terms; it did not "amend" it in the sense of this provision of the constitution. A subsequent statute may be inconsistent with part of a former statute, and so operate as a repeal of that part by implication; or it may not be wholly inconsistent with any part of the former law, so as *to repeal it, but it may operate to modify the construction and effect of the former law. In all such cases, the subsequent law has the effect of an amendment of the former law, but such cases are not affected by this provision of the constitution.

It was contended, that the personal liability attached to such only as were stockholders at the time the liability of the company was incurred; and that there is no evidence to show that the plaintiff in error was a stockholder when the taxes for which he was held liable were incurred, or when they became payable. And it was insisted, that for this defect of proof, there should have been a final judgment for the defendant, on the authority of *Webb v. McNeil*, 3 Munf. 184; *Brown v. Ferguson*, 4 Leigh 37; and *Watson v. Robertson*, Ib. 236.

The ninety-third section does not define

what stockholders are to be held liable. On the one hand it may be said, that the effect of the law is to treat the members of the company, pro hac vice, as partners, so that only those should be held liable who were stockholders when the taxes were incurred or became payable. On the other hand, it may be said, that such a construction would lead to great inconvenience and injustice, by holding a stockholder responsible after he has parted with his stock, and consequently with all power to have the debts paid or to protect himself by his influence in the management of the company; that purchasers of stock should be held to take it cum onere, and that the language of the statute is satisfied by holding those liable who are stockholders when the proceedings are commenced. Such provisions have given rise to much conflict of opinion in other States. *Angell & Ames on Corp. sec. 616*, and cases cited. It is not necessary, however, to decide in this case what particular class of stockholders are liable under the act in question. The letter of the

plaintiff in error admitted *that he was a stockholder, and alleged that he had paid all the requisitions that had been made upon him, so that he had probably been such for a considerable period. When he became a stockholder, and when he ceased to be such, were matters which lay peculiarly within his own knowledge as to which the means of proof were open to him, while they were not equally open to the Commonwealth. If the plaintiff intended to dispute his liability for any part of the taxes, on the ground that he was not a stockholder at the time they were incurred or became payable, he ought to have proved that fact. Having failed to do so, we are authorized to hold that he was a stockholder throughout the whole period for which the taxes were due.

It was also contended that the proof of the Commonwealth was defective, because it did not show that the taxes demanded of the plaintiff in error had not been paid by the Company. Authorities were cited to show, that where a duty is enjoined under a penalty, it will be presumed, in the absence of all evidence, that it has been performed, and that a party who claims a right founded upon an omission to perform such duty, must overcome this legal presumption by proving that the duty has not been performed, although this involves the proof of a negative. The doctrine and authorities on this subject may be found in 1 Starkie Evid. 588-590, ed. of 1860.

This objection proceeds upon an assumption that the ninety-third does not make the stockholders liable primarily and equally with the Company for the payment of the taxes due from the Company. If it does make them so liable, it puts them on the footing of debtors, not of mere guarantors, and it was only necessary for the Commonwealth, in this proceeding, to prove the amount of tax with which the Company was chargeable. For that proof, without more, established a liability on the plain-

303 tiff in *error as a stockholder for the payment of that amount, and it was incumbent on him to discharge himself from that liability by proof. 1 Starkie Evid. 589.

The ninety-third section does not, in terms, declare whether the stockholders are to be liable primarily and equally with the Company, or whether their liability is to be merely secondary. I am inclined to think that it was the intention of the Legislature to make them liable primarily and equally with the Company, and my brethren entertain no doubt upon this point. Harger v. McCullough, 2 Denio R. 119. It is not important, however, to decide this question. For we are all of opinion that it may fairly be inferred from the evidence of the witness Poitiaux, that the taxes had not been paid by the Company. There was, therefore, no such defect of proof as the argument I have been considering assumes.

I think that the judgment is right, and ought to be affirmed.

The other judges concurred in the opinion of Joynes, J.

Judgment affirmed.

304 *Midlothian Coal Mining Co. v. Finney & als.

January Term, 1868, Richmond,

1. Contracts—Latent Ambiguities—Parol Evidence.*—

By deed of April 1, 1861, A leased certain coal property to B until December 31, 1864; and by deed of November 11, 1861, endorsed on the first, and declared to be a part of it, he leased other adjoining coal property to B for the same time. By contract of September 4, 1864, A and B agree to renew the lease of April 1, 1861, for five years from the 1st of January, 1865. A question arising whether the lease of the property mentioned in the deed of November 11, 1861, is renewed as being part of the lease of April 1, 1861. **Held:** This is a latent ambiguity, and parol evidence is admissible to prove what was the intention of the parties.

2. Appellate Practice—Case at Bar.—The court below having decided the case on the construction of the deeds, and there having been little enquiry before the commissioner as to the intention of the parties, upon the reversing of the decree, the cause will be referred to a commissioner, with liberty to both parties to introduce testimony.

*Ambiguities—Parol Evidence.—As to when extrinsic evidence, and what extrinsic evidence, is admissible to aid in the interpretation of valid written instruments, the Virginia decisions seem to be somewhat at sea; and while the cases are full of dicta, and general statements, the principles have never been fully worked out. Some cases lay down the proposition that the only exception to the rule excluding parol evidence as to the intention of the writer is in cases of latent ambiguities, i. e., where, for anything appearing on the face of the writing the intention is certain, but there is some collateral matter *de hors* the writing that causes ambiguity; and that, under such circumstances, extrinsic evidence is admissible to show the existence of the

In May, 1866, a decree was made in three causes depending in the Circuit Court of Henrico county, one in the name of Finney and others against Heth's administrator and others, one in the name of Gwathmey's executor against the same defendants, and one in the name of Barksdale and others against the same defendants, by which a commissioner of the court was directed to enquire and report to the court the amount due in the present currency from the Midlothian Coal Mining Company and others, under leases by the receivers of the 305 court in said *causes, to said lessees of the coal land and other property of the Chesterfield Coal and Iron Mining Company embraced in said leases. In pursuance of this decree, Commissioner Evans, in October, 1866, made a report, in which he charged the Midlothian Coal Mining Company, among other items, with \$2,250 of principal and \$270 of interest, as rent of what is called the Swann pit, from the 20th of November, 1861, to the 20th November, 1866, at \$450 per annum. He returned with his report the leases under which the rents were held by him to be due; and also the deposition of J. L. Morrisett, the receiver who had made the leases to the Midlothian Company, under which the question in this cause arises. On the 26th of October, 1866, the court made a decree confirming the report, and directing the Midlothian Coal Mining Company to pay into the National Exchange Bank the several sums reported to be due from the Company.

latent ambiguity and to remove it and disclose the author's meaning. This proposition is approved in *Hawkins v. Garland*, 76 Va. 149; *Burke v. Lee*, 76 Va. 386; *Senger v. Senger*, 81 Va. 687; *Hubble v. Cole*, 85 Va. 87, 7 S. E. Rep. 242; *Gatewood v. Burrus*, 3 Call 198.

But in *Roy v. Rowzie*, 25 Gratt. 599 (approved in *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. Rep. 323), the rule was laid down that where the person or object or subject referred to in a bequest is uncertain, or does not answer precisely the description given it in the will, or where there are two more objects or subjects which answer equally well the description, resort must be had to parol evidence and the surrounding circumstances to show what the testator intended by the expressions which he used; and if such intention is so ascertained with sufficient certainty the bequest is valid.

The kinds of extrinsic evidence that can be offered in aid of the interpretation of a written instrument may be divided into two great classes: first, the surrounding facts and circumstances; second, the author's declarations of intention.

In a learned and masterly paper on "Extrinsic Evidence in Respect to Written Instruments" read before the Virginia State Bar Association, August 2, 1893, by Prof. C. A. Graves, of the University of Virginia, it was said, at p. 12: "Evidence of the surrounding facts and circumstances is *always* admissible in aid of the interpretation of the will—i. e., as explanatory of the meaning of the words as used by the testator." Among the authorities to sustain this proposition, he cites *Smith v. Bell*, 6 Peters 74 (opinion by CHIEF JUSTICE MARSHALL); *Colton v. Colton*, 127 U. S. 300; *Hatcher v. Hatcher*, 80 Va.

On the 2d of November, 1866, the Midlothian Coal Mining Company, with the consent of the parties in these causes, filed their petitions in the causes, and also exceptions to the report of Commissioner Evans. The first exception is—Because they are charged with rent at the rate of \$450 per annum for five years for the Swann pit, whereas, as they insisted, the lease of that pit was only from the 20th of November, 1861, until the end of the year 1864.

It appears that, by a deed of lease bearing date the 1st day of April, 1861, James Morrisett, as receiver of the court, leased to the Midlothian Coal Mining Company certain coal lands of the Chesterfield Coal and Iron Mining Company, described in the lease; and the lease was to continue until the 31st of December, 1864. This lease did not embrace the Swann pit, which was the property of the same Company. At this time the Midlothian Company held

other parts of said lands under a previous lease *executed by Farrar, a previous receiver in these causes, which would terminate at the same time. On the 20th of November, 1861, Morrisett made another lease to the Midlothian Company, which was endorsed on or added to that of the 1st of April, in which it is said that, in addition to the privileges granted to the said lessees by the foregoing lease bearing date the 1st of April, A. D. 1861,

the said lessees shall have the like privileges of working the pit known as Swann's pit, and of raising coal from the same, subject to the same conditions and restrictions as are prescribed in the foregoing lease in respect of the workings therein contemplated, and subject also to these conditions; and then sets out certain provisions as to what the Company should not or should do; and containing a covenant by the lessee that the annual rent of said Swann's pit shall not be less than four hundred and fifty dollars. The last provision in this deed is: 3. This agreement being in addition and supplement to the foregoing lease, shall be taken and considered as a part thereof; and it shall be in the power of the said receiver, or of his successor in office, to terminate the foregoing lease, and also this agreement as a part thereof, upon giving three months' notice to the said lessees.

By another deed bearing date the 1st of September, 1864, Morrisett and the Midlothian Company agree to renew and extend the lease granted by Farrar, and also the lease of Morrisett of the 1st of April, 1861, for five years from the 31st of December, 1864. This deed commences by reciting the existence of the lease by Farrar by its date, and the one from Morrisett as dated the 1st of April, 1861, and then says, that the said parties, Morrisett and the Company, have agreed and do agree to renew and continue

169; Miller v. Potterfield, 86 Va. 876, 11 S. E. Rep. 496. See also, Shelton v. Shelton, 1 Wash. 56; Hooe v. Hooe, 13 Gratt. 247; Williamson v. Coalter, 14 Gratt. 398.

He then proceeds to lay down the proposition that the judicial expositor has the right to invoke the aid of the writer's declaration of intention *only* in the case of "*equivocation*," i. e., where the words in the writing describe well but equally well two or more persons, or two or more things, and such declarations are offered to show which person or which thing was meant by the writer, i. e., by the words in the writing as used by him. Patch v. White, 117 U. S. 211, 217; Senger v. Senger, 81 Va. 667, 696; Wootton v. Redd, 12 Gratt. 190, 208.

At page 29, he says: "The maxim (Bacon's maxim, *ambiguitas verborum latens verificationes suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur*) itself implies that only latent ambiguities are holpen by averment; and the commentary confirms this by expressly declaring that patent ambiguities are never thus holpen. And the cases are to this day full of dicta to the effect that patent ambiguities are beyond the aid of extrinsic evidence; and even some of the decisions profess to proceed on this principle. But it must be manifest on a moment's reflection that the fact that a difficulty is apparent on the face of a writing is not of itself sufficient to bar the door against extrinsic evidence explanatory of the writer's meaning; and that the same doctrines should apply to all ambiguities, whether patent or latent, admitting evidence of the facts and circumstances in all cases, and of declarations of intention in the one case of equivocation. And that this is the law as to 'facts and circumstances' to explain a patent ambiguity is established by the authorities; (see Wigram Ext. Evid. Pl. 80, 208; 1 Jarm. Will. p. 745;

Browne on Parol Evid., §§ 49, 126; Colpoys v. Colpoys, Jacob 451; Golbet v. Beachy, 3 Sim. 24;) and there are not wanting decisions directly in point that in the case of a true equivocation apparent on the face of a will declarations of intention are also admissible; and the fact that the equivocation is patent is immaterial. Thus in Doe d. Gord v. Needs, 2 M. & W. 120, the will showed on its face that there were two George Gords, viz.: George, the son of George Gord, and George, the son of John Gord. Then followed a devise to "George Gord the son of Gord"—thus making a patent ambiguity, and yet it was held that declarations of the testator were admissible; and PARKE, B., speaking for the court, repudiated the idea that the fact that the ambiguity was patent could affect the rule which permits extrinsic expressions of intention when the words of the will describe well, but equally well, two or more persons or things. And so the same effect is the case of Doe v. Morgan, 1 Cr. & M. 235. And see Hill v. Felton, 47 Ga. 455 (15 Am. Rep. 643).

"It seems, then, notwithstanding Bacon's maxim, that there is at the present day no real difference in the rule of law governing patent and latent ambiguities, and the most careful text-writers avoid the use of the terms altogether. In the language of Professor Thayer, from whom I have above quoted (6 Harv. Law Review 424), 'Ambiguities or any other difficulties, patent or latent, are all alike as regards the right and duty to compare the documents with extrinsic facts, and as regards the possibility that they may vanish when this is done. As to the resort to direct statements of intention in the one case of equivocation, viz.: where there are more than one whom the name or description equally fits, the right to resort to these declarations in such cases in no way depends on the difference between what is patent and latent.'"

the said leases for the term of five years from the said 31st of December, 1864, to the 31st of December, 1869, upon the same terms and conditions as are set forth in the two existing leases, in all respects, except so far as the same are varied by what follows in this deed. The deed then proceeds to provide what rent shall be paid per bushel upon the coal raised.

Morrisett, in his deposition, which was taken by the commissioner and returned with his report, says: That the Midlothian Coal Mining Company had paid no rent for the Swann pit under the lease of April 1st, 1861. They expended something considerable in cleaning out and drifting the pit, though they raised no coal from it. As he understood the purpose of the Midlothian Company, it was to keep other persons from renting and working the Swann pit. It is just and fair, however, to say, that the Midlothian Company tried their best to raise coal from the Swann pit, and failed, because the coal was not there to raise.

The petition of the Midlothian Coal Mining Company, after referring to the Commissioner's report and the leases hereinbefore mentioned, says that the report shows that there was no evidence whatever before the Commissioner of any holding over of the Swann pit by the Midlothian Company, after the 31st of December, when the lease of the property expired by its terms; and they aver and are prepared to prove, that no such evidence was in fact before him, and that none such could have been before him, because none such existed. They insist that the lease of April 1st and November 20th, 1861, were distinct leases, and the renewal of the first did not renew the last. That if the terms of the lease are ambiguous, so as to admit parol evidence to show what was the intention of the parties in taking the renewed lease of the 1st of September, 1864, the evidence of Morrisett should have led the Commissioner to an inference opposite to that he has drawn. And they aver that they never intended to renew the lease of the Swann pit, and never imagined they had done so.

That in fact, long before the first lease had expired, they withdrew their machinery, abandoned the possession of the pit, and never afterwards interfered with it in any manner whatever; and though they remained lessees until the first lease expired, and liable, as such, for the rent, yet after the expiration of that lease, they never asserted or claimed any title or interest whatever in the Swann pit, never exercised any control over it, or had any sort of possession of it; nor were they aware, until Commissioner Evans' report was made, that any person regarded them as tenants of that pit, or responsible for rent in any way or to any extent. And all these allegations they are prepared to establish by proofs, if an opportunity is afforded them to do so. This petition was sworn to by the President of the Company.

On the 6th of November, 1866, the court,

by consent of the parties, made a decree, that the operation of the decree confirming the report of Commissioner Evans, be suspended so far as it relates to the sum of \$2,250, principal money, and \$270 interest, reported as the rent due from the Midlothian Company for the Swann pit; but the cause coming on again to be heard on the 30th of April, 1867, the court was of opinion that, according to the true intent of the contracting parties, the lease of the Swann pit was incorporated with and made part of the original lease of the 1st of April, 1861; and that the whole lease was renewed, including the Swann pit as a part of the demised premises, by the lease of the 1st of September, 1864. The decree of the 6th of November, 1866, was therefore set aside, and the Commissioner's report was again confirmed. And the Midlothian Coal Mining Company obtained an appeal to this court.

N. P. Howard, for the appellants.

A. Johnston, for the appellees.

309 *JOYNES, J. Upon the face of the contract of September 1, 1864, there is no ambiguity. It recites that there are in existence two leases, which will expire on the 31st day of December, 1864—one dated November 11, 1854, the other dated April 1, 1861—and provides for a renewal of these leases for a term of five years, upon certain specified terms. But when we come to apply this contract to the subject matter, it appears that on the 20th November, 1861, a paper was executed containing a lease of the Swann pit until the 31st day of December, 1864, which paper refers to the lease of April, 1861, and describes itself as "an addition and supplement" to the lease of April 1, 1861; and declares that it "shall be taken and considered as a part thereof." A question then arises, whether the parties intended, by the contract of September 1, 1864, to renew the lease of April 1, 1861, as it originally stood, so as to exclude the Swann pit, or to renew that lease along with the "addition and supplement" of November 20, 1861, "as a part thereof," so as to embrace the Swann pit. This presented a case of latent ambiguity, for the removal of which it was competent to show by parol evidence, what was the actual intention of the parties. The lease of November 20, 1861, was called part of that of April, 1861, so as to subject it, without the necessity of repetition, to the same conditions; but it was still actually distinct from it, inasmuch as it related to different property, was made at a different time, reserved a distinct rent, and was, in some respects, subject to different conditions.

The only parol evidence in this case was the deposition of Morrisett, the lessor. He testified that the appellants expended a considerable sum in cleaning out and drifting the Swann pit, though they raised no coal from it; that they tried their best to raise coal from that pit, but failed, "because the coal was not there to raise."

310 He further said *that he understood that the purpose of the appellants was to keep other persons from renting and working the Swann pit.

Though not so stated in terms, this witness seems to have had reference to what was done by the appellants during the original term, and to the motives which induced them to obtain the original lease of the Swann pit. It cannot be supposed that they would allow the whole term of the original lease to expire without ascertaining whether or not coal could be found in that pit; and after ascertaining that no coal was there, they would have had no motive to keep other persons from renting and working it.

This evidence, given by the lessor himself, affords strong ground to believe that the parties did not intend to embrace the Swann pit in the contract of September 1, 1864. The appellants had no motive to renew the lease of that pit; the former lease had been a dead loss to them of the rent and of the money expended in cleaning out and drifting the pit. A renewal of the lease must have entailed a like loss; and these facts were well known to the lessor.

The appellants excepted to the report of the Commissioner charging them with rent of the Swann pit under the contract of renewal, and supported the exception by an affidavit. This affidavit stated, among other things set forth by the appellants in a petition, that the appellants "never intended to renew the lease of that pit, and never imagined that they had done so; that in fact, long before the first lease expired, they withdrew their machinery, abandoned the possession of the pit, and never afterwards interfered with it in any manner whatever; and though they remained lessees until the first lease expired, and liable, as such, for the rent, yet after the expiration of that lease, they never asserted or claimed any title or interest in the Swann pit; never exercised any con-

311 trol over it, or had any *sort of possession of it; neither were they aware, until the report of Commissioner Evans was made, that any person regarded them as tenants of the Swann pit, or responsible for rent in any way or to any extent. And all these allegations they are prepared to sustain by proofs, if the opportunity be afforded them to do so." The appellants, in their petition, asked that the report of the Commissioner might be corrected by excluding the rent charged for the Swann pit, and that, if necessary, the report might be recommitted for that purpose, with leave to the petitioners to adduce proof of the allegations made in their petition.

The Circuit Court overruled the exception and confirmed the report, being "of opinion that, according to the true intent of the contracting parties, the lease of the Swann pit was incorporated with and made a part of the original lease of April 1, 1861, and that the whole lease was renewed, including

the Swann pit, as part of the demised premises, by the lease of September 1, 1864." It would seem from this, that the court decided the case upon the construction of the several leases, and without reference to the parol evidence. For the reasons already given, I think the case must be decided upon the parol evidence, and that it is at least doubtful, from the evidence in the record, whether the parties did intend to embrace the Swann pit in the contract of renewal.

But it is evident that the parties did not go fully into the parol evidence bearing on this question. It is alleged by the appellants, in their petition, that they did not do so themselves, and they cannot complain if an opportunity is given to the other parties to adduce further evidence.

I am, therefore, of opinion that the Circuit Court, instead of overruling the exception of the appellants, should have recommitted the report, with instructions to the Commissioner to enquire whether it was the actual intention of the parties to em-

312 brace or to exclude the Swann *pit in the renewed lease, and with leave to all parties to take further evidence on that subject.

I think the decree should be reversed.

The other judges concurred in the opinion of Joynes, J.

Decree reversed.

313

*Utterbach & als. v. Rixey.

January Term, 1868. Richmond.

1. Stay Law—Application of § 2—Case at Bar.—When a creditor gives up a substantial part of a debt due before the 2d of April, 1865, or the liability of a person bound to him for its payment, in consideration of a new security for the payment of the debt, or any part of it, such new security comes within the saving of the act to stay the collection of debts for a limited period, passed March 2, 1865. Sess. Acts 1865-66, p. 180; and may be enforced according to its terms; such a case not being embraced in the third section of that act.

This was a motion in the Circuit Court of Fauquier county, by B. F. Rixey against Charles H. Utterbach and two others, for execution upon a forthcoming bond; and a cross motion by Utterbach against Rixey to quash the forthcoming bond. The only ground of the last motion was that the execution under which it had been taken was sued out in violation of the statute, called the stay law.

The Circuit Court quashed the forthcoming bond, and the execution under which it was issued, with costs; and Rixey excepted. The facts are fully stated in the opinion of this court, delivered by Judge Moncure. Upon a writ of error to the District Court of Appeals at Fredericksburg, the judgment of the Circuit Court was reversed. And thereupon Utterbach and the other defendants obtained a writ of error to this court.

Tucker, for the appellants.

Green, for the appellees.

314 *MONCURE, P., delivered the opinion of the court:

This is a supersedeas to a judgment of the District Court holden at Fredericksburg, reversing a judgment of the Circuit Court of Fauquier quashing a forthcoming bond and the execution under which it was given, upon the ground that the execution was issued contrary to the first section of the act commonly called the stay law, passed March 2, 1866, entitled "an act to stay the collection of debts for a limited period." Acts 1865-6, p. 180. The first section enacts, that no execution, &c., shall be issued, except in the cases thereafter provided for, until the 1st day of January, 1868. The second section declares, that the foregoing section shall not apply to any case in which the debt or liability sought to be enforced was contracted or incurred since the 2d day of April, 1865, &c. The third section provides, that "no security or undertaking of any sort, the consideration of which is a debt contracted or liability incurred prior to the second day of April, 1865, shall, though executed or assumed after that day, be considered as a debt contracted, or liability incurred, after that day, within the meaning of this act. And when a part of the consideration of any security or undertaking of any sort is a debt contracted, or a liability incurred, prior to the 2d day of April, 1865, such security or undertaking, though executed or assumed on or after that day, shall, as to so much of the money due thereon, be considered as a debt contracted or liability incurred before that day, within the meaning of this act." The only question we are called upon to decide in this case is, whether it comes within the true intent and meaning of the said third section? No question is raised as to the constitutionality of the stay law. On the contrary, the defendant in error, by his counsel, requested that no such question should be decided in the case. We will, therefore, proceed to consider and dispose of the case without reference to that question.

315 *The facts of the case are set out in a bill of exceptions taken by the defendant in error Rixey to the judgment of the Circuit Court quashing the execution and forthcoming bond as aforesaid. Those facts are substantially as follows:

That in the year 1864 an agreement was made between the plaintiff in error C. H. Utterbach and one Silas H. Turner that the said Turner should purchase tobacco, for which said Utterbach was to furnish the money, and the profits arising therefrom was to be divided between them. Thereafter Turner purchased from Rixey, without communicating to him his arrangement with Utterbach, a lot of tobacco which went into the hands of Utterbach. Turner having paid to Rixey all that was due him on account of said tobacco except the sum of \$2,700, "which was payable in Southern

State funds (bankable);" and being anxious to pay the same, procured from said Utterbach an order drawn by him in April, 1864, on Delaplane, of Richmond, payable to Turner, for \$2,700 "in Southern State funds (bankable);" which order he placed in the hands of Rixey, who was going to Richmond, to collect and apply the proceeds, if collected, to the debt of Turner to Rixey. The order was protested by Delaplane; and thereupon Rixey offered to re-deliver the same to Turner; but at the request of Turner, Rixey retained possession of the order as collateral security for the amount due upon the purchase of tobacco. Rixey was not aware of Utterbach's transactions with Turner, further than the information afforded by the order on Delaplane, and had no communication with Utterbach until about the 20th of October, 1865, when he was sought by Utterbach, who proposed to settle with him the order on Delaplane by paying a smaller sum in United States currency. Just before this, Turner had offered to pay Rixey his said debt in United

States currency at the rate of twenty-
316 two per cent., which offer was declined. Utterbach, in his said interview, offered to pay him twenty-three per cent. in such currency, which was supposed to be less than its market value; which offer Rixey accepted, in consideration of the payment to be then received, and which was agreed to be taken, and was taken, in the form of a note drawn by said Utterbach, dated October 20, 1865, for six hundred and seventy-six dollars and eighty-nine cents, with interest from date, payable sixty days after date to said Rixey or order, negotiable and payable at the First National Bank at Alexandria, Virginia, and endorsed by Charles Bragg and R. E. Utterbach. The drawer of said negotiable note, the said C. H. Utterbach, assured the said Rixey and Charles Bragg, one of the endorsers, that it would certainly be paid at maturity, and the said note would not have been accepted but for that assurance. The said Rixey, upon the giving of said negotiable note, and in consideration thereof, thereupon released and discharged the said Turner from all liability to him on account of the purchase of said tobacco, and delivered up the order on Delaplane to said Utterbach. The said negotiable note was not paid at maturity, though deposited at the said bank for collection, but was duly protested for non-payment, and due notice of such non-payment and protest was given to the drawer and endorsers. After the protest of the note, and while it was in the hands of a third party, to whom Rixey had delivered it, Utterbach the drawer repeatedly promised in writing to pay it, his last promise in writing to pay it being on the 4th to pay it on the 6th day of August, 1866. The judgment on which the execution was issued, which was quashed in this case, was obtained on the said negotiable note by Rixey the payee, against Utterbach the drawer thereof.

The first section of the act before referred

to, standing alone, clearly embraces this case. The second as clearly
 317 *excepts it from the operation of the first; this being a case in which the debt or liability sought to be enforced was contracted or incurred since the 2d day of April, 1865, and the only question is, whether the third section takes the case out of the operation of the second, and restores it to the operation of the first; that is, whether the negotiable note dated October 20, 1865, on which the judgment was obtained, which was the foundation of the execution and forthcoming bond that were quashed, is a security or undertaking, the consideration of which was a debt contracted or liability incurred prior to the second day of April, 1865, within the meaning of the said third section?

This section is certainly very broad in its terms: "No security or undertaking of any sort, the consideration of which is a debt contracted," &c.; though not broader than the second section, which declares that "the foregoing section (that is the first) shall not apply to any case in which the debt or liability sought to be enforced was contracted," &c. But surely it was not designed by the Legislature to include in the operation of the third section every security and undertaking made since the 2d day of April, 1865, founded in any manner or to any extent whatever, directly or indirectly, on the consideration arising from a debt contracted or a liability incurred prior to that day. Surely the Legislature did not intend to attach to all debts contracted before that day such an indelible stain as that they could not, by any combination with other elements, be made a sufficient consideration for a debt contracted after that day to bring it within the operation of the second section of the act. Then where is the line to be drawn between securities and undertakings executed or assumed after the 2d day of April, 1865, in consequence of a debt contracted or liability incurred prior to that day, which are
 318 within the saving of the second section, and such *securities and undertakings which are not within the saving of that section?

Without undertaking to draw the precise line so as to ascertain what cases lie on one side and what on the other side of it, we think we may safely say, that wherever the creditor gives up a substantial part of the old debt, or the liability of a person bound to him for its payment, in consideration of the new security for the payment of the debt or any part of it, such new security comes within the saving of the second section, and may be enforced according to its terms, notwithstanding the stay law. In this case, it cannot be said that the consideration of the new security is the old debt within the meaning of the third section. "The consideration," within that meaning, is where the old debt forms the whole consideration of the new security, and does not embrace a consideration compounded of the old debt and other elements

of value. Where the old debt is the sole consideration of the new security, it is regarded by the act as the same debt, although the security is changed; and that, too, although the creditor may have been benefited by the change, as where he gets additional security. But where a substantial part of the debt is given up, or the liability of some person bound for the old debt is released, in consideration of the new security, there has been such a novation of the debt as brings it within the saving of the second section. If this were not so, the stay law would deprive a debtor of the power of making any composition with his creditors for his relief from debt, or for the release of any of his sureties. A creditor being stayed by the law in the enforcement of his debt, might be willing to give up a part of it, and even give up the liability of a surety, provided he could get a new security of the debtor for the payment of a certain sum at a certain time. If the law denies to the debtor the right to give
 319 such a security which the creditor *may enforce, does him an injury instead of a benefit. He may surely waive a benefit which the law intended to provide for him, especially if by so doing he can secure what he esteems to be a greater benefit. Whenever a creditor gives up a substantial part of the debt, or releases a person who may be bound for it, in consideration of a new security given for the payment of a certain sum at a certain time, it may fairly be inferred to be the intention of both parties that payment shall be made at that time, notwithstanding the stay law.

There is nothing in the latter part of the third section which is inconsistent with this view. The meaning of that provision is, that where a security or undertaking is executed or assumed after the 2d day of April, 1865, for a sum of money composed, among other things, of a debt contracted or liability incurred prior to that day, such security or undertaking shall, as to so much of the money due thereon, be considered as a debt contracted or liability incurred before that day, within the meaning of the act. The several portions of the sum of money for which the security is executed or the undertaking assumed in that case being wholly independent of one another, no alteration is thereby effected in the nature of the former debt within the meaning of the act. But this is very different from a case in which a part of the former debt is given up or the liability of another person therefor is released in consideration of the new security.

And now let us apply the principle which we have laid down to the facts of this case. About the 20th of October, 1865, Turner and Utterbach were indebted to Rixey in the value of \$2,700 in "Southern State funds (bankable)" as of the month of April, 1864, in the city of Richmond, that being the amount of the order which in the latter month and year was drawn by Utterbach on Delaplane in favor of Turner, and by him passed to Rixey, to

320 *be collected and applied to a debt of the same amount then due to him by Utterbach and Turner, but which order was protested by Delaplane as aforesaid. Being so indebted, Turner offered to pay the debt to Rixey in United States currency at twenty-two per cent., which offer was declined. The fair inference from this statement is, that this offer was to make the payment in cash. So that Rixey might at that time have received payment of the debt of Turner in United States currency, at the rate of twenty-two per cent., but declined to do so, no doubt because he thought the rate was too low. Shortly thereafter, Utterbach sought an interview with Rixey, and "offered to pay him twenty-three per cent. in such currency, which was supposed to be less than its market value; which offer the said Rixey accepted, in consideration of the payment to be then received, and which was agreed to be taken, and was taken, in the form of the negotiable note aforesaid, and which said negotiable note the said Utterbach assured the said Rixey and Charles Bragg, one of the endorsers, would be certainly paid at maturity. Said note would not have been accepted but for said assurance. Said Rixey, upon the giving of said negotiable note, and in consideration thereof, thereupon released and discharged the said Turner from all liability to him on account of the purchase of said tobacco, and delivered up the said Delaplane's order to said Utterbach." Now here it appears that Rixey, on or about the 20th of October, 1865, might have received in cash the amount of his debt in United States currency at twenty-two per cent., but declined doing so; and at or about the same time, accepted an offer of twenty-three per cent. in such currency, which was supposed to be less than its market value. Supposed by whom? The fair inference is, by both parties, or generally. There is nothing in the record to show what was the value of "Southern State *funds (bankable)" in

321 April, 1864, or even what was the precise nature of the funds referred to, though the presumption is they were Southern bank notes, receivable at bank in payments or on deposit. Nor can the court judicially know what was the value of such funds. Less than the amount of the debt may have been offered and accepted in satisfaction thereof, in consideration of its immediate payment, notwithstanding the stay law enacted by the Legislature at Alexandria on the 23d of January, 1865—Acts of Assembly, p. 7, ch. 7—which was then in force; "which offer the said Rixey accepted," as the bill of exception states, "in consideration of the payment to be then received." So that the payment was considered in effect as a cash payment. "And which," as the bill of exceptions proceeds to state, "was agreed to be taken (and was taken) in the form of the negotiable note aforesaid, and which said negotiable note the said Utterbach assured the said Rixey and Charles Bragg, one of the

endorsers, would be certainly paid at maturity." The transaction, then, was the same in effect as if the money had been actually paid to Rixey, and by him immediately loaned to Utterbach upon his negotiable note at sixty days, endorsed by Bragg, which Utterbach assured Rixey and Bragg would certainly be paid at maturity. It is fair to presume from the evidence, that Rixey did not get a cent more by taking the note than he would have accepted in cash. The note was, in effect, a new transaction and a new debt, though created in consequence of the old one. But something of still more importance yet remains to be stated to give this character to the note. Not only is it stated in the bill of exceptions that the "note would not have been accepted but for said assurance," but it is further stated, "that said Rixey, upon the giving of said negotiable note, and in consideration thereof, thereupon released and discharged the said Turner

322 *from all liability to him on account of the purchase of said tobacco, and delivered up the said Delaplane order to said Utterbach." In other words, Rixey, in consideration of the negotiable note, and the assurance which was given of its certain payment at maturity, released and discharged his original debtor, who had just before offered to pay him in cash only one per cent. less of the original debt than the amount of the said note, and delivered up the order which he had been holding as collateral security, and which operated as an equitable assignment of so much of what might have been due, if anything, by Delaplane to Utterbach. Upon the principle before laid down, the case clearly comes within the operation of the second and not of the third section of the act of March 2, 1866, aforesaid.

We are, therefore, of opinion to affirm the judgment of the District Court.

Judgment of the District Court of Appeals affirmed.

323

*Ragland & Co. v. Butler.

January Term, 1868, Richmond.

1. **Pleading and Practice—Contract—Counts—Case at Bar.**—B contracts to sell the merchantable pine timber on certain land, and saw it into lumber; pile the said lumber openly with sticks, and deliver it in Richmond. One count says the *lumber* was piled openly with sticks; another count says the *lumber* delivered was sawed from merchantable pine timber, and does not say the lumber was merchantable. **Held:** The contract meant the *lumber* should be piled, and therefore the first count was good; and that the merchantable timber meant merchantable lumber, and therefore the second count was good.

2. **Same—Same—To Pay by Sixty Day Note—Count—Case at Bar.**—In this case the contract was to pay on delivery by a note at sixty days. The count avers the refusal to give the note, and the refusal to pay the money after the sixty days. **Held:** If the non-delivery of the note was the sole grava-

men of the action, the averment of non-payment of the money was surplusage, and did not vitiate the count. But *held* further: That the agreement to give the note to pay at a specified time was, in legal intentment, an obligation to pay at that time if there was a failure to give the note.

3. **Same—Same—To Advance Freight—Unnecessary to Aver Payment.**—By the contract, R was to advance the freight, which was to be deducted when the note was given. It was not necessary to aver the payment of the freight by B.

4. **Contracts—Obligation to Deliver Implies Obligation to Receive.**—One count avers the refusal of R to receive the lumber. The obligation to deliver implies the correlative obligation to receive; and the refusal to receive is therefore a breach of the contract.

5. **Same—Mutual Promises—Case at Bar.**—The demand of the note is averred to have been made on the day of the delivery, or the offer to deliver the lumber. It is a case of mutual promises, and B was entitled to demand the note when he delivered or offered to deliver the lumber; and the demand was not made too soon.

324 *6. **Contract—To Sell Merchantable Timber—Rule by Which to Determine Compliance.**—A contract to sell the merchantable pine timber upon a certain tract of land, to be sawed into lumber by the vendor according to the directions of the purchaser, and to be delivered at Richmond, is a contract that the lumber shall be merchantable; and the usage at Richmond as to what constitutes a compliance with the directions of the purchaser, is to be the rule in determining that question.

7. **Appellate Practice—Instructions—Misleading.**—The court having refused to give an instruction to the jury asked for by the defendant, that the plaintiff must prove the delivery or the offer to deliver of merchantable lumber cut from the merchantable timber upon the land, &c., and afterwards having instructed the jury that if they believed that the plaintiff cut from the land, &c., merchantable pine timber, and sawed it into lumber, without saying that the lumber must be merchantable, this instruction, after the refusal of the first, was calculated to mislead the jury; and the judgment will be reversed.

This was an action of covenant in the Circuit Court of the city of Richmond, brought by James T. Butler against E. F. Ragland and N. H. Ragland, partners under the name and style of Ragland & Co., to recover the value of a quantity of lumber contracted to be sold by Butler to Ragland & Co.; and which they refused to receive, on the ground, as they alleged, that it was not such as the contract provided for. Butler was a citizen of the county of Caroline, and Ragland & Bro. were lumber dealers in the city of Richmond.

The contract, which bore date the 25th of August, 1865, provided that Butler sold to Ragland & Co. all the merchantable pine timber on a certain tract of land in Caroline county, Va., purchased by said Butler of Bendalls, Peatross and Coleman, to be sawed into lumber of such lengths, widths and thicknesses, as may be required in writing by the said Ragland & Co., from time to time, as they may want it; pro-

vided that they keep an order on hand, so that the mill may be kept constantly running without loss of time; and that the lengths of such timber *are not to exceed thirty-six feet; and the width not to exceed the largest sized timber on said land; also, that all of said timber shall be piled openly with sticks for at least thirty days before being shipped. And Ragland & Co. agreed to pay to Butler \$22.50 per thousand feet, for the said lumber delivered in the city of Richmond, at the depot of the Richmond, Fredericksburg and Potomac Railroad Company; said payment to be made by negotiable notes payable at sixty days from the time of completion of delivery of each one hundred thousand feet of lumber at said depot in Richmond. Freight to be advanced as the lumber was received by the said Ragland & Co., and deducted at each settlement.

The declaration contained five counts, in each of which the contract was set out. A demurrer to the first count was sustained; and it need not therefore be noticed further. The second count averred, that the plaintiff did, on divers days between the 25th of August in the year 1865 and the 26th of July, 1866, deliver to the defendants in the city of Richmond, at the depot of the Richmond, &c., Railroad Company, merchantable pine lumber, sawed of the lengths, widths and thicknesses required by the orders in writing of the defendants; which lumber amounted to more than one hundred thousand feet, viz., on, &c., stating the different days when the lumber was delivered, extending from April 25th to July 23d, 1866, and the quantity delivered on each day. The count then goes on to aver a compliance by the plaintiff with each provision of the contract on his part, notice of the delivery of each parcel of lumber to the defendants on the day of delivery; and the demand after the whole hundred thousand feet of lumber had been delivered, to wit, on the 23d of July, 1866, upon the defendants for their negotiable note, payable at sixty days, for the price of one hundred thousand feet of lumber at \$22.50 per thousand feet. And the defendants *had then and there refused to make their said negotiable note payable at sixty days from the said 23d of July, 1866, &c.

The third count sets out the orders of the defendants for the lumber, and the delivery in pursuance of said orders, the last being on the 23d of July, 1866, at the railroad depot, of lumber sawed from the merchantable pine timber on the tract of land referred to in the contract, and part of the merchantable pine timber sold to the defendants; which said lumber, before being shipped to Richmond, had been piled openly with sticks for thirty days, and amounted to more than one hundred thousand feet. There was then an averment of the demand, to wit, on the 23d of July, 1866, of the negotiable note, and the refusal to give it; and that, although sixty days had elapsed since the completion of the delivery of the

lumber, and the price thereof, amounting to \$2,250 is due and payable, the defendants, &c., had not paid, &c.

The fourth count differs from the third only in averring that, on the 23d of July, 1866, in the city of Richmond, he demanded of the defendants the price of said lumber at the rate of \$22.50 per thousand feet, viz., \$2,250, and required that the said price should be paid by a negotiable note, payable at sixty days as aforesaid. But that the defendants had refused to make such note; and that though the price of the said one hundred thousand feet of lumber so delivered had long since become due and payable, the defendants, though often requested, had refused to pay the same.

The fifth count sets out the orders of the defendants for lumber as of the dates of the 26th of August, 1865, the 15th of February and the 16th of April, 1866, stating the different kinds and quantities of each, and then averred, that the plaintiff was ready in fulfillment of his part of said article of agreement to deliver to the

327 defendants lumber *of the lengths, width and thicknesses mentioned in said orders of the defendants, and that he had ready for delivery in the city of Richmond, at the depot of the Richmond, Fredericksburg and Potomac Railroad Company, lumber of the lengths, &c., required by the said orders in writing of the defendants, amounting to a large number of feet, to wit, to one hundred and seven thousand one hundred and fifty-six feet, stating the times from the 25th day of April to the 23d of July, 1866, and the kinds and quantity of each at each date. That the lumber was sawed from the merchantable pine timber on the tract of land in Caroline county; that it had been piled before shipment for thirty days openly with sticks; that the defendants had notice on the several days the lumber was at the depot in Richmond that it was ready for delivery; but that they had refused to receive the said several lots of lumber.

At the November term, 1866, of the court, the record says, "the defendants demurred generally to the plaintiff's declaration, and the plaintiff joined in the demurrers." The cause was continued until the May term, 1867, when it was heard upon the demurrer, and the entry is: "The defendants' demurrer to the plaintiff's declaration being argued, it seemed to the court that the second, third, fourth and fifth counts of the said declaration were sufficient in law for the plaintiff to have and maintain his action against the defendants; whereupon the court overruled the said demurrer to the said counts; and that the first count of said declaration, and the matters therein contained, were insufficient in law for the plaintiff to have and maintain his action on that count. It was therefore considered by the court that the demurrer to the first count be sustained; and no ground being assigned for the general demurrer to the declaration, the court overruled said demurrer." Issues were then made up

328 on "the pleas of "covenants performed" and "covenants not broken."

On the trial, the plaintiff introduced in evidence the contract declared upon, the orders of the defendants for the lumber, the certificates of the measurer and inspector of lumber for the city of Richmond that he had passed the different parcels of lumber, specifying the kind and quantity, as good merchantable lumber, and also written notices to the defendants that it was at the depot, and calling upon them to take possession of it; and he introduced evidence to prove the delivery of these notices, and also that the lumber had been piled as required by the contract, and was merchantable. The defendants introduced a number of witnesses, the most of whom were builders in the city of Richmond, and had examined the lumber at the request of the defendants, to prove that it was not merchantable. It appeared that, after the refusal of the defendants to receive the lumber, it had been sold at auction by the plaintiff, after notice of sale to the defendants.

After the evidence had been introduced, the defendants moved the court for an instruction embracing the first three propositions asked for in the second instruction; and that upon the plaintiff's failure to prove any one of said propositions he could not recover in this action.

This instruction the court refused to give; and thereupon the defendants asked the court to instruct the jury as follows:

2d. The court instructs the jury that, to recover in this action, the plaintiff must prove that he delivered or tendered between the 25th of April, 1866, and the 23d of July, 1866, at the depot of the Richmond, Fredericksburg and Potomac Railroad Company, one hundred thousand feet of merchantable lumber, cut from the merchantable timber upon a tract of land bought by him 329 from *Bendalls, Peatross and Coleman, in the county of Caroline; and upon a failure to prove which he cannot recover in this action.

3d. The court instructs the jury that, to recover in this action, the plaintiff must prove that said lumber was sawed in such lengths, widths and thicknesses as was required by the defendants by orders dated August 26th, 1865, February 15th, 1866, and April 16th, 1866, provided that said orders did not require lengths exceeding thirty-six feet, and widths not exceeding the largest size timber on said land; and upon a failure to prove which he cannot recover in this action.

4th. The court instructs the jury that, to recover in this action, the plaintiff must prove that the said lumber, before it was shipped from Caroline, had been piled openly with sticks for at least thirty days; and upon failure to prove which he cannot recover in this action.

5th. For the plaintiff to recover in this action, the jury must be satisfied from the evidence that one hundred thousand feet of lumber was delivered or tendered by the

plaintiff between the 25th day of April, 1866, and the 23d day of July, 1866, at the depot of the Richmond, Fredericksburg and Potomac Railroad Company, in the city of Richmond, of the kind called for in the contract sued on, of the sizes specified in the orders of the 26th of August, 1865, 15th of February, 1866, and the 16th of April, 1866; and if they shall not be satisfied from the evidence that one hundred thousand feet of such lumber was so delivered or tendered, they must find for the defendants.

The court refused to give these instructions. The plaintiff then applied for an instruction, which the court refused to give, and gave the following:

If the jury shall believe from the evidence that, on or before the 23d day of July, 1866, the plaintiff cut from *the land mentioned in the contract between himself and the defendants given in evidence in this cause, merchantable pine timber, and sawed it into lumber of the lengths, widths and thicknesses required in the written orders of the defendants, from time to time, and piled the said lumber openly with sticks at least thirty days before being shipped, unless shipped sooner by order of the defendants, and within a reasonable time after said orders were received; and on or before the 23d day of July, 1866, the said plaintiff delivered one hundred thousand feet of said lumber at the depot of the Richmond, Fredericksburg and Potomac Railroad Company, in this city, of which delivery the defendants had due notice, then the plaintiff is entitled to recover the value of the one hundred feet of lumber so delivered, estimated at the rate of \$22.50 for each one thousand feet; unless the jury shall further believe that the defendants made payment therefor by negotiable note at sixty days from the time of completion of the delivery of the lumber as aforesaid. But if the jury shall believe that the defendants refused to receive the lumber delivered as aforesaid, and that the plaintiff sold the same after having duly notified the defendants of such sale, then the amount so ascertained is to be credited by the net proceeds of such sale and the freight advanced by said defendants, if any. In ascertaining whether said lumber was sawed as directed by said order, the jury may consider what is a compliance with such orders according to the custom of the trade in lumber in this city.

To the opinion of the court refusing to give the instructions asked for by the defendants, and giving the foregoing instruction, the defendants excepted. There was a verdict and judgment for the plaintiff for \$1,162.04, with interest from the 23d of September, 1866, till paid. And the defendants thereupon applied to this court for a writ of error, which was allowed.

331 *Williams and Crump, for the appellants.

Steger & Sands and Lyons, for the appellee.

RIVES, J. There seems to be some uncer-

tainty and imperfection in the record as to the state of pleadings in this case. The first entry of 21st November, 1866, is, "that the defendants demurred generally to the plaintiff's declaration; and the plaintiff joined in said demurrers." If this stood alone, there would appear to have been only a general demurrer to the whole declaration; and that the plural "demurrers" was used by mistake for the singular. But when we look further into the proceedings, we find that there has been some omission or inaccuracy which devolves upon us the duty of giving a consistent interpretation to the whole. I think the materials for doing so will be found in the entry of May 15th, 1867, by which the pleadings were adjusted by the court. The statement is, "that the defendants' demurrer to the plaintiff's declaration being argued, it seemed to the court that the second, third, fourth and fifth counts of the said declaration were sufficient in law for the plaintiff to have and maintain his action against the defendants; whereupon the court overruled the said demurrer as to said counts; and that the first count of said declaration and the matters therein contained were insufficient in law for the plaintiff to have and maintain his action on that count. It was therefore considered by the court that the demurrer to said first count be sustained; and no ground being assigned for the general demurrer to the declaration, the court overruled said demurrer." This action of the court can only consist with the hypothesis of a demurrer to the whole declaration, and demurrers to the several counts thereof. The uncertainty, therefore, of the first entry is corrected by this latter one; and when both are taken and construed together, we are warranted in viewing 332 the case as if in *addition to the demurrer to the whole declaration, the counts were severally demurred to, so as to give effect and meaning to the plural designation employed in said first entry, which would have been inapplicable if there had been a demurrer to the whole declaration alone. Hence, I infer from the whole record that the appellants are entitled to the benefit, if any, of their several objections to the counts of the declaration, as if the record had shown demurrers to them in terms.

The first two grounds of demurrer may be considered together—the first alleging that the performance should have been alleged in the terms of the contract as set forth, namely, that the timber and not lumber was piled openly with sticks, &c.; and the second, that in the third, fourth and fifth counts the delivery was averred in the language of the contract as of "lumber sawed from merchantable pine timber," without the epithet used in the second count of "merchantable." It is obvious that these exceptions militate against each other. While the first complains of any averment save in the literal terms of the contract, the second requires a departure from the words, and a construction of the contract

in the meaning and interest to the defendants. This seems to me to involve a total misconception of the objects of pleading and the duty of the pleader. In the averment of performance or breach the plaintiff has a right to conform to the legal effect and substance of the instrument he declares upon; and necessarily takes the hazard of any departure therefrom. The demurrer raises the question and devolves upon the court the construction of the instrument of which proft is made. There can, of course, be no error in counting on the delivery of the lumber in the language of the contract; can there be any in substituting "lumber" for "timber" in reference to the obligation to pile? If the latter term is

assumed to mean the unsawed log or
333 beam, it would *stultify the parties to the contract, as there is neither sense nor object in piling such; and the first rule of legal construction is reasonableness; but if the context plainly demonstrate the terms to be interchangeable in that application, there is still less semblance of propriety in the objection. These mere technicalities, therefore, were properly overruled.

A third ground of demurrer is, that the breach should have been confined to the non-delivery of the note, and should not have embraced along with that the non-payment of the money, for which the note should have been given. The whole force of this objection is avoided by two considerations: First—Upon the hypothesis of the defendants, that the non-delivery of the note was the sole gravamen of the action, the averment of non-payment was surplusage; and, secondly, that an agreement to give a note to pay at a stipulated time created, by force of a necessary legal intendment, an obligation to pay at that time, if there were a failure to give the note. I do not, therefore, discern any defects in the counts in this particular.

The fourth objection rests on the pretension, that the deduction of costs of transportation was a condition precedent to the action; but this is not so; it is a matter of plea or defence, or abatement of the plaintiff's demand. The right of action was complete on delivery; and it was not incumbent on him to aver a set-off, to which the defendants in a certain event might be entitled; nor in this case could the payment of freight have been alleged, because the refusal to receive carried with it a denial of the freight.

Fifthly, it is claimed that the fifth count is faulty, in averring a refusal to receive as a breach of this contract. An obligation to deliver, implies the correlative duty to receive; and the pleader was well
334 justified to vary his allegations *according to legal intendments, and to rely on this version of the contract.

The sixth and last objection to the declaration is, that the demand of the negotiable note is laid on the same day that the delivery was averred, namely, on the 23d July; whereas it is contended that the defendants had the whole of that day for the making

of their note. The doctrine, thus invoked, does not apply to this case. It is one of mutual contracts, contemporaneous in performance, and falling under the fifth rule laid down by Mr. Sergeant Williams, in his note to *Portage v. Cole*, 1 Wms. Saund. R. 310. Such is the case of all sales. Delivery is predicated of payment; and payment, of delivery, leaving it uncertain which party is to do the first act. Here, upon the delivery or offer to deliver, the plaintiff was entitled at the same moment to the note of the defendants. It is not, therefore, a question at all analogous to the one made at the bar, whether, in the computation of time, a day was to be reckoned inclusively or exclusively; the making of the note was contemporaneous in the understanding of the parties with the act of delivery; and both were properly laid on the same day. The delivery might have been refused without the note; as well as the note refused without the delivery.

I have thus reviewed all the grounds of demurrer, and given my reasons for approving the action of the court below in overruling them. This brings us to the substance and merits of this controversy. The questions arise upon the instructions refused, and the instruction given by the court. A comparison of the former with the latter, shows that there are but two enquiries submitted to us: first, as to the interpretation of the contract respecting the lumber to be delivered; and secondly, as to the proof of usage, or its admissibility in governing its fulfilment.

I. In order to arrive at a just and
335 reasonable interpretation *of this contract, we must look at the situation and conduct of the parties, and the subject-matter of their contract. The plaintiff was the owner of certain lands, and proposed to sell all of the merchantable pine timber upon them; the defendants were lumber-dealers in the city of Richmond, and agreed to buy this timber, to be sawed into lumber of dimensions to be ordered, under certain restrictions as to length and width, and as to time and mode of seasoning. There seems to have been no preliminary survey to inspect and ascertain the character of the growing timber, as would have been proper and necessary, if it had been the subject of the sale. But such was not the bargain; lumber was the object of the defendants, and the subject-matter of the contract. With the sale of the timber, the plaintiff coupled the further undertaking to have it sawed according to orders; and when dried in a particular mode, to deliver in the city of Richmond. What was the design of stipulating that the timber should be merchantable, if the same quality was not to attach to the lumber into which it was to be converted? What is the meaning of merchantable timber, if it be not timber that will make merchantable lumber? The application of this epithet to the timber, doubtless superseded with the contracting parties the propriety of its repetition in regard to the lumber, because it

is not reasonable to suppose that the parties could have contemplated anything but merchantable lumber as the product of merchantable timber; or could have imagined any other test of merchantable timber except its capacity to make merchantable lumber.

The ambiguity of this contract in this particular, is also removed by the dealings of the parties under it. The plaintiff caused the lumber, as delivered, to be measured, and certified by the measure as merchantable. These certificates of measurement and quality were transmitted by the plaintiff, and recognized by him as due to 336 the defendants. *They may, therefore, be considered as his practical interpretation of his obligation for the lumber; and authoritatively explain whatever of ambiguity confuses the terms of the bargain.

It might seem that the language of the court's instruction should not have misled the jury. They would have been well warranted in construing the instruction as requiring the lumber to be merchantable, inasmuch as it was required to be sawed from merchantable timber; but inasmuch as the court had refused the defendants' instruction on this particular point, there was ground of misconception, and the language of the instruction was not precise and definite enough. I think, therefore, this instruction was, under the circumstances, too restricted, and should in terms have required the lumber to be also merchantable.

II. In regard to the second point of our enquiry—the control of usage over this contract—it is not clear what foundation was laid for the introduction of such proof, or to what precise matter it was addressed.

The term "merchantable" is not one that the law can define; and the sense in which it was used must be left to the determination of the jury. For that purpose, they are to consider the circumstances under which the contract was entered into, the situations and business of the parties, and the usage of the lumber trade, that prevailed in the city of Richmond at the date of the contract, as the means of ascertaining the intentions of the parties.

In the fulfilment of orders like those contemplated by the parties in this case, it must often happen that the dimensions of the lumber furnished, in length, width and thickness, do not precisely correspond with those specified in the orders.

As a general principle, usage cannot be allowed to control the execution of the 337 orders, or justify a departure *from them; but an exception may arise upon proofs—namely, if it should appear that there was an established usage, showing what should be deemed a substantial and sufficient compliance with such orders, it might be proved to ascertain the sense in which the orders were understood by the parties—whether they were to be presumed as contracting in reference to such usage, and whether an exact, mathematical com-

pliance was intended; or if not, what approximation to it would satisfy the contract. For this purpose, too, the usage to be referred to, is that which prevailed in Richmond at the date of the contract, for that alone must be supposed to have been in the contemplation of the parties.

I am, therefore, of opinion, the judgment of the court below should be reversed, and the case sent back for another trial, in conformity with the principles indicated.

The other judges concurred in the opinion of Rives, J.

Judgment reversed.

338 *DeVoss & als. v. City of Richmond.*

April Term, 1868, Richmond.

[98 Am. Dec. 647.]

1. **Municipal Corporations—Borrowing Money—Liability for Acts of Agents.**—In exercising the power to borrow money, a municipal corporation is not exercising sovereign powers, but is responsible for the acts of its agents as a private corporation.
2. **Municipal Bonds—Purchasers;—How Far Bound by Directions to Officers.**—An individual purchasing the bonds of a municipal corporation, and having no actual notice of any special directions given to the officers of the company in relation to the particular bonds purchased, will only be bound by such directions if he has been wilfully ignorant of them; and not merely where there has been a want of caution.
3. **Municipal Corporations—Bonds Issued in Lieu of Confiscated Bonds—Liability.**—The District Court of the Confederate States confiscated certain bonds of the City of Richmond, and by its decree directed the City Council to issue bonds in lieu of those so confiscated to its receiver. The Council, by resolution, directed its officers to issue the bonds as directed by the decree; but to insert on the face of the bond so issued, and on the books of the office, that it was so issued in lieu of a confiscated bond; and to do this upon every re-issue of the bond. The officer obeyed the directions on the first issue of the bond, but failed to do it upon the re-issue of the bond; and it was purchased by a party having no knowledge that it was such a bond. The City is bound to pay the bond.

*For monographic note on Municipal, County, and State Bonds, see end of case.

†**Municipal Corporations—Liability for Acts of Agents.**—See *Sawyer v. Corse*, 17 Gratt. 230, and *foot-note*; *City of Richmond v. Long*, 17 Gratt. 375.

‡**Municipal Bonds—Bona Fide Purchaser.**—“This court held in *DeVoss v. City of Richmond*, 18 Gratt. 338, that the *bona fide* holder of a bond issued to him, standing in the position of a holder of a negotiable security, is not bound to look behind the bond itself. And this is unquestionably the result of the authorities generally.” *City of Lynchburg v. Slaughter*, 75 Va. 62. See also, the principal case cited on this point in *Supervisors v. Randolph*, 80 Va. 621, 16 S. E. Rep. 722.

See generally, monographic note on “Municipal Corporations” appended to *Danville v. Pace*, 25 Gratt. 1.

In December, 1866, the City of Richmond filed a bill against E. W. DeVoss, R. H. Maury & Co. and Asa Otis, in which it was stated that there were then outstanding two bonds of the city, each for the same sum of twenty-three hundred dollars, of the funded debt of the city, one of which was held by Otis and the other by DeVoss. The

339 *plaintiff was advised that the bond held by Otis was valid, and that the bond held by DeVoss was not a valid claim against the city. That Otis, who was a citizen of Massachusetts prior to the late war, held the bond of the city No. 7, for the sum of twenty-three hundred dollars, on which he had received interest up to July 1st, 1861. That from July 1st, 1861, to some time in the year 1865, the government of the Confederate States exercised over the greater portion of the State of Virginia, and certainly over the city of Richmond and its inhabitants, all the powers and functions of a legitimate sovereignty, exacting obedience to its laws and measures from all persons, municipal bodies and bodies corporate; and among these were certain laws sequestering and confiscating to the use of the Confederate States all property, rights and credits within its limits which belonged to the citizens of the United States, as the estate of alien enemies; and the courts of the Confederate States were charged with the execution of these laws. That in a suit in the District Court of said Confederate States for the Eastern District of Virginia, between the Confederate States and the City of Richmond, the court by its decree confiscated the debt due upon the bond of Otis, along with many others alike situated, to the use of the Confederate States, as the property of an alien enemy, and commanded the said city by its decree to issue to Henry L. Brooke, as receiver of the said court, a new bond for the said debt of twenty-three hundred dollars, and directed the said Brooke, when the said bond should be received by him, to sell the same for the use of the Confederate States.

That the Council of the City adopted a resolution: "That in obedience to a decree of the District Court of the Confederate States of America for the Eastern District of Virginia, made April 3d, 1862, in a suit between the Confederate States of America and the City of Richmond, 340 *bonds of the city of Richmond be issued to Henry L. Brooke, receiver of said court, as directed by said decree, and that upon the books of the auditor, and also upon the face of the bonds, it shall be stated on account of what bonds said new bonds are issued. And whenever said bonds are transferred, they shall show that the bonds issued are on account of bonds mentioned in said decree. And the auditor is hereby directed to pay to the said H. L. Brooke, receiver as aforesaid, the interest now due upon the aforesaid bonds as directed in said decree." That in pursuance of said decree and resolution, the interest was paid to Brooke, and a bond

No. 40, was issued to him by the auditor in place of the bond of Otis, on the face of which it was stated: "Be it known, that the City of Richmond is indebted to H. L. Brooke, receiver of the District Court of the Confederate States of America for the Eastern District of Virginia, in lieu of bond No. 7, standing in the name of Asa Otis, and sequestered by the decree of said court on the 3d of April, 1862, in the case of The Confederate States v. The City of Richmond, and his assigns, in the sum of \$2,300 redeemable 1st of July, 1891, and bearing interest at the rate of six per cent. per annum from the 1st of January, 1862, payable semi-annually 1st of January and 1st of July;" which bond was dated 15th of April, 1862.

The bill further stated that Brooke passed the bond to R. H. Maury & Co., who, being the holders thereof, applied to the auditor for a new bond; and they having surrendered the bond, the auditor issued to them a new bond, in which they were the obligees, but omitted to make the said new bond show on its face that it was on account of a bond mentioned in said decree. That this omission was without the authority or sanction of the City, by its Council or otherwise; the aforesaid resolution being at that time, and ever since its adoption, in full force. The *bill charges 341 that Maury & Co. took the bond with notice that it was given in lieu of the bond of Otis; and that afterwards they passed it off to DeVoss, who in like manner obtained a new bond, payable to himself, in the place of the one he surrendered.

The prayer of the bill was for a surrender of the bond held by DeVoss, and for general relief.

The resolution of the Council is properly stated in the bill; but there is no copy of the bond issued to Brooke in the record, though the bill makes it an exhibit. This bond was, on the 29th of October, 1862, assigned by the attorney of Brooke to R. H. Maury & Co., and the bond issued to them, and that afterwards issued to DeVoss, is in the usual form of bonds issued by the City of Richmond; and is executed in the mode prescribed by the ordinance of the city.

DeVoss, in his answer, denied all knowledge of the confiscation of the bond of Otis, all knowledge of the resolution of the Council, or that the bond he held was issued on account of Otis' bond. And he said that it had been his purpose not to purchase confiscated property, and he invariably asked if the stock he proposed to buy was free from the taint of confiscation; and it was only upon such assurance that he would buy. He says that the bond issued to R. H. Maury & Co. was not delivered to him; but that Maury & Co. delivered to him the bond he holds payable to himself.

R. H. Maury & Co., by their answer, denied all notice that the bond they received was issued in place of the bond issued to Brooke. They say, that a suspicion that such was the fact would have prevented

their purchase of it, it being their settled practice not to buy stocks or other securities, the title to which was derived through proceedings of sequestration in the Confederate court. That they bought the bond of Lancaster & Co., brokers, who
342 *did not inform them of the name of the holder of the bond or exhibit it to them; and that upon their agreeing to buy, Lancaster & Co. procured a bond to be issued to the respondents, which was in the usual form.

The charter of the city gives authority to borrow money without any restrictions as to the amount, and the ordinance of the city, which is substantially taken from the Act of Assembly, prescribes the mode in which bonds or certificates of debt of the city shall be issued and executed. The practice in the transfer of bonds is generally for the owner to give a power of attorney to his agent who sells, to transfer the bond on the books of the auditor; and when a sale is made, this agent has the transfer made and the new bond issued payable to the purchaser, which the agent delivers to the purchaser.

DeVoss having been in Europe during the period of these transactions, his agent, who made the purchase for him, fully sustains his answer as to notice and his refusing to deal in securities derived under the sequestration acts.

The cause came on to be heard on the 19th of December, 1866, and it was agreed that the court might refer to the charter of the city, as well as its ordinances and entries upon the books of the auditor of the city. And thereupon the court held, that the bond held by DeVoss constituted no binding and valid obligation upon the City of Richmond; and that the complainant be forever quieted and acquitted from all claims or demands by reason of the same. From this decree, DeVoss applied to this court for an appeal, which was allowed.

Page & Maury and J. Alfred Jones, for the appellants.

Daniel, for the appellee.

JOYNES, J. The only point decided by the Circuit Court was, that the bond held by DeVoss imposed no valid obligation
343 *on the city, and the propriety of that decision is the only question upon which our decision has been invoked.

The bill proceeds upon the assumption that the decree of the court of the Confederate States, by which the bond held by Otis is alleged to have been sequestered and confiscated, and in pursuance of which it was sold, did not protect the city against his claim, after the suppression of the Confederate Government. This assumption is controverted by the answer of DeVoss, which denies that rights growing up under the laws of that government and the decrees of its courts, while it was de facto the government, expired with it on its overthrow. This question, however, was not discussed in the argument in this court. The proceedings and decree of the Confederate

court are not exhibited, nor their existence even admitted by the pleadings; and though the existence of a law for the confiscation of the property of alien enemies is admitted, the special terms of the law do not appear. There are not sufficient materials in the record, therefore, to enable the court to consider and decide upon the legal effect of the decree of confiscation, if we were asked to do so. And accordingly, we have not considered that question. I shall assume, for the purposes of the case, as was assumed in the argument, that the decree of confiscation and the proceedings under it did not affect the title of Otis to claim payment of the bond held by him, or, of themselves, give validity to the bond held by DeVoss. And besides, it would not be competent to consider the effect of that decree as between the City and Otis, because no such question has been raised in the pleadings. Whatever may be the rights of DeVoss, the City is not at liberty, on the present pleadings, to controvert the title of Otis.

It is conceded that the bond held by DeVoss was executed and issued to him by the officers of the city to whom was entrusted,

by its laws, the general duty of executing *and issuing bonds. In the
344 argument for the appellants, these officers were treated as the agents of the City, and the general principles of the law of agency were regarded as applying to the City in respect to the acts and functions of such officers, in like manner as to other corporations and their officers and servants.

For the appellee it was contended that the functions of these officers in reference to the execution, transfer, and renewal of bonds of the city, pertain to the execution by the City of the powers and duties devolved upon it in the character of a local government, and that the City cannot be held liable for their misfeasance or negligence in the discharge of those functions, according to the principles on which this court proceeded in *City of Richmond v. Long's adm'r*, 17 Gratt. 375.

But that principle has no application to this case. The power which was in question in the case referred to, was one of those conferred upon the city for public purposes only, and pertained to its character as a local government. It was not conferred with any view to the private advantage or emolument of the City. But the power to borrow money is bestowed primarily for the advantage and benefit of the City. It has no direct relation to the powers and duties of the City as a local government. It may be exercised in a particular case with a view to the better execution of those powers and duties, but it is not essential to their execution. It involves no exercise of sovereign power over the persons or property of the citizens, but is such a power as may be exercised by a private individual, or by an ordinary trading or commercial corporation. Such a power is entirely distinct, in contemplation of law, from those which are bestowed upon the City for public purposes

only, and pertain to its functions as a local government, exercising, for that purpose, a portion of the sovereign power of the State. The city, quoad hoc, is a
 345 *private corporation. This distinction is taken by Sir Lloyd Kenyon, Master of the Rolls, in *Moodaly v. East India Company*, 1 Brown C. C. 469. The plaintiff had taken a lease from the Company granting him permission to supply the inhabitants of Madras with tobacco for ten years. Before the term was out, the Company dispossessed the plaintiff, and granted the privilege to another. The plaintiff filed a bill of discovery, with a view to bringing an action against the Company. It was objected on behalf of the defendants, that the act complained of was incident to their character as a sovereign power, and could not be made the subject of a suit. His Honor admitted that no suit would lie against a sovereign power for any thing done in that capacity; but he held that the defendants, in that case, did not come within the rule. He said: "They have rights as a sovereign power; they have also duties as individuals; if they enter into bonds in India, the sums secured may be recovered here. So in this case, as a private company, they have entered into a private contract, to which they must be liable."

The power to borrow money is, of course, a discretionary power, to be executed or not, at the pleasure of the City, and in such manner as it may see fit. But when the City, through its proper authorities, has determined to exercise this power, and has prescribed how the bonds shall be executed, how they shall be transferred, and how new bonds shall be issued to the assignees, duties devolve upon the City which are absolute and purely ministerial. The holder of a bond has a right to transfer it. The City is bound to allow the transfer; to make the proper registry; and to issue a new bond to the assignee. For a refusal to perform these duties, an action will lie against the City, though perhaps the performance of them cannot be enforced by mandamus. *Angell & Ames on Corp.* § 381, § 710. The

City may, and, indeed, must, from the
 346 necessity *of the case, confide the performance of these duties to officers and agents; but they perform them in the place and stead of the City; their acts, in the execution of these duties, are the acts of the City. They are the mere agents and servants of the City, and in such a case the maxim respondeat superior applies. *Sawyer v. Corse*, 17 Gratt. 230. See *Bailey v. Mayor &c. of New York*, 3 Hill R. 531; *City of Dayton v. Plase*, 4 Ohio N. S. R. 80; *Clark v. Mayor &c. of Washington*, 12 Wheat. R. 40; *Thayer v. Boston*, 19 Pick. R. 511; *Weightman v. Corporation of Washington*, 1 Black. U. S. R. 39; *Conrad v. Ithaca*, 16 N. Y. R. 158, and cases cited.

It was contended for the appellee that DeVoss must be taken to have had notice of the character and history of the bond issued to him. It is not pretended that he had

actual notice, and it is very clear that he did not have such notice. But he purchased the bond from R. H. Maury & Co., by whom it was transferred to him in February, 1863; and it was transferred to them in October, 1862, by H. L. Brooke, receiver, under the decree of confiscation. From this, it is argued, DeVoss must be charged with constructive notice of the character of the bond, which he might have ascertained if he had traced it back through the books of the Auditor. But I do not think so. The bond delivered to DeVoss by Maury & Co. was perfectly regular on its face. DeVoss had no reason to suspect that it was a bond issued in lieu of one that had been confiscated, but he had the best reason to believe the contrary. For 1. The bond did not contain the statement which such bonds were required to contain by the resolution of the Council. And 2. Maury & Co. knew that DeVoss would not purchase such bonds, and their delivery of this bond to him was an assurance that it did not belong to that class. It does not appear that he ever saw

the bond which Maury & Co. held; but
 347 if he had seen it, that, too, *was regular on its face. There was nothing, therefore, to excite his suspicion, or to put him on enquiry. All that can be said is, that he might have ascertained the facts if he had gone to the Auditor's office and traced the bond back to its source. But that is not enough to charge him with constructive notice of what he might there have ascertained, in the absence of anything to put him on enquiry. 2 Rob. Pr. 29; *Opinion of Cabell, J., in French v. Loyal Company*, 5 Leigh 627. And according to the recent cases in England, a party will not be charged with constructive notice, unless the circumstances are such that the court can say that it was his duty to acquire the knowledge in question, and that his failure to obtain it was the result of culpable negligence. It is not enough that he should, from a want of prudent caution, have neglected to make enquiries; but he must have designedly abstained from such enquiries, for the purpose of avoiding knowledge; there must be a willful blindness, and not mere want of caution. *Jones v. Smith*, 1 Hare R. 55; *S. C.* on appeal, 1 Phillips R. 244; *Ware v. Lord Egmont*, 31 Eng. L. and Eq. R. 89. It was argued that DeVoss claims under assignment from Maury, and that it was his duty to look to Maury's title, by tracing the bond back through the previous transfers. This, however, is not the title which DeVoss holds. He holds a new bond given directly to himself. The nature of his title will be more fully considered hereafter.

The validity of the bond held by DeVoss is controverted on the ground that the officers of the City by whom it was issued exceeded their authority in doing so. This objection is founded on the resolution of the Council passed April 14, 1862. This resolution directed, 1. That bonds of the city should be issued to H. L. Brooke, receiver, in obedience to the decree of confis-

cation; and 2, in substance, that it should be stated on the face of such bonds, 348 *and also on the face of all others that might be given in place of them, in case of transfer, that they were issued in place of bonds which had been confiscated. The object of this last provision was to give notice to purchasers of this class of bonds, so that they should cease to be binding on the City in case the decree of confiscation should be overthrown by the event of the war.

It is undoubtedly true that it was the intention of the Council, that no bond in lieu of a confiscated bond should be issued in any case without the special statement on its face required by the resolution. The prohibition is as plain as if the language of the resolution had been in the form of express prohibition. As between the City and the officers, therefore, it limited, in respect to this class of bonds, the authority of the officers.

But the authority of these officers to transfer bonds and to issue new ones was not derived from this resolution. They had a general authority for these purposes conferred by the ordinance. They had long been in the habit also of making such transfers and renewals, from which the public might have inferred a general authority to do so. This resolution, with a view to the protection of the City, directed the officers not to exercise their authority in respect to this particular class of bonds, except in a particular way. The officers were relied upon to observe this direction, and it does not appear in the record that the resolution was ever communicated to the public. There appears to be strong ground, therefore, to say, as was contended by the counsel for the appellants, that in respect to the public, this resolution did not operate as a limitation of the apparent power of the officers, which remained the same as before, but was only in the nature of private instructions as to the manner in which they should execute their authority in particular cases. If so, it is clear that

the act of the officers in issuing the 349 bond to DeVoss, in *conformity with their apparent authority, was not vitiated by their omission to observe the direction contained in the resolution.

But under the ordinance the officers had no authority to issue a new bond without the surrender of the old one, except in the case of a lost bond. The power to make the first issue of bonds in place of those which had been confiscated was derived, therefore, from this resolution alone. It was conferred on special terms in this, that the bonds were to be in a particular form, which was prescribed for an important purpose. Every bond that might be issued in place of these was also to have the same form. In this view, it may be contended, that this resolution had the effect, in respect to this class of bonds, of taking away from the officers the general power which they before had, and of substituting for it a new and limited authority, of which the public must

take notice. I do not think it worth while to discuss this question, and will assume, for the purpose of the argument, that the view just stated is a sound one.

Assuming that the officers had then only a limited authority, of the extent of which the public were bound to take notice, in respect to the renewal of this class of bonds, the counsel for the appellee contended, that the bond held by DeVoss, which was not issued in conformity with this authority, cannot be held binding on the City. The counsel for the appellants contended, on the other hand, that the City cannot be allowed to avail itself of this defence against DeVoss, who took the bond issued to him without a knowledge of the fact that the officers exceeded their authority in issuing it. And I think this position may be maintained on principle and authority.

The City of Richmond is authorized by its charter to contract loans, without limit as to amount, and to issue bonds or certificates of debt for the money borrowed.

350 It *provided by an ordinance, which is a transcript of a law of the State, (Code of 1860, p. 264,) for the execution, transfer and renewal of these bonds or certificates. They are to be under seal, to be registered in the office of the auditor, and to be subscribed by the president of the council and the chamberlain. Upon the surrender of a certificate at the office in which it is registered, a transfer may be made of the whole amount, or any part thereof, by the person appearing on the books to be the owner, or by another bearing a power of attorney from him to make the transfer. When a transfer is made, the old certificate is to be cancelled and filed in the office of the chamberlain, and one or more new certificates issued. New certificates may be obtained by a holder, on application, in place of an old one, where there has been no transfer. Every new certificate is to be registered, signed and countersigned like the former one. When a certificate has been lost, the holder may obtain a new one on affidavit and three months' advertisement of the loss, and upon giving bond and security to indemnify all persons against any loss by reason of issuing the new certificate.

The same ordinance also provides that the person appearing on the books of the office in which any certificate is registered, as the owner thereof, shall be deemed the owner as regards the City, so as to make valid all payments to him on account thereof by the City, made before a transfer of the certificate on the books of the officer. But if the person so appearing on the books as owner shall bona fide, and for valuable consideration, sell, pledge, or otherwise dispose of a certificate to another, and deliver to him the certificate, with a power of attorney authorizing the transfer thereof on the books of the proper office, the title of the former to said certificate (both at law and in equity) shall vest in the latter for the whole amount of the certificates, or so much thereof as may be necessary to

351 effect *the purpose of the sale, pledge, or other disposition, and it shall so vest, not only as between the parties themselves, but also as against the creditors of, and subsequent purchasers from, the former, subject to the last preceding provision in respect to payments by the City.

Under these arrangements, the bonds of the City were put upon the market. It is manifest that a leading object contemplated by these arrangements was to give security to the title of holders of the bonds, and thus to promote their credit. If the bonds had been made so as to pass by assignment merely, each successive assignee would have taken only an equitable title, and the bonds in his hands would have been subject to the same defences to which they would have been subject in the hands of any prior holder. It is provided, however, that upon each successive transfer a new bond shall be issued in the name of the transferee, which will give him a legal title to demand payment of the money. See *Union Bank v. Laird*, 2 Wheat. R. 390; *Black & al. v. Zacharie & Co.*, 3 How. U. S. R. 483; *Fisher & al. v. Essex Bank*, 5 Gray's R. 373. So an assignee for value, who receives a bond from the holder with a power of attorney to transfer it, acquires, under the ordinance, the legal title of the holder before a transfer on the books, subject only to the right of the city to make payment to the registered owner. The new certificate, or the delivery of an old certificate with a power of attorney to transfer it, will cut off all defences which the City might have against any prior holder. For the question, whether the holder of an obligation for the payment of money is subject to the defences of the debtor against a prior holder, depends, in the absence of notice or fraud, upon the character of his title, as legal or equitable. If it is an ordinary chose in action, and therefore only assignable in equity, it is subject to all the rights, legal and equitable, which the debtor had

352 against a former *holder. For, while a court of equity will sustain the rights of the assignee, it will also sustain the rights of the debtor existing before notice of the assignment, and these being prior in time to those of the assignee, prevail over them. But where the assignee takes the legal title without fraud or notice, this principle does not apply; the title of the holder is absolute; and all defences of the debtor against prior holders are cut off.

The bona fide holder of a bond issued to him stands, therefore, in this respect, in the position of the holder of a bill of exchange or negotiable note. This is conclusive to show that he is not bound to look behind the bond. The City cannot deny the title of the registered owner, who still holds his bond. Any other principle would lead to embarrassment and inconvenience, and greatly impair the credit of the bond. To require a holder to investigate the previous history of his bond, he must examine the books in the auditor's office and the files in the chamberlain's office, which

are not open to public inspection. It would often be impossible for him to trace the history of his bond, from the union, under one name, of a number of bonds bought from different persons. On the other hand, it is the duty of the officers of the City to make every necessary investigation, at each successive transfer, and they have all the means of doing so.

It is of the very nature of such a bond, and the very object for which it is issued, that it shall furnish authentic and conclusive evidence of the holder's title to demand the money it calls for. Such is the general understanding upon which such bonds and stocks are bought and sold in the market; and any other principle would be fatal to the credit of such securities. In *Davis v. Bank of England*, 2 Bing. R. 393 (9 Eng. C. L. R. 444), when the Bank had permitted certain stock in the public funds standing on the books of the Bank to be trans-

353 ferred under a forged *power of attorney, the Court of Common Pleas said: "We are not called on to decide whether those who purchase the stock transferred to them under the forged power might require the Bank to confirm that purchase to them and to pay them the dividends on such stocks, or whether their neglect to enquire into the authenticity of the power of attorney might not throw the loss on them that has been occasioned by the forgeries; but to prevent, as far as we can, the alarm which an argument urged on behalf of the Bank is likely to excite, we will say that the Bank cannot refuse to pay the dividends to subsequent purchasers of their stocks. If the Bank should say to such subsequent purchasers, the persons of whom you bought were not legally possessed of the stock they sold you, the answer would be, the bank, in the books which the law requires them to keep, and for keeping which they receive a remuneration from the public, have registered these persons as the owners of these stocks, and the Bank cannot be permitted to say that such persons were not the owners. If this be not the law, who will purchase stock, or who can be certain that the stock which he holds belongs to him? It has ever been an object of the Legislature to give facility to the transfer of shares in the public funds. This facility of transfer is one of the advantages belonging to this species of property, and this advantage would be entirely destroyed if a purchaser should be required to look to the regularity of the transfer to all the various persons through whom such stock had passed. Indeed, from the manner in which stock passes from man to man, from the union of stocks bought of different persons under the same name, and the impossibility of distinguishing what was regularly transferred from what was not, it is impossible to trace the title of stock as you can that of an estate. You cannot look further, nor is it

the practice ever to attempt to look 354 further than the bank *books for the title of the person who proposes to transfer to you." In conformity with these

views, it was held in *Bank of Kentucky v. Schuylkill Bank*, 1 Parsons Sel. Ca. 180, in reference to spurious stock fraudulently issued by an agent of the bank, and transferred from time to time to innocent purchasers, that against bona fide holders of such stock the bank "would be estopped from going beyond its last certificate in any question between the bank and such holder, touching the obligatory force of such certificate on the corporation." p. 250. To the same effect is the opinion of Redfield, J., in *Sabin v. Bank of Woodstock*, 21 Verm. R. 353, cited with approbation in *Fisher v. Essex Bank*, 5 Gray R. 373.

The common course of business in the sale and purchase of such bonds shows that such is the general understanding as to the character and effect of the bond. A party having a bond to sell delivers it to a broker, with a power of attorney authorizing an attorney to transfer it to —, the name of the transferee being left blank. When a purchaser is found, the blank is filled with the name, the transfer is made on the books, and a new bond issues to the purchaser. The purchaser takes the bond, but he seldom knows, and never cares, who held the previous bond.

There is nothing unreasonable or harsh in holding the City to be estopped from disputing the title of DeVoss. On the contrary, it is highly just and reasonable. The City appointed officers to issue its bonds, in whom it confided. It knew that its bonds were the subject of daily traffic, in and out of Richmond. From the nature of the business, it must have expected and intended the public to confide in these officers. There were two classes of bonds to be issued, and the class to which each bond belonged was to be indicated by its form. The officers were specially entrusted by the city with that duty; they had the means
355 *of knowing the fact in every case, and could not make a mistake without gross negligence. These means were not equally open to the public.

Under these circumstances, it was natural that purchasers should presume that the officers did their duty. They had a right to rely on such a presumption in their dealings. Indeed, it was necessary for them to do so; and it would be unjust to allow the City to say to them, when they dealt in good faith, that they ought not to have relied on it.

The case of *The Royal British Bank v. Turquand*, 5 El. & Bl. R. 248 (85 E. C. L. R.), was an action against the official manager of a railway company (that being the mode of suing the company), upon a bond for £2,000, payable to the plaintiff, and signed by two directors, under the seal of the company. There was a plea setting out a clause in the deed of settlement of the company, which provided that the company might borrow, on bond, such sums as should, from time to time, by a general resolution of the company, be allowed to be borrowed, and averring that there was no

such resolution authorizing the making of this bond. The Court of Q. B. held the plea to be bad. The judgment was affirmed in the Exchequer Chamber, 6 El. & Bl. R. 327 (88 Eng. C. L. R.). Jervis, C. J., delivering the opinion of the whole court, said: "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete, by a resolution, he would have a right to infer the fact of a resolution authorizing
356 that which, on the face *of the documents, appeared to be legitimately done."

In the case of *The Prince of Wales Co. v. Harding*, El. Bl. & El. 183 (96 Eng. C. L. R.), which was an action against the official manager of the Athenæum Assurance Company upon a policy, the deed of settlement provided (sect. 20,) that the common seal should not be affixed to any policy, except by the order of three directors, signed by them and countersigned by the manager; and that (sect. 28), every policy should be given under the hands of not less than three directors, and sealed with the common seal. The policy in question was sealed with the common seal and signed by three directors, one of whom was manager; but there was no previous order made, as required by the 20th section. The case was elaborately argued by the most eminent counsel. It was contended for the defendant, that the previous order required by the 20th section was a condition precedent to the power of the directors to affix the seal to the policy; that the directors were agents, with limited authority; that those who contracted with them had notice of the limits, because the statute conferred the authority subject to the provisions of the act and of the deed of settlement, which was registered for public inspection; and that the shareholders, as the principals, had a right to repudiate every policy not executed in pursuance of the authority given to the directors. The Court of Q. B., in an elaborate judgment, overruled this argument, and held that the policy was binding on the company. It was held that a person receiving a policy in good faith, had a right to presume that the directors who signed it had done their duty, and that they had the preliminary order for executing it.

The case of *The Royal Bank v. Turquand* was cited with approval by the Supreme Court in *Commissioners of Knox county v. Aspinwall*, 21 How. U. S. R. 539. The

Board of Commissioners of a county
357 were authorized by *statute to subscribe for railroad stock, and to issue bonds of the county therefor, in case a majority of the voters of the county should so determine, after a certain notice should

be given of the time and place of election. The Board subscribed for the stock and issued the bonds, purporting to act in compliance with the statute. The required notice was not given, and it was contended that consequently the power to issue the bonds was ever vested in the Board. It was conceded by the court that every person dealing in the bonds was chargeable with a knowledge of the statute under which they were issued, and that as the Board was acting under delegated authority, he must show that the authority was properly conferred. But it was held, 1. That as the bonds imported on their face a compliance with the law under which they were issued, the purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power. "The purchaser of the bonds had a right to assume that the vote of the county, which was made a condition of the grant of the power, had been obtained, from the fact of the subscription by the Board to the stock of the railroad company and the issuing of the bonds." 2. That upon the true construction of the statute, the Board were the proper judges whether a majority of the votes in the county had been cast in favor of the subscription. The court said: "The right of the Board to act in an execution of the authority is placed upon the fact that a majority of the votes had been cast in favor of the subscription, and to have acted without ascertaining it, would have been a clear violation of duty, and the ascertainment of the fact was necessarily left to the enquiry and judgment of the Board itself, as no other tribunal was provided for the purpose. The Board was one, from its organization and general duties, fit and competent to be the depository of the trust thus confided to it." *

358 "We do not say that the decision of the Board would be conclusive in a direct proceeding to enquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached; but after the authority had been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question."

This case has been followed in several subsequent cases in the same court, the latest of which is *Supervisors v. Schenck*, 5 Wall. U. S. R. 772, decided in 1867. In all these cases, the bonds in question were payable to bearer, and passed by delivery. That circumstance was not expressly made a ground of decision in the case of *The Commissioners of Knox county v. Aspinwall*, which proceeded on the principle of the case of *Royal Bank v. Turquand*, where the instrument was a common bond, payable to the plaintiff. In the case in 5th Wallace, the opinion, referring to the previous cases, says: "Where a corporation has power, under any circumstances, to issue negotiable securities, the decision of this court is, that the bona fide holder has a right to presume they were issued under

the circumstances which give the requisite authority, and they are no more liable to be impeached in the hands of such a holder than any other commercial paper." This ground of decision is equally applicable to the present case. For, as we have already seen, the person to whom a bond of the City of Richmond is issued, and who takes it in good faith, takes a legal title, and is no more subject to defences which might be made against a former holder than he would be if he was the holder of negotiable paper.

It was part of the duty of the officers interested with the transfer and renewal of bonds to ascertain, in every instance after April 14, 1862, whether the bond transferred represented a confiscated bond, and to certify whether it did or did not in the 359 form of the renewed bond. *When, therefore, these officers failed in any case, through negligence, to certify on the face of a bond issued by them that it represented a confiscated bond, when such was the fact, it was the common case of an agent acting negligently in the regular course of his employment. The law is well settled and familiar that, in such cases, the principal must bear the consequences of his agent's negligence, as between himself and an innocent third person, even though the act or omission of the agent, which constitutes the negligence, was wholly unauthorized by the principal, or even positively forbidden by him. 1 *Parsons Sel. Ca.* 180; 14 *How. U. S. R.* 486. Upon this principle, a bank is held to suffer for the negligence of its officer, who received from an innocent person payment of debt in forged notes, which purport to be the issue of the bank. *U. S. Bank v. Bank of Georgia*, 10 *Wheat. R.* 333. So where an officer of a bank, through negligence, pays to an innocent holder a forged check, which purports to be drawn upon the bank by one of its customers. *Levy v. Bank U. S.*, 1 *Binn. R.* 27. And so the bank must bear the loss where its officer permits a transfer of stock under a forged power of attorney, or is otherwise guilty of negligence or of fraud in the issue or transfer of stock. *Davis v. Bank of England*, *ubi supra*; *Pollock v. National Bank*, 3 *Selden R.* 274; *Bank of Kentucky v. Schuykill Bank*, 1 *Parsons Sel. Ca.* 180; *Bridgport Bank v. N. Y. & N. H. R. R. Co.*, 30 *Conn. R.* 231; *N. Y. & N. H. R. R. Co. v. Schuyler & als.*, 34 *N. Y. R.* 30; *Sewall v. Boston Water Power Co.*, 4 *Allen R.* 277.

The City bonds, as I have said, were put upon the market by the City, and were the subject of daily traffic. The public were invited to deal in them, and it was important to the credit of the City that they should do so with confidence and safety. To insure its own safety, and at the same time the safety of purchasers, the City 360 undertook *to mark the class of confiscated bonds. Upon principles of good faith and fair dealing, we must consider that the intention was, not only to admonish purchasers as to what bonds they could not buy without risk, but also to in-

form them as to what bonds they might buy with safety. The absence of a statement in a bond, that it represented a confiscated bond, was equivalent to a representation to the person to whom it was issued, and to all others who might trade for it, that it did not represent such a bond. It was, in law, the representation of the City, because made in its behalf by officers charged by it with the duty of issuing all bonds, and of representing on the face of each whether it did not belong to the class of confiscated bonds.

From the nature of the business, the City knew that this representation, conveyed by the form of the bond, would be relied on, and must have intended that it should be. When a party has relied upon it, and in good faith paid his money on the faith of it, it would be the height of injustice to allow the City to say to him it is not true, and that it was his folly to believe it.

This case, therefore, falls within the principle of estoppel in pais, and the city must be held liable to DeVoss to the same extent as if the representation, conveyed by the form of the bond, was in fact true. It is not necessary, in order to bring a case within this principle of estoppel, that the representation should be made fraudulently, or with a positive intention to deceive; nor, on the other hand, is it enough that it has been relied on, in point of fact, when there was no intention that it should be, or reasonable expectation, from the course of business or otherwise, that it would be. The principle, as stated by Lord Denman in *Pickard v. Sears*, 6 Ad. & El. R. 469, (33 Eng. C. L. R. 115,) is, that "where one, by his acts or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to

361 act on *that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things existing at the same time." In *Freeman v. Coke*, 2 Exch. R. 663, Baron Parke, delivering the judgment of the court, said, that by the term "wilfully," as here used by Lord Denman, we "must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it, as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect." Here the duty of making known the truth as to the character of every bond issued after April 14, 1862, was cast upon the City by its own undertaking.

In a case in which a corporation put its bonds upon the market, under certain implied

representations inviting public confidence in their validity and value, but where no direct and express representation had been made to the particular purchaser, the Supreme Court said: "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced." *Zabriskie v. C. C. & C. R. Co.*, 23 How. U. S. R. 381. The same language was repeated, subsequently, in the case of a municipal corporation. *Bissell v. City of Jeffersonville*, 24 How. U. S. R. 287.

362 *It was said in the argument by the counsel for the appellee, that the City itself had no authority under the charter to execute the bond to DeVoss, because it was not given for money lent to the city, or for any other sufficient consideration. But the City had authority to execute bonds, in proper cases, without limit as to number or amount, and for reasons already mentioned, it cannot allege against DeVoss that this particular bond was not executed in a proper case. And it is at least doubtful, upon the authorities, whether a corporation can, in any case, allege against a third person, who has contracted with it, that its contract was void because ultra vires, where the other party had no knowledge of the facts which made it so. *Eastern Counties R. Co. v. Hawkes*, 35 Eng. L. & Eq. R. 8; *Bateman v. Mayor, &c.*, 3 H. & Nor. 323; *Bissell v. Mich. E. & N. Ind. R. R. Co.*, 22 N. Y. R. 258. If this had been the case of shares of stock issued in excess of the number limited by the charter, the case would have been different; for, in such a case, as was said in the case of *N. Y. & N. H. R. R. Co. v. Schuyler & al.*, 34 N. Y. R. 30, the validity of such shares is a legal impossibility.

There is a class of cases in New York, relied on for the appellants, in which it has been settled, as the law of that State, applicable to all cases of agency, that where, upon comparing the act of the agent with the power given to him, it appears to be such an act as the agent may lawfully do under the power, and the question whether it was in fact done in conformity with the power, or was an abuse of it, depends upon the state of extrinsic facts within the knowledge of the agent, and not known to the other party, such other party has a right to presume that the state of extrinsic facts is such as to authorize the act, and the principal will be bound. The doing by the agent of an act of such a kind, that it may

363 be within the power, is regarded *as a representation by him that, in point of fact, it is within it—a representation which, it is held, he has authority from the principal to make, resulting by implication from his employment, and all persons dealing in good faith are held entitled to rely on the truth of this representation. *North River Bank v. Aymar*, 3

Hill R. 262; *F. & M. Bank v. B. & D. Bank*, 16 N. Y. R. 125; *Exch. Bank v. Monteath*, 26 N. Y. R. 505; *Griswold v. Haven*, 25 N. Y. R. 596; *N. Y. & N. H. R. R. Co. v. Schuyler & al.*, 34 N. Y. R. 30. This doctrine was not established without strong opposition, and was objected to as unsound in principle, and in conflict with authority. *Mech. Bank v. N. Y. & N. H. R. R. Co.*, 3 Kernan R. 599; *Opinion of Comstock, J.*, 16 N. Y. R. 125, and cases cited. See also, *Stagg v. Elliott*, 12 C. B. R. N. S. 373 (104 Eng. C. L. R.); *Mussey v. Beecher*, 3 Cush. R. 511; *Sears v. Wingate*, 3 Allen R. 103; *Mann v. King*, 6 Munf. R. 428; *Stainback v. Read & Co.*, 11 Gratt. R. 281; *Same v. Bank of Va.*, *Ibid.* 260.

If this doctrine is sound, it has a conclusive application to the present case. But I have not found it necessary to invoke so broad a principle, and as there seems to be difficulty in reconciling the authorities, I have thought it best to decide this case upon its own special circumstances, and to leave the general question open until a case shall arise which renders its decision necessary.

I am of opinion that the decree should be reversed and the bill dismissed.

The other judges concurred in the opinion of Joy nes, J.

Decree reversed.

MUNICIPAL, COUNTY, AND STATE BONDS.

A. County and Municipal Bonds.

1. Authority to Issue.
 2. Interest.
 3. Defences.
 - a. Usury.
 - b. Bona Fide Purchaser.
 - c. Defences—Estoppel.
 4. Redemption.
 5. Remedy—Subrogation.
- ##### B. State Bonds—Coupons.
1. When Payments in Coupons Allowed.
 2. Virginia Statutes—Scope.
 3. Commencement of Suit.
 4. Rules of Evidence.
 5. Defence.
 6. Burden of Proof.
 7. Jurisdiction of Courts.

In connection with this subject, see monographic notes on "Municipal Corporations" appended to *Danville v. Pace*, 25 Gratt. 1, and on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 698.

A. COUNTY AND MUNICIPAL BONDS.

1. AUTHORITY TO ISSUE.

County and Municipal Bonds—Authority to Issue.—

A county has no inherent right to borrow money and give its bonds for payment. Such power may be granted it by the legislature either in express terms or by implication; in view however of the dangerous nature of such authority, its great liability of abuse and the constant habit of the legislature to grant it in terms, when intended, the implication, to be justified, should be very clear if not irresistible. *Bonsack v. Roanoke County*, 75 Va. 865.

A municipal corporation cannot without legislative authority, become the surety for another corporation or individual; cannot guarantee the bonds or obligations of another, or make accommodation endorsements. Such authority cannot be implied or deduced from the general or usual powers conferred upon such corporations. In accord with this view it was held that the city of Lynchburg had no power under the Acts 1884, p. 121, ch. 124, § 3, (Acts 1887, p. 399, ch. 302, § 7, cl. 37), to guarantee the payment of certain bonds issued by a corporation. *Lynchburg, etc., Street Ry. Co. v. Dameron*, 95 Va. 545, 28 S. E. Rep. 951.

The competency of the legislature to authorize counties or other municipalities to subscribe to the stock of a railroad company, and to issue bonds in payment of such subscriptions, is unquestionable. And this authority may be conferred with or without the sanction of a popular vote. *Supervisors v. Randolph*, 89 Va. 614, 16 S. E. Rep. 722; *Redd v. Supervisors*, 81 Gratt. 695.

The power of the legislature to authorize a county or other municipality to make a subscription to the stock of the railroad company, and to issue bonds with which to pay it, is settled in this state. And it is also settled that if, by reason of mistake, carelessness, or other causes, the conditions precedent to the exercise of such power by the municipality have not been complied with, the legislature can cure all irregularities by subsequent legislation, and make such contracts as valid and binding as if all the conditions precedent had been complied with. *Bell v. F., etc., R. Co.*, 91 Va. 99, 20 S. E. Rep. 942; *Redd v. Supervisors*, 81 Gratt. 695; *Supervisors v. Randolph*, 89 Va. 614, 16 S. E. Rep. 722.

That express power to a municipal corporation to borrow money includes the power to issue its bonds, or other usual securities, to the lender, is a proposition now too well settled to be questioned. Without such incidental power, the power to borrow money would ordinarily be nugatory, and wherever a general power to do a thing is given, every particular power necessary for doing it, is included. *Bunch v. Fluvanna Co.*, 86 Va. 452, 10 S. E. Rep. 532.

Sound reason, no less than authority, forbids that it should be held that a corporation may not incur a debt in the exercise of its appropriate powers, or may not purchase, upon a credit, property which is required for purposes authorized by its charter. Having the power to make the purchase, it had authority to do so upon a credit to which there was no limit but its own discretion, and the right to give bonds would follow as a necessary consequence; for power to contract a debt must carry with it power to give a suitable acknowledgment of the indebtedness. *Richmond, etc., Imp. Co. v. West Point*, 94 Va. 674, 27 S. E. Rep. 460.

A municipal corporation having a general authority under its charter to contract loans or cause to be issued certificates of debt or bonds, may issue coupon bonds and sell them at public auction for less than their par value, and for bonds sold during the war might receive payment for them in confederate money. *City of Lynchburg v. Slaughter*, 75 Va. 57.

Legislative authority, to issue "coupon bonds," implies authority to issue bonds and coupons payable to bearer, which are negotiable instruments, having all the qualities and incidents of commercial paper. *Supervisors v. Randolph*, 89 Va. 614, 16 S. E. Rep. 722; *Arents v. Com.*, 18 Gratt. 750.

In an ordinance the authorization of bonds not to

exceed \$6,000 is equivalent, in legal effect, to fixing the amount of such bonds at such sum. In either case, the authorities would only have the right to issue bonds sufficient to cover the purpose for which the ordinance is adopted. *Knight v. Town of West Union*, 45 W. Va. 194, 22 S. E. Rep. 168.

The county court of Ohio county, having been authorized by the voters of that county at an election held according to law, to subscribe the sum of three hundred thousand dollars to the Hemp-Field Railroad Company, may issue bonds for that amount due in twenty years, with interest payable semi-annually. *Goshorn v. Supervisors*, 1 W. Va. 307.

Section 8, art. 10, of the constitution of West Virginia 1872, does not show an intent to authorize the legislature to empower cities, towns or municipal corporations to issue bonds for other than corporate purposes. Bonds purporting to be issued under this section for the aid of individual interest are illegal, null and void. *Ohio Val. Iron Works v. Town of Moundsville*, 11 W. Va. 1; *List v. Wheeling*, 7 W. Va. 508; *Kaufe v. Delaney*, 25 W. Va. 410.

Equity Jurisdiction—Enjoining Issuance of Bonds.—Though the act of January 15th, 1875, Sess. Acts 1874 ch. 37, p. 39, provides a mode by which the qualified voters of a county or corporation may contest the due returns of the election or decision of the voters of said county or corporation upon the question whether the county or corporation shall subscribe to the stock of an internal improvement company, a court of equity still has jurisdiction of the question upon a bill filed by fifteen or more of the citizens and taxpayers of the county or corporation, and to enjoin the issue of the bonds of said county or corporation in payment of said subscription if the proceeding has not been properly conducted. *Redd v. Supervisors Henry County*, 81 Gratt. 605.

Municipal Securities—Sale under Invalid Order—Rights of City.—F was the owner of \$8,700 of the certificates of stock of the city A, which by a decree of the United States court in May, 1864, were confiscated and sold by the marshal, and \$2,000 of it purchased by W; and at his request the marshal made a transfer of the same on the books of the city. When the stock became due W received from the city of A four coupon bonds of \$500 each in exchange for his stock. In 1874 F sued the city for his stock and recovered it, the court holding that the decree of the United States court confiscating it was invalid. The city of A then sued W to recover the four bonds issued to him for the stock. *Held*, the city of A is entitled to recover the bonds. *Webb v. Alexandria*, 33 Gratt. 168.

Under the constitution of Virginia of 1830, an act authorizing the common council of the city of Lynchburg to tax persons and property within the corporate limits, and for half a mile around and outside of the corporate limits, to pay the interest upon the guaranty by the city of six per cent. per annum upon the stock of the Virginia and Tennessee Railroad Company, to the amount of half a million of dollars, is not a violation of that constitution. *Langhorne v. Robinson*, 20 Gratt. 661.

County Bonds—Authority to Issue—Strictly Construed.—A county court acting under the statute authorizing county courts to purchase salt, is exercising a special authority, and it must appear from the record that the justices were summoned, or a majority were present, when a bond was executed for salt purchased, or the bond will be held to be

null and void. *Dinwiddle County v. Stuart*, 23 Gratt. 593.

2. INTEREST.

Bonds—Interest Coupons—Effect.—A railroad company not having been able to pay the interest on its bonds, gave to the holders of the interest coupons the coupon bonds of the company for the amount of the said interest. *Held*:

1. This was not a novation of the debt for the interest; and these bonds are secured by the mortgage.

2. The coupons for interest bore interest from the time they were payable. *Gibert v. Washington City, Virginia Midland & Great Southern Railroad Company*, 38 Gratt. 586; *Fidelity Ins., etc., Co. v. Shenandoah Val. R. Co.*, 86 Va. 1, 9 S. E. Rep. 758.

3. DEFENCES.

a. Usury.—City bonds, payable thirty years after date, and bearing six per cent. per annum interest from their date, sold in 1864, for confederate money, at the rate of two and one-half for one, when confederate money was at the rate of twenty to one for gold. *City of Lynchburg v. Norvell*, 20 Gratt. 601.

This is Usury.—The fact that these bonds might be paid in the currency which at the time they fell due would be taken by the state for taxes, does not constitute such a contract of hazard as relieved it from the taint of usury. *City of Lynchburg v. Norvell*, 20 Gratt. 601.

Municipal Bonds—Usury.—The council of the town of Danville has authority, under its charter, to contract loans and issue certificates of debt. In 1863, the council sold the bonds of the city, to be issued, at public auction for confederate money, and for a bond of \$5,000, bearing six per cent. interest, and payable at the end of twenty years, the purchaser gave \$11,050; confederate currency being at the time as ten for one of gold. This is usury. *Town of Danville v. Sutherland*, 20 Gratt. 555. See monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 608.

b. Bona Fide Purchaser.—If a municipal corporation has the power to issue bonds, and the bonds are free from conditions and negotiable, a bona fide purchaser before maturity is not bound to inquire for what purpose the issue was actually made, or to see to the application of the purchase money. *Town of Clifton Forge v. Bank*, 92 Va. 283, 23 S. E. Rep. 284; *Town of Clifton Forge v. Electric Co.*, 93 Va. 289, 23 S. E. Rep. 288; *City of Lynchburg v. Slaughter*, 75 Va. 57.

The holder of negotiable paper is presumed to have taken it before maturity, for valuable consideration and without notice of any objection to which it was liable, and this presumption stands until overcome by sufficient proof. To impeach his title by proof of any facts and circumstances outside of the instrument itself, it must first be shown that he had notice of such facts at the time the purchase was made. Such a holder is not affected by anything which has occurred between other parties unless he had knowledge thereof at the time of the purchase, and he is entitled to transfer all his rights unimpaired to a third person, although such transferee be acquainted with defences against the paper. Negotiable bonds delivered in escrow and wrongfully put in circulation are valid in the hands of a bona fide holder for value and without notice. Nor is such a holder affected with constructive notice of a suit respecting such paper. *Pickens v. Post*, 5 Va. Law Reg. 730.

An individual purchasing the bonds of a municipal corporation, and having no actual notice of any special directions given to the officers of the company in relation to the particular bonds purchased, will only be bound by such directions if he has been wilfully ignorant of them; and not merely where there has been a want of caution. *DeVoss v. City of Richmond*, 18 Gratt. 333.

The fact that the act of the legislature authorizing the issue of such bond is unconstitutional is a valid defence even against a *bona fide* holder for value. *Pickens v. Post*, 5 Va. Law Reg. 739.

c. Defences—Estoppel.—In a suit by a *bona fide* holder before maturity for value and without notice brought on county bonds issued in aid of the construction of a railroad, the county is estopped by the certificate of the proper officers, appearing on the face of the bond, to the effect that all the conditions precedent to the issuing of such bonds have been fully performed, from setting up any irregularities of the proceedings antecedent to the preparation, execution and issuance of the bonds. *Pickens Township v. Post*, 5 Va. Law Reg. 739.

4. REDEMPTION.

Bonds—Redemption—Effect.—Bonds issued to aid a railroad company were payable upon a condition whose performance was secured by mortgage. The company received and hypothecated part of said bonds. Upon a sale of the railroad under a second mortgage part of the proceeds of the sale were applied to redeem the hypothecated bonds. *Held*, the purchasers were not entitled to the redeemed bonds until they first refunded the proceeds applied to their redemption. *W. O., etc., Co. v. Lewis*, 33 Va. 346, 2 S. E. Rep. 744.

5. REMEDY—SUBROGATION.

County Bonds—Subrogation.—Where a railroad company receives from the county conditional coupon bonds by way of subscription and gives a mortgage to insure the performance of the condition, a purchaser from the railroad company for value and without notice is entitled to be substituted to the benefit of the mortgage security. *W. O., etc., R. Co. v. Cazenove*, 33 Va. 744, 2 S. E. Rep. 443.

B. STATE BONDS—COUPONS.

1. WHEN PAYMENTS IN COUPONS ALLOWED.

Delinquent Taxes—Coupons of State Bonds Receivable for.—The act of March 30, 1871, entitled "An act to provide for the funding and payment of the public debt," provides that the coupons attached to the bonds to be issued under that act "shall be payable semi-annually, and be receivable at and after maturity, for all taxes, debts, dues and demands due the state; which shall be expressed on their face." The act constitutes a contract on the part of the state, which cannot be repealed by the General Assembly, and the contract follows the coupons in the hands of the holders thereof, though purchased after an act repealing the said act. *Antoni v. Wright*, 22 Gratt. 833; *Hartman v. Greenhow*, 103 U. S. 672; *Antoni v. Greenhow*, 107 U. S. 769; *Polindexter v. Greenhow*, 114 U. S. 370, 5 S. E. Rep. 903; *McGahey v. Virginia*, 135 U. S. 606; *Royall v. Virginia*, 116 U. S. 573.

The act of March 7, 1873, which directs what shall be received in payment of taxes, dues, etc., to the state, and repeals all acts inconsistent with it, so far as it respects the provision of the act of March 30, 1871, in relation to the coupons of bonds issued under this last act, is repugnant to the provision of the constitution of the United States, which forbids

a state to pass any law impairing the obligation of contracts. *Antoni v. Wright*, 22 Gratt. 833.

The overdue coupons upon bonds issued under act of March 26, 1879, are receivable for all taxes levied by the state, including the capitation tax; and the auditor is bound to receive them, when offered in payment of taxes returned delinquent to his office. *Williamson v. Massey*, 33 Gratt. 237; *Greenhow v. Vashon*, 81 Va. 350; *Antoni v. Wright*, 23 Gratt. 833, and *note*; *C. & O. R. Co. v. Miller*, 19 W. Va. 408; *Com. v. Smith*, 76 Va. 477; *Com. v. Guggenheimer*, 78 Va. 71.

L. holding coupon bonds issued under act of March 1871, after the passage of the act of March 12, 1873, received from the auditor of the state two-thirds of the interest due thereon, and in 1880 offered the said coupons in payment of taxes due to the state to the extent of the remaining one-third. Held, *L.* is entitled to pay his taxes in this manner, and a *mandamus* should be awarded to compel the receipt of the said coupons by the treasurer. *Lee v. Harlow*, 35 Va. 33.

Fines—Payments in Over-Due Coupons.—Fines imposed for a violation of law are embraced in the act of 1871 known as the funding act, and a person upon whom such a fine is imposed, may discharge it by the over-due coupons taken from the bonds mentioned in said act. *Clarke v. Tyler*, 20 Gratt. 124.

Fines—Payment in Coupons—Mandamus.—Fines collected by the sheriff of a county, or by the sergeant of a city or town, are to be paid by him to the treasurer of his county, city or town, and not to the auditor of accounts of the state; and therefore a *mandamus* will not lie at the suit of a sheriff or sergeant, to compel the auditor to receive coupons which have been paid to him in a discharge of a fine. *Tyler v. Taylor*, 20 Gratt. 705.

In the case of *Huckless v. Childrey*, 135 U. S. 323, 40 Sup. Ct. Rep. 963, the supreme court of the United States decided that the act of the Virginia legislature authorizing the receipt of coupons on or after maturity in payment of "all debts, dues, and demands due the state" had no application to the case of a license tax payable for a license to sell by retail wine, spirits and other intoxicating liquors. The court said: "We are of opinion that the requirement that the license fee shall be paid in lawful money of the United States does not, as contended, impair the obligation of the contract made by the state with the holders of the coupons referred to. Licenses for the sale of intoxicating liquors are not only imposed for the purpose of raising revenue, but also for the purpose of regulating the traffic and consumption of these articles, and hence the state may impose such conditions for conducting said traffic as it may deem most for the public good. The manner of payment is part of the condition of the license intended as a regulation of the traffic. It would be very different if the business sought to be followed was one of the ordinary pursuits of life, in which all persons are entitled to engage. License taxes imposed upon such pursuits and professions are imposed purely for the purpose of revenue, and not for the purpose of regulating the traffic or the pursuit." In accord with the last proposition of this quotation, see the case of *Royall v. Virginia*, 116 U. S. 573.

In the case of *Vashon v. Greenhow*, 135 U. S. 716, 10 Sup. Ct. Rep. 967, the question of the validity of the act of the Virginia legislature authorizing the payment in coupons of "all debts, dues, and demands due the state," was considered in relation to school taxes. It was held that, so far as the act applied to the school or literary fund, it was in contravention

of the constitution of Virginia in force at the time of the said enactment. The court said: "We think that the position of the court of appeals in this case is well taken,—that coupons could not be made receivable as a portion of the literary fund, and that, if they could not be received as part of the fund, they could not properly be made receivable for the taxes laid for the purpose of maintaining said fund." It was accordingly held that the law requiring the school tax to be paid in lawful money of the United States was a valid law, notwithstanding the provisions of the act of 1871, and that it was sustained by the constitution of Virginia antedating the law of 1871, and overriding any provision therein repugnant to said constitution.

In the case of *Com. v. McCullough*, 90 Va. 597, 19 S. E. Rep. 114, we find what appears to be the final solution of the coupon legislation. The supreme court of the United States had decided in the case of *Vashon v. Greenhow*, 136 U. S. 716, that the acts of the Virginia legislature authorizing the receipt of coupons in payment of all "debts, dues and demands due the state," were void so far as they related to the literary or school fund. In the case of *Com. v. McCullough*, *supra*, it was held that since these acts contemplate an *entire* contract, the supposed contract being void in part was void in entirety and wholly unconstitutional. Acts of Assembly 1891-92, pp. 533-42.

2. VIRGINIA STATUTES—SCOPE.

Act of 1871—Bonds—Funding Act.—The holder of bonds of the state issued before the war to the Kanawha Board of the James River and Kanawha Company, under § 9 of the act of March 23d, 1860, is entitled to have them transferred upon the books of the 2d auditor, and funded under the provisions of the act of March 30, 1871, as amended by the repealing clause of the act of March 7, 1872, entitled an act declaring what shall be received in payment of taxes, etc. *Robinson v. Rogers*, 24 Gratt. 319.

Public Debt—State Bonds—Statutes.—The act of March 30th, 1871, which authorized the holders of state bonds to invest them in tax-receivable coupon bonds, was modified and repealed as to the tax receivable coupons by the act of March 7th, 1872, and was wholly repealed by the act of March 28th, 1879, entitled "an act to provide a plan of settlement of the public debt." And a holder of state bonds applying in November, 1879, cannot have them funded under the act of March, 1871, in tax-receivable coupon bonds. *Paulsen v. Rogers*, 32 Gratt. 654.

The act of January 14, 1883, entitled "an act to prevent frauds upon the commonwealth and the holders of her securities, in the collection and disbursements of her revenues" applies in terms only to coupons detached from bonds of the commonwealth issued under the act of 1871. *Com. v. Smith*, 76 Va. 477; *Com. v. Guggenheimer*, 78 Va. 71.

Bonds of 1862.—The obligations created in the name of the state of Virginia, by the general assembly which sat in Richmond, at its session of 1861-62, are embraced by article 10, § 10, of the constitution of Virginia, which forbids that any provision shall be made for their payment. *Meredith v. Rogers*, 24 Gratt. 172.

Sale of Coupons—License.—§ 65, ch. 450, Acts of Assembly 1883-4, p. 590, requiring a special license for the sale of tax-receivable coupons cut from the bonds, of the state of Virginia is not repugnant to the constitution of the state of Virginia or that of the United States. *Com. v. Lucas*, 84 Va. 303, 4 S. E. Rep. 695; *Com. v. Larkin*, 84 Va. 517, 5 S. E. Rep. 526;

Com. v. Plunkett, 84 Va. 519, 9 S. E. Rep. 1120; *Com. v. Krise*, 84 Va. 521, 9 S. E. Rep. 1121; *Cuthbut v. Com.*, 85 Va. 809, 9 S. E. Rep. 16; *Com. v. Maury*, 82 Va. 663, 1 S. E. Rep. 185.

3. COMMENCEMENT OF SUIT.

Bond—Commencement of Suit.—Under act of January 26, 1882, the proper proceeding to commence a suit on a coupon detached from a bond was by petition filed at rules; and in such case a suit begun by a summons sued out of the clerk's office should be dismissed on motion. *Dunnington v. Ford*, 80 Va. 177.

4. RULES OF EVIDENCE.—The act of March 4, 1886, declaring the method of obtaining licenses and declaring that if coupons be tendered therefor no license shall be issued until the coupons are verified under the act of January 14, 1882, it is not repugnant to article 1, § 10 of the constitution of the United States which forbids "a state to pass any law impairing the obligation of contracts." *Com. v. Jones*, 82 Va. 789, 1 S. E. Rep. 84.

The act of January 26, 1886, requiring, in a suit to test the genuineness of coupons purporting to be cut from state bonds, the production of the bonds with proof that the coupons were actually cut therefrom, is not repugnant to art. I., § 10 of the constitution of the United States. It is the province of the legislature to prescribe rules of evidence to govern the procedure of the state courts and the constitution of the United States has no application in such case. *Cornwall v. Com.*, 82 Va. 644; *Newton v. Com.*, 82 Va. 647; *Com. v. Weller*, 83 Va. 721, 1 S. E. Rep. 107; *Com. v. Booker*, 82 Va. 964, 7 S. E. Rep. 381; *Va. Code 1887*, § 412; *McGahey v. Com.*, 85 Va. 519, 8 S. E. Rep. 244; *Bryan v. Com.*, 85 Va. 526, 8 S. E. Rep. 246; *Cooper v. Com.*, 86 Va. 523, 8 S. E. Rep. 247; *Laube v. Com.*, 86 Va. 530, 8 S. E. Rep. 246; *In re Ayres*, 123 U. S. 455; *Com. v. Larkin*, 88 Va. 422, 13 S. E. Rep. 901.

Where the petitioner has, in accordance with the refunding act of February 20, 1892, surrendered certain coupon bonds to the commonwealth, no production of those bonds in court is required to prove the coupons as is directed by sec. 412 of the Code. *Com. v. Ford*, 89 Va. 427, 16 S. E. Rep. 277.

5. DEFENCE.—When coupon bonds have been stolen or unlawfully abstracted from the custody of the state after they had been redeemed and taken in, the state is not liable for them to the holders, although they be *bona fide* purchasers for value, and without notice. *Branch v. Commissioners*, 80 Va. 427.

6. BURDEN OF PROOF.

Spurious Bonds—Burden of Proof.—Under § 413 of the Code, the burden of proving spurious bonds produced in evidence as directed by that statute is upon the commonwealth. *Com. v. Dunlop*, 89 Va. 431, 16 S. E. Rep. 278.

In a proceeding to try the question as to whether certain alleged tax-receivable coupons were genuine or not, it was competent for the commonwealth to show that the bonds were not genuine, in order to show that the coupons detached were spurious, and therefore not "legally receivable for taxes;" and to show this it was not necessary that a plea of *non est factum* should have been filed. *Com. v. Hurt*, 85 Va. 918, 9 S. E. Rep. 148; *Com. v. Adams*, 85 Va. 931, 9 S. E. Rep. 148; *Com. v. Tunstall*, 86 Va. 372, 10 S. E. Rep. 414.

7. JURISDICTION OF COURTS.

Negotiable Notes—County Bonds—Jurisdiction of State Court.—C, trustee of a bank in liquidation, transfers to B the note of A, due to the bank, and certain county bonds which had been deposited

with the bank by A as security for his note, to be applied first to pay a debt due B, and then for the trustee. After this transfer an order was made in a suit of the circuit court of the United States, in which C, as trustee of the bank was a defendant, appointing C receiver in cause. The note having been protested for nonpayment, B gives A notice that, unless the note was paid by a day specified, he would proceed to sell the county bonds; and the note not having been paid, B advertises the bonds to be sold at auction, specifying time and place. Notice of this sale is not given to A, but he has knowledge of it. A files a bill to enjoin the sale, making B and C defendants. *Held*, the transfer, of the note and bonds to B, having been made before the appointment of C as receiver, the state court has jurisdiction of the case. *Alex. L. & H. R. Co. v. Burke*, 22 Gratt. 254.

State Bonds—Jurisdictional Amount.—In cases necessarily involving the validity of coupons cut from bonds issued under Acts March 30, 1871, and March 28, 1879, no jurisdictional amount is necessary to give supreme court of Virginia jurisdiction of the case. In such cases, art. 6, § 2 of the Constitution of Virginia applies. *Com. v. McCullough*, 90 Va. 597, 19 S. E. Rep. 114.

364 *Hill & als. v. Bowyer & als.

April Term, 1888, Richmond.

Absent, RIVES, J.*

1. **Decrees—Opening—By Petition or Original Bill.**—A party against whom a decree has been rendered, without his appearance, may apply to the court to have the decree opened either by petition or by original bill. In either form it is an original proceeding, and may be commenced without previous leave of the court.

2. **Same—Same—Petition Rejected—Effect.**—If application is made to the court for leave to file a petition to open a decree, and the application is rejected, this is not a legal adjudication upon the case presented in the petition, as it would be in the case of the refusal to allow a bill of review to be filed, in which case the leave is necessary to entitle the plaintiff to file it; and the party may therefore file his original bill to have the decree opened.

3. **Same—Correction of Errors—Original Bill—Cannot Be Treated as Bill of Review.**—An original bill which seeks to correct errors in a decree by de-

*He had been counsel in the original cause.

Bill of Review—Leave of Court to File Necessary.—In *Amiss v. McGinnis*, 12 W. Va. 304, the court said: "Mr. Robinson in the second volume of his old practice, at page 418, says: 'In Virginia the practice is to apply in the first instance for leave to file a bill of review, whether it be for error apparent in the body of the decree, or upon discovery of new matter since the decree was pronounced;' and he refers to 2 H. & M. 591, note; *Quarrier v. Carter's Representatives*, 4 H. & M. 243. See also, the case of *Hill et al. v. Bowyer et al.*, 18 Gratt. 364 and 367. I apprehend the practice in this state in this respect is the same as in Virginia. At least I am not aware of any different practice having been recognized."

Decrees—Correction of Errors—Bill of Review.—The principal case was distinguished in *Amiss v. McGinnis*, 12 W. Va. 309, where the court held that, when a party files a bill of review for errors of law,

fault apparent on its face, and also set it aside on the ground of mistake and surprise, having been filed without leave, cannot be treated as a bill of review. But a copy of the original record being filed with the bill, the court may consider and correct any errors apparent on the face of the decree, which may be corrected by the court, under the Code, ch. 181, § 5.

4. **Same—Same—Under Direction of Counsel—Client Bound.**—Decrees by default in favor of husbands and wives give interest upon interest; but the counsel of the parties direct the clerk to correct the error by endorsement on any executions that might be issued upon them; which is done.

365 The counsel had full authority to direct the correction, and to bind the wives as well as their husbands; and thus to correct the error.

5. **Appellate Practice—Depositions—Notices—Presumption.**—In the absence of objection in the court below, an appellate court would presume that

and the bill is barred by the statute of limitations, it is not proper to treat it at the hearing as a notice to correct errors under Code 1880, c. 181, § 5, especially if one of the plaintiffs in the bill could not make such motion under said section.

Bill of Review—Ground of.—In *Carter v. Allan*, 21 Gratt. 245, the principal case is cited as authority for the rule that errors of law apparent on the record, and newly-discovered evidence, are alone proper grounds of a bill of review. See also, *foot-note* to *Carter v. Allan*, 21 Gratt. 241.

Notice—Treated as Bill of Review.—See *foot-note* to *Kendrick v. Whitney*, 28 Gratt. 646.

Chancery Pleading—Technicalities Abolished—Bill of Review—Treated as Original Bill.—In *Sturm v. Fleming*, 23 W. Va. 412, the court said: "A rigid and technical construction of bills and other pleadings is exploded. *Mayo v. Murchie*, 8 Munf. 384. Many of the old forms, names and technical distinctions of bills are abolished, and all that is now required is that the material allegations should be put in issue by the pleadings so that the parties may be duly apprised of the essential enquiry and be enabled to meet it by testimony. The name and the form are immaterial. Substance is all that is required. In Virginia the practice of courts of equity, which is the rule of practice in this state, allows the greatest liberality with respect to pleadings. Sometimes a petition for a rehearing is treated as a bill of review and *vice versa*, a notice to correct a decree on bill taken for confessed may be treated as a petition for a rehearing. *Kendrick v. Whitney*, 28 Gratt. 646. A bill of review may be regarded as an original bill or a petition in the nature of an original bill. *Hill v. Bowyer*, 18 Gratt. 364. In *Laidley v. Merrifield*, 7 Leigh 346, it was declared that an application of a party is not to be rejected altogether because he has given it the form and name of a bill of review, instead of a petition or a supplemental bill in the nature of a bill of review. *JUDGE CABELL* said the court should regard its substance, and treat it accordingly as a petition or a supplemental bill in the nature of a bill of review."

See also, *foot-note* to *Mettert v. Hagan*, 18 Gratt. 231.

Decrees—Errors—Appellate Practice.—*Davis v. Commonwealth*, 16 Gratt. 134; *Goolsby v. Strother*, 21 Gratt. 109, and *foot-note*.

Appellate Practice—Depositions—Notices.—*Steptoe v. Read*, 19 Gratt. 8; *Coffman v. Sangston*, 21 Gratt. 271, cite the principal case as authorizing the rule

notices to take the depositions were duly given, the contrary not appearing; and an objection to depositions on this ground, where the decree was by default, would not be available on a proceeding under § 5, ch. 181 of the Code.

6. **Commissioners—Taking an Account—Notice by Publication.**—The statute, Code, ch. 175, § 4, does not limit the class of cases in which the court may direct that notice may be given by publication; and it is no valid objection by a party upon whom process in the suit has been served, that he did not see or hear of the notice by publication of the taking an account by a commissioner, under the order of the court.

7. **Appellate Practice—Taking an Account—Presumptions as to Regularity.**—In the absence of objection in the court below, that the Commissioner had not regularly adjourned from time to time the taking the accounts, an appellate court would presume that they were regular; and the objection is not therefore available under § 5, ch. 181 of the Code.

8. **Chancery Practice—Decrees—Reversal of—Multifariousness.**—A decree by default is made against a guardian and his sureties; and the process had not been served on one of the sureties. Upon a bill by the guardian and the other sureties, to open the decree, no objection to the decree on this ground can be raised by them. Nor will the objection of multifariousness alone be ground for reversing the decree.

9. **Decree by Default—Relief from—Laches.**—A defendant upon whom process has been served, who wholly neglects his defence, or contents himself with merely writing to a lawyer who practices in the court to defend him, without giving him any information about his defence, or enquiring whether he is attending to the case, is not entitled to relief against a decree by default, on the ground of surprise, however grossly unjust the decree may be.

In January, 1851, James M. Bowyer and Ruth J., his wife, filed their bill in the Circuit Court of Albemarle county, in which they set out, that Achilles Wood, the father of the female plaintiff, departed this life about the year 1833, having made a will, which was duly admitted
366 *to probate in the county court of Albemarle. That he left a widow and two infant daughters; the female plaintiff and Rhoda, who married George

that objections to depositions for want of proper notice to a party cannot be made for the first time in an appellate court.

[**Decree by Default—Relief from—Laches.**—*Post v. Carr*, 42 W. Va. 72, 24 S. E. Rep. 585, cites the principal case as authorizing the proposition that a party to a suit must not depend entirely upon an attorney's attention to the case, and the action of parties so relying is not ground for a new trial, because they evince negligence and want of due diligence. On this point, the principal case is also cited in *Hubbard v. Yocum*, 80 W. Va. 755, 5 S. E. Rep. 875.

On the subject of laches as grounds for refusal of equitable relief, see *Doggett v. Helm*, 17 Gratt. 96, and *foot-note*; also, *Bargamin v. Clarke*, 20 Gratt. 544, and *foot-note*, where there is an extended collection of cases in point and also reference to other *foot-notes* in this series of reports where the subject is discussed.

Hill. That he provided that the estate might be kept together, unless the widow married again; but in that event, or whenever the executor thought best, it was to be divided, one-third to the widow for life, and the residue in equal proportions to his two children.

That the executor declined to qualify, and Ryland Rhodes qualified as administrator with the will annexed. That in 1834 he was removed, and the estate was committed for administration to Bazallet Brown.

That in February, 1833, on motion of Rhodes, the administrator, an order was made appointing Commissioners to divide the estate; and a division was made. That there was a tract of land of six hundred and seventy-one acres, of which one hundred and eighty-five acres, including the dwelling house, were allotted to the widow, and one slave; the remainder of the land, with four slaves, was allotted to the two daughters.

That about the year 1835 or 36, the widow removed to the county of Greenbrier with her children, and about the same time married John Cooper. In 1839, William Carey was appointed guardian of the children. The only estate coming to his hands as guardian being the land and slaves. In June, 1840, Carey was removed from the guardianship, and Samuel S. Smith was at the same time appointed guardian in his stead, with Shannon Butt and Edwin R. Fanshaw as his securities.

That at the January term, 1845, of Fayette county court, an order was made to the effect that Ruth Jane Wood and Rhoda B. Wood, with the approbation of the court, made choice of Hiram Hill as their guardian, who together with Robert McCutchen, John Rhodes, Charles Bibb and James Y. Waite, his sureties, entered into a
367 *bond in the penalty of \$4,000, conditioned according to law. That at the

April term, 1845, of the county court of Fayette, another entry is made, to the effect that H. Hill presented in court, under oath, an account of the property and effects belonging to his said wards, which had come to his hands; but though the office of the Fayette county court has been searched, yet no trace of such paper can be found, though at the time the said Hill was clerk of the court. That at the June term, 1850, of the court, upon the application of his sureties, he was removed, as appeared by a copy of the order filed with the bill.

That John Cooper dying, his wife, some years afterwards, married William Tracey, and they then lived in the county of Fayette.

The bill states, that all the slaves have disappeared; that it is said Smith sold one of them; that Tracey sold one or more of them; and that George Hill, after his marriage with Rhoda B., got into his possession one of the said slaves, and sold him.

George Hill and Rhoda B. his wife, the two administrators Rhodes and Brown, Smith and his sureties, Hiram Hill and his sureties, and Tracey and wife, were made

defendants to the bill; and accounts were asked against the administrators and guardians.

Process was served upon all the parties, except Waite, one of the sureties of Hiram Hill, and the sureties of Smith, and Tracey and wife. The case was, however, compromised between Smith and his wards; and there was an order of publication against Tracey and wife as absent defendants; but the record states that there was no evidence of the execution of this order.

By an order made in vacation, on the 11th of February, 1853, which was modified by an order made in term in May, 1853, a commissioner was directed to take an account—

First, of Rhodes' administration on 368 the estate *of Achilles Wood. Second, of Brown's administration on same estate. Third, Smith's guardianship account. Fourth, Hiram Hill's guardianship account; and, fifth, an account between Rhodes and Brown and the children of Wood. And the commissioner was directed, instead of serving personal notice on the parties of the time and place of executing the order, to have such notice published once a week for four successive weeks in some newspaper in the town of Charlottesville; and also to serve a notice on the counsel respectively engaged in the suit, of the time and place of taking said accounts, four weeks previous to the time of commencing the same.

The commissioner returned his report on the 14th of April, 1854; but the only account which it is necessary to notice is that of Hiram Hill as guardian of the two children of Achilles Wood.

The commissioner, in his report, states "that he fixed on Wednesday, the 10th of August, 1853, as the time for executing the order, and notified the parties by publication for four weeks successively in the Virginia Advocate, and by giving personal notice to all the counsel engaged in the cause who were known to be so engaged. That at the time appointed, some of the parties attended in person and by counsel, and the cause was taken up. It was then left open for the introduction of further testimony on both sides, and from time to time the depositions of various persons were taken, a number of these before the commissioner, and others in different parts of the State. Finally, the commissioner fixed upon the 10th of the then month March, 1854, as the time at which, if the parties were through with their testimony, he would take up and complete his statements, and report in the case. Of this the parties had informal notice through counsel several months beforehand."

In making out the account of Hiram 369 Hill as guardian *of his wards, it is commenced from the time of his appointment in January, 1845, and is carried on to June, 1850—the time when it was stated in the bill the guardianship terminated; which statement was founded on an office copy of the order by which he was

removed, and which purported to be made at the June term, 1850.

The commissioner stating in his report that Hill had never attended before him, had filed no answer, and had paid no attention to the case, charged him not only with the rent of the land and the hire of the slaves until they were disposed of, from 1845 to 1850, but also charged him with the price or value of the four slaves. Of these the commissioner reports, that the guardian permitted Tracey to sell one in 1846; that George Hill, who married Rhoda Wood, sold another for \$487.50; that another was sold in 1849 by Ruth, the wife of the plaintiff, who was said then to be a minor, and that Tracey got the money; and as the commissioner could hear nothing of the fourth, he charged Hill with her estimated cash value on the 1st of January, 1851, at \$500. No credits for disbursements of any kind were allowed; but George Hill and wife were charged with the price of the negro he sold, and the hire of him for the year 1847. The account thus made out made Hiram Hill debtor to the female plaintiff on the 1st of January, 1851, \$1,257.57; and on this sum the commissioner calculated interest up to the 22d of May, 1864, \$255.70; making principal and interest, \$1,513.27; and he was made debtor to George Hill and wife at the same date in \$724.92, upon which interest was also calculated to May 22, 1854, \$147.40, making principal and interest \$872.30. But if Bowyer and wife should get from George Hill the sum of \$337.30, being one-half principal and interest to May, 1854, of the price of the slave sold by George Hill, then Hiram Hill would be indebted to George Hill and wife \$1,209.65; and to Bowyer and wife but \$1,175.97.

370 *George Hill excepted to the commissioner's report in relation to the charge against him for half the price of the slave he sold.

The cause came on to be heard on the 26th of May, 1864, when the court overruled the exceptions of George Hill to the commissioner's report, and confirmed the same in all respects, except as to the transactions of Ryland Rhodes; and after decreeing as to other parties, decreed that the defendants Hiram Hill, and his sureties Robert McCutchen, John Rhodes, Charles Bibb and James Y. Waite, should pay to the plaintiffs the sum of \$1,513.27, with interest on \$1,257.57, a part thereof, from the 1st day of January, 1851, till paid; subject to certain credits as of the 22d May, 1854, for one moiety of a sum decreed against Brown, and for a sum decreed against Sandridge. And the court decreed against the same parties in favor of George Hill and wife for the sum of \$1,209.62, with interest on \$968.67, a part thereof, from the 1st day of January, 1851, till paid; with an ulterior provision which it is not necessary to state.

Executions having been issued upon these decrees against Hiram Hill and his sureties, he presented a petition to the judge, in which he complains of great injustice be-

ing done him by the decree. He says that he had been guardian of these parties for a short time, and no profits had ever come into his hands; and he exhibited copies from the records of the County Court of Fayette, showing that he had been removed from his guardianship in June, 1845, instead of 1850, as stated in the bill, and in the copy filed with it. He said that he had employed counsel practicing in the court to defend the suit, and knowing that nothing was due, he had given himself no uneasiness about the matter. That the counsel he had written to mistook the party for whom he had been retained, and had prosecuted the claim for George Hill, 371 *and thus the petitioner had been left wholly undefended. And he prayed that the case might be re-opened, and that he might have relief.

There is no notice of any action of the court on this petition; though it seems that the motion to file it was refused.

In April, 1855, Hiram Hill and three of his sureties as guardian, viz., John Rhodes, Charles Bibb and Robert McCutchen, filed their bill in the Circuit Court of Albemarle county, against James F. Bowyer and Ruth J. his wife, and George Hill and Rhoda B. his wife, asking for an injunction to the decrees which had been rendered against Hiram Hill and his sureties; and that the decrees might be re-opened, reconsidered and reversed; and for general relief. They made the record in that case an exhibit with their bill; and set out various irregularities and errors in the proceedings and decrees. First—That the first subpoena, which issued November 15th, 1850, was against George Hill and wife alone; but that others were issued in January, 1851, against numerous other defendants, without noticing G. Hill and wife; and the bill was filed including Hill and wife, and these other defendants. Second—That the bill was multifarious, against different parties, in different characters, and for wholly independent transactions. Third—That though an order of publication was made against Tracey and wife as absent defendants, there was no proof of the fact that they lived out of the State, and the order was not executed; and no process had been served on Butt and Farnsworth, the sureties of Smith as guardian, or upon Waite, one of the sureties of Hiram Hill; and yet that decrees had been rendered against Waite to a large amount. Fourth—That notice by publication of the taking the accounts by the commissioner was improper in the case; and that the commissioner had not adjourned his 372 proceedings in taking the *accounts regularly. Fifth—That depositions had been taken both before the commissioner and in the country without notice to Hiram Hill or any of his sureties. Sixth—That the decrees are for interest on the principal sums from the 1st of January, 1851, whilst the commissioner had calculated the interest down to May 22d, 1854, and the decree included this interest with the principal sums, and was for the whole

amount; thus giving interest for this period twice.

The bill further alleged, that Hiram Hill had been removed from his guardianship in June, 1845; and that having been guardian but a few months, and the slaves having been hired out for the year, nothing had been received by him. That when the subpoenas were served upon Hiram Hill and his sureties, they knowing nothing of the grounds of his defence, committed it to him; that he employed able and experienced counsel to defend his interest, Mr. E. R. Watson, who practiced in the court; that he felt satisfied he would be fully defended; and knowing himself not to be justly liable for any amount, gave himself no uneasiness about the matter. That when the executions came out and were placed in the hands of the sheriff of Fayette county, he immediately wrote to Mr. Watson, his counsel in the case, inquiring into the matter, and received a letter from him informing him that, by mistake, he had prosecuted the claim of one of the defendants in the suit of the same name, instead of defending Hiram Hill; so that the latter was wholly undefended in the suit. The injunction was awarded; but was never perfected by executing the injunction bond with security.

The defendants, George Hill and Rhoda his wife, were proceeded against as absent defendants. Bowyer and wife demurred to the bill, and also answered. They insisted,

that there was no error of law or fact 373 apparent upon the *record which could entitle the plaintiffs to review the decree. And they insisted, that the excuse given for not attending to the defence of the case by Hiram Hill and his sureties was not sufficient to entitle them to relief on the ground of surprise; on the contrary, it evinced the grossest negligence on the part of these parties. And they insisted, that if there had been any error, it was not occasioned by any act of theirs; they having filed with their bill the copies from the clerk's office of Fayette County Court as they received them, without any knowledge of a mistake in the dates.

It was proved by the clerk of the county court of Fayette, and copies of the orders of the court, that Hiram Hill was in January, 1845, chosen by Rhoda and Ruth Woods, with the approbation of the court, as their guardian, and gave bond, with the sureties before named, as guardian; and at the June term of the court for the same year he was removed. Of the five slaves belonging to the infants, which went into the hands of Smith, the previous guardian, one was sold by the order of the county court of Greenbrier, where Smith was appointed, for the payment of debts of the wards. Of the remainder, one seems to have been sold by Tracey in 1846; one was sold by George Hill in 1848; one was sold by Ruth Wood whilst, it was said, she was an infant, in November, 1849, whilst she was living with Tracey and her mother, at

Point Pleasant, in Virginia; the other woman died, and her child, of about a year old, was sold in August, 1845, to Joshua Mooney. The bill of sale is signed by Rhoda and Ruth Woods, but they were then minors, living with Tracey and wife. In August, 1845, Tracey, acting as agent for the children of Achilles Wood, rented their land to James R. Watson for three years, commencing on the 1st of January, 1846, for one hundred and ten dollars, of which ten dollars were to be discharged by putting up rails on the place. Tracey

374 *assigned this bond to G. T. Antrim; and Watson enjoined the payment of the money on the ground that it was the property of Achilles Wood's children. This cause was pending in the court when the case of Bowyer and wife against Hill and others was decided; and the Commissioner suggested they should be heard together; which, however, was not done.

It was, therefore, abundantly evident that the Commissioner's report and the decrees based upon it, did great injustice to Hiram Hill and his sureties, and subjected them for a large amount, for which they could not have been liable if the case had been properly defended. And the question, therefore, was, whether the excuse for not attending to the case was sufficient. The only proof that Hiram Hill employed counsel to defend him, or that he ever gave any attention to the case himself, is a letter of E. R. Watson, Esq., dated Charlottesville, September 6th, 1854, filed by Hill. In it Mr. Watson says: "I have a letter from you dated June 26th, 1854, in which you say that you had previously written to me to attend to your interests in the chancery suit brought by Bowyer and wife, and that I replied I would do so. In the progress of the case, which was frequently referred to between Mr. Rives and myself, he took charge of its management, and I did not attend to it at all; but devoted myself to other cases, to which he paid no attention—I being perfectly satisfied that he was representing the Mr. Hill who had written to me. It turns out that Mr. George Hill had retained us in the case, in my absence, or by letter which I never saw, and Mr. Rives was really representing him, whose interests in the case were, I believe, adverse to yours. We could not, in fact, have acted as your counsel; but my misapprehension doubtless prevented me from informing you of our position, and thereby giving you an opportunity to employ other counsel."

375 *The cause came on to be heard in May, 1859, when the court dissolved the injunction and dismissed the bill, with costs; and thereupon the plaintiffs applied to this court for an appeal, which was allowed.

There is a certificate of the clerk of the Circuit Court appended to the record, that the counsel of Bowyer and wife and G. Hill and wife had directed him, as clerk, to endorse; and, under such instructions, he had endorsed on the execution book of his office; and that he had also been directed, as

clerk, to endorse on any executions issued on the decree of May 22, 1854, in favor of Bowyer and wife and Hill and wife, against Hiram Hill and others, the following corrections of errors in said decree: so much of said decree as gives interest upon interest from January 1st, 1851, to May 22d, 1854.

The cause was argued in writing in the Circuit Court by John Thompson, Jr., for the plaintiffs, and V. W. Southall for the defendants; and these notes were printed with the record, and were before the judges of this court.

JOYNES, J. The petition presented by Hiram Hill at the fall term, 1854, is spoken of in the bill in this case, and in the printed arguments, as a bill of review. But it was not a bill of review, either in form or in substance. It did not allege either error of law apparent on the record, or newly discovered evidence, which are alone the proper grounds of a bill of review. It was a petition to open the original decree, which had been rendered without an appearance by the petitioner, and alleged accident and surprise as the grounds of it. Such a proceeding may be either by petition, as in *Kemp v. Squire*, 1 Ves. Sr. R. 205, and *Cunyngham v. Cunyngham*, Ambler R. 89; which seems to be the usual and proper practice in England (2 Daniel Ch. Pr. 684-5, and cases cited), or by original bill, as in *Erwin v.*

376 *Vint*, 6 Munf. 267, and *Callaway v. Alexander*, 8 Leigh 114. In either form it is an original proceeding, and may be commenced without previous leave of the court. It is alleged in the bill that this petition was presented to the court, and that the court overruled the application for leave to file it, though the order of the court is not in the record. The refusal of the court to allow this petition to be filed was not a legal adjudication upon the case presented by it, as in the case of refusal to allow a bill of review to be filed. In the case of a bill of review, the leave of the court is necessary to entitle the plaintiff to file it; so that the refusal to give the leave is an adjudication of a question properly before the court for its decision. But in this case, the court, in refusing the leave, did not decide a question properly before it, and its decision was, therefore, simply nugatory. Hill might have filed his bill, in the usual way, notwithstanding that refusal. The rejection of that petition, therefore, was no bar to the present bill, which seeks relief, in part, on the same grounds relied on in that petition.

The bill in this case is called on its face an original bill. It alleges, among other things, various objections to the decree arising on the face of the proceedings. It has been contended in argument, that it may be treated as a bill of review, for the purpose of enabling the court to pass upon such of its averments as contain proper matter for such a bill. I do not think we can regard it as a bill of review, in the

proper sense, because it was filed without the previous leave of the court, which, according to our practice, is necessary in all cases of bills of review. 2 Rob. Pr. 418. But this is a matter of no practical importance. The decree complained of was rendered against the appellants upon the bill taken for confessed, and without any subsequent appearance by them. And the Code, ch. 181, sect. 5, provides that the court in which there is a judgment by default, or a decree on a bill taken for

377 confessed,* or the judge of such court in vacation, may, on motion, reverse such judgment or decree for any error for which an appellate court might reverse it, but for the next following section, and give such judgment or decree as ought to be given. The next section provides that no appeal, writ of error, or supersedeas shall be allowed by an appellate court or judge for any matter for which a judgment or decree may be reversed or amended on motion by the court which rendered it or the judge thereof, until such motion is made and overruled, in whole or in part.

It was competent, therefore, for the appellants to submit a motion to the circuit court for a reversal and correction of the decree complained of upon any ground on which it might have been reversed and corrected by an appellate court, if the statute had allowed an appeal without such previous application to the circuit court. See *Davis v. Commonwealth*, 16 Gratt. 134.

This statute, it will be observed, contemplates a cheap, convenient and expeditious mode of proceeding, by motion and without pleadings. It allows notice of the motion, which is to be only "reasonable notice," to be given to the opposite party, or to his agent, or attorney, in fact or at law. It does not contemplate the more formal, expensive, and dilatory proceeding, by bill and regular process. And it contemplates, that if the motion is overruled, wholly or in part, the appeal shall afterwards be taken from the original decree, as it stood originally, if the motion is wholly overruled, or as amended and corrected, if the motion is sustained in part.

The proceeding in the present case, therefore, has not been in strict conformity to this statute. The proceeding is by bill and not by motion, and the appeal is from the decree on this bill, and not from the original decree. But as the bill embraced other grounds which gave the court jurisdiction,

378 no inconvenience or additional expense *resulted from embracing in it likewise such allegations of error as might have been made the ground of a motion under the statute. And as the record in the original case has been made a part of the bill in this case, so that all the facts are fully before the court, I think we may properly review the action of the court upon this appeal in reference to the alleged errors in the original decree, as well as in reference to the other grounds upon which the bill seeks relief. If we find such errors in the original decree, a reversal and cor-

rection of the decree now appealed from, in those particulars, will have the same effect as a reversal and correction of the original decree. I will proceed, therefore, to consider whether there has been shown to be any error in the original decree for which the appellants would have been entitled to have it reversed or corrected by an appellate court, if the statute had allowed an appeal in the first instance, or if it was now before us on a direct appeal from it. The allegations of error are not anywhere precisely collated, but I shall notice such as seem to be mainly relied upon, as I collect them from the bill, the petition of appeal and the arguments of counsel.

1. It is alleged that the original decree is erroneous in giving interest to Bowyer and wife on \$1,257.37 from January 1, 1851, instead of from May 22, 1854, and in giving interest to Hill and wife on \$968.67 from January 1, 1851, to May 22, 1854, the commissioner in his report having already allowed interest to the latter date on both these sums.

These are palpable errors. It appears by a paper which has been annexed to the record by the clerk, and is stated by him to have been so annexed by consent of counsel, that subsequently to the date of the decree now appealed from, the counsel for Bowyer and wife and the counsel for Hill and wife directed the clerk to correct these

379 errors by endorsement on any executions that might be issued on *the original decree. The petition of appeal admits that these corrections have been thus made by the counsel, but it is suggested that they are not sufficient in law to bar the femes, in case they should survive their husbands and become thereby entitled to demand the money decreed. This objection cannot be sustained. The mistakes were obvious, and their correction was a matter of course. The counsel for the parties in whose favor the decree was made had full authority to bind their clients by making the corrections. The femes are bound by this act of the counsel as well as their husbands. It being thus apparent to us, by the admission of counsel, that these errors have been properly corrected, we would not give costs to the appellants if we were to correct them by an amendment of the decree on the ground that the correction of them by the counsel is not technically before us. This matter may, therefore, be left to stand as it is.

2. It is alleged as error that, while the appellant Hill is charged with the rents for 1846, 1847 and 1848, he is not credited for the money collected by Bowyer and George P. Hill from Watson, who occupied the land during those years under a contract with Tracey, as shown by the record of the case of *Watson v. Tracey*.

The commissioner in his report, suggested that the case of *Watson v. Tracey* should be heard along with *Bowyer & wife v. Hill & als.*, and that whatever sum might be realized in *Watson v. Tracey* for these rents should be a credit to Hill on the

balances due by him as guardian. But the cases were not heard together. The money collected from Watson in *Watson v. Tracey* was not received until after the decree in *Bowyer & wife v. Hill & als.*, and there was nothing in the latter case to show what was likely to be realized in the former. The court was not bound, in consequence of the suggestion of the commissioner, to postpone the decree in *Bowyer & ux.*

380 *v. Hill & als.* until this could be ascertained, or to make provision in the decree for a credit that was wholly contingent. The appellants are entitled to a credit on the decree in favor of Bowyer and wife for the sum of \$51.96, as of June 3, 1854, and to a credit on the decree in favor of Hill and wife of \$68.05, as of the same date. But the Circuit Court can give them the benefit of these credits by directing them to be endorsed on the executions, on a motion for that purpose.

3. It is alleged as error that the case of *Bowyer & ux. v. Hill & als.* was heard upon depositions, of the taking of which the appellants had no notice. This objection could not be taken, for the first time, in the appellate court. *Dickenson v. Davis & al.*, 2 Leigh 401; Code, ch. 182, sect. 6. In the absence of objection in the court below, an appellate court would presume that notices to take the depositions were duly given, the contrary not appearing. This objection is, therefore, not avoidable on a proceeding under sect. 5, ch. 181.

4. It is alleged as error that the appellants had no notice of the taking of the accounts by the Commissioner, and that the Commissioner did not make regular adjournments of his proceedings, in conformity with sect. 7, ch. 175 of the Code.

The court directed the Commissioner to give notice of the time and place of taking the accounts by publication in a newspaper, as authorized by sect. 5, ch. 175 of the Code. Such publication, the statute declares, "shall be equivalent to personal service of such notice on the parties." The statute does not limit the class of cases in which the court may direct notice to be given by publication, and we would virtually repeal the statute if we should allow a party to whom notice had been duly given by such publication, to say that he did not see it, or hear of it, and so did not have notice in point of fact. The

381 *party being duly served with process, and thus apprized of the institution of the suit, I apprehend there can be no doubt of the right of the legislature to provide, that notice of subsequent proceedings in it may, if so directed by the court, be given by publication.

As to the adjournments, it does not appear affirmatively that they were not regular. In the absence of objection on that ground in the court below, an appellate court would presume that they were regular. This objection is, therefore, not available in a proceeding under sect. 5, ch. 181.

5. It is alleged as error that Waite, one

of Hill's securities as guardian, was not served with process.

The decree was rendered against Waite, and its validity cannot be questioned in this collateral proceeding by other parties.

6. It is further alleged as error that the bill was multifarious, because it united in one suit parties and subjects which had no necessary or proper connection with each other.

If this objection had been raised in the case while it was in the Circuit Court, it must have been sustained. But not having been raised there, an appellate court would not reverse the decree on that ground alone.

The bill further claims that the decree in the case of *Bowyer & wife v. Hill & als.* should be opened, and the appellants let in to make their defence, on the ground that they were prevented from doing so by accident and surprise. These grounds, if sustained, are sufficient to entitle the appellants to relief, unless they are precluded by laches, according to the decisions of this court in *Erwin v. Vint*, and *Callaway v. Alexander*, before cited. Two facts are alleged to sustain the averment of accident and surprise:

1. The appellant, Hiram Hill, for whom the other appellants are sureties in his bond as guardian, qualified as 382 *guardian at January term, 1845, of the county court of Fayette, and was removed from the guardianship, on the motion of his sureties, at June term of the same year. In the copy of the order of removal furnished by the clerk of Fayette to the counsel for the plaintiffs in *Bowyer & ux. v. Hill & als.*, and which was filed as an exhibit in that case, a mistake was made in the year, 1850 being put in the place of 1845, so that Hill was thus made to appear to have been guardian for five years and five months, when, in point of fact, he was guardian for only five months. The Commissioner accordingly made up an account against him for five years after he had ceased to be guardian, charging him with rents and hires which he never received, and with the proceeds of the sale of slaves which he never sold.

2. It is alleged that the appellant, Hill, who, as well as the other appellants, resided in Fayette county, wrote, soon after the institution of the suit, to Mr. Watson (now Judge Watson), of Albemarle county, where the suit was, to engage his services as counsel in the case; that the other appellants relied on Hill to attend to the defence; that Hill supposed that Mr. Watson was giving proper attention to the case in his behalf; and knowing that he had never received anything, and could not justly be made liable for anything, gave himself no uneasiness about the matter. In consequence of a misapprehension, however, Mr. Watson did not attend to the case as counsel for the appellant Hill, while his partner attended to it as counsel for George P. Hill, whose interest was adverse to that of the appellants, and whom Mr. Watson supposed to be the same Hill who had written

to him. The consequence was, that the appellants were wholly undefended by counsel.

There is no proof of these allegations. The letter to Mr. Watson is not produced. His deposition has not been taken. The only thing relied on to prove that
383 such a letter *was written, is a letter from Mr. Watson, written after the decree had been rendered in *Bowyer & ux. v. Hill & als.* But even if we could accept that as evidence that such a letter was written to Mr. Watson and received, and that he failed to defend the appellants in consequence of the misapprehension alleged in the bill, there is no evidence of any sort that Hill's letter was replied to, or that he had any sufficient reason to believe that Mr. Watson had received it, and would serve him as counsel.

The whole of the allegations on this head should, therefore, be laid out of the case, as being entirely unsupported by evidence. But if we take them as all true, it would be difficult to imagine a case of grosser laches than this. The appellants were all duly served with process. Hill contented himself with writing a letter to a lawyer to engage his services, while the other appellants did nothing. Hill had no further communication with the lawyer. If he ever heard from him at all, which he does not allege, he gave him no information as to the defence; he paid no fee; made no enquiry as to the progress of the case. How could he suppose that counsel, if willing to work for nothing, could defend him without knowing anything of the facts? When parties are admonished of the institution of a suit, by the service of process, it is their duty to take care of their interests; if they neglect this duty, it is at their peril. The allegation that Hill gave himself no uneasiness, because he knew that he could not justly be made liable for anything, if proved, would not alter the case. He knew, by the service of the process upon himself and his securities, that a claim was made against him; and he must have known that some ground, just or unjust, true or false, would be shown to sustain it. How was counsel or the court to know the facts, so as to protect him against an unjust claim, if he would furnish no evidence and no information? The truth, is,

384 however, that *he was not justified by the facts in feeling the indifference he professes to have felt. He qualified as guardian at January term, 1845. It does not appear who hired out the slaves and rented out the land for that year. If the former guardian, he ought to have turned over the bonds to Hill, and it must be presumed that he did so. What did he do with these bonds, when he ceased to be guardian? What did he do with the slaves? Though they were hired out, they were legally in his charge and possession. What did he do with the property of his wards, of which he returned an inventory to the court at April term? It is a remarkable fact in this case, that Hill, who was clerk

of the court, returned an inventory, as required by law, of the property of his wards that had come to his hands, which the court directed to be recorded, but that it cannot be found either on record or among the files of the office.

Hill undoubtedly had a right to suppose that the clerk would make true copies from the records, and that the papers would, therefore, show that he was guardian for only five months. If he had suffered injury from this negligence of the clerk in giving a wrong date to the order of removal, without being guilty of gross negligence himself, he would have had a strong case for relief. But if he had given the least attention to his own interests; if he had obtained a copy of the bill, or if he had furnished counsel with the merest outline of his defence, he would have suffered no injury from this blunder of the clerk.

The cases in which this court has held parties responsible for the consequences of laches in making their defence to legal proceedings against them, are too numerous and familiar to require citation. They are generally cases in which relief has been sought in equity against judgments at law. But in *Callaway v. Alexander*, already cited, the same principle was held to be applicable to the case of a bill to open a decree by default on the ground of
385 accident *and surprise. That case bears a strong resemblance to this in the facts, and is a conclusive authority for holding the appellants bound by their laches.

The appellants have certainly been decreed to pay more than they were justly liable for. But we cannot relieve them on this ground from the consequences of their gross and inexcusable laches. To do so, would be to hold out a direct encouragement to such conduct. Diligence and vigilance would cease to be the rule, and we should destroy all certainty in the results of judicial proceedings. There have been many cases of great hardship in which this court has refused to give relief on the ground of laches. There was never a harder case, for instance, than *Meem v. Rucker*, 10 Gratt. 506. But as the court said in that case, "the inevitable answer to the argument [of hardship] is, that the hardship complained of is not to be traced to the administration of justice, but to the party's own folly and gross laches."

The bill makes no charge of fraud against Bowyer and wife and Hill and wife, or any of them. It does not allege that they knew that the copy of the order of removal bore a wrong date, or that they knew how long Hill continued to be guardian; and there is no evidence that they did so. Hill and wife, who were non-residents, did not answer the bill, but Bowyer and wife say in their answer, that they did not know that the order had been incorrectly copied, and Mrs. Bowyer, answering in her separate behalf, says she does not know when Hill ceased to be her guardian.

It is contended, however, that if the par-

ties were not guilty of fraud in obtaining the decree, it was a fraud in them to insist upon it after its injustice had been established. I do not think that we can reverse the decree on this ground. No authority has been cited to sustain it. It would have been applicable in *Meem v. Rucker*, 386 and in every other case of hardship, in which this court has refused to give relief on the ground of laches.

I am of opinion to affirm the decree.

MONCURE, P., concurred in the opinion of Joynes, J.

Decree affirmed.

387 *Gordon & als. v. Cannon & als.

April Term, 1888, Richmond.

1. **Deeds of Assignment—To Secure Creditors—Preferences—Release Clause.**—A debtor in failing circumstances may convey his whole property for payment of his debts, giving preferences among his creditors, and requiring a release from such as accepted it.

2. **Same—Same—Same—Whole Property Must Be Conveyed.**—To render such a deed valid, the whole of

***Deeds of Assignment—To Secure Creditors—Preferences.**—It is firmly settled that apart from statute, a debtor, even in failing circumstances, until his property is specifically bound to the satisfaction of his debts, has an absolute right to dispose of it at his pleasure. He may give undue preference to a part of his creditors, or even to one, and such preference cannot be treated as a fraud. As authority for this proposition, see, besides the principal case, *Alexandria, etc., Inst. v. Thomas*, 20 Gratt. 490; *Lucas, etc., v. Claffin*, 76 Va. 277; *Williams v. Lord*, 75 Va. 402; *Sipe v. Earman*, 26 Gratt. 566; *Young v. Willis*, 82 Va. 298; *Long v. Meriden, etc., Co.*, 94 Va. 596, 27 S. E. Rep. 499; *Skipwith v. Cunningham*, 8 Leigh 271, 280, and cases cited; *McCullough v. Sommerville*, 8 Leigh 415; *Dance v. Seaman*, 11 Gratt. 780, 781; *Wickham v. Lewis Martin & Co.*, 13 Gratt. 441, 444; *Harden v. Wagner*, 22 W. Va. 365; *Clarke v. Figgins*, 27 W. Va. 670; *Williams v. Gillespie*, 30 W. Va. 590, 5 S. E. Rep. 212; *Fink v. Patterson*, 21 Fed. Rep. 606; *Marbury v. Brooks*, 7 Wheat. 556, 5 L. Ed. 522, and *note*; *Brooks v. Marbury*, 11 Wheat. 78, 6 L. Ed. 423, and *note*.

The mere fact that the deed was made during the pendency of an action does not effect the validity of the deed in the absence of fraud. *Paul v. Baugh*, 85 Va. 958, 9 S. E. Rep. 329.

†**Same—Same—Release Clause.**—And the debtor making such a deed of assignment may impose upon his creditors the condition that those who participate in the fund shall release him from the residue of their demands. *Phippen v. Durham*, 8 Gratt. 457; *Long v. Meriden, etc., Co.*, 94 Va. 595, 27 S. E. Rep. 499; *Robinson v. Mays*, 76 Va. 708; *Kevan v. Branch*, 1 Gratt. 274; *Skipwith v. Cunningham*, 8 Leigh 291; *Fink v. Patterson*, 21 Fed. Rep. 605.

‡**Same—Same—Whole Property Must Be Conveyed.**—But to render such a deed valid, the whole of the debtor's property must be conveyed by it. *Robinson v. Mays*, 76 Va. 716; *Paul v. Baugh*, 85 Va. 960, 9 S. E. Rep. 329; *Long v. Meriden, etc., Co.*, 94 Va. 596, 27 S. E. Rep. 499; *Clarke v. Figgins*, 27 W. Va. 671, 673; *Skipwith v. Cunningham*, 8 Leigh 291, 292; *Phippen*

the debtor's property must be conveyed by it; but this need not appear on the face of the deed.

3. **Same—Same—Partnership.**—A partnership in failing circumstances has the same power; and if two of three partners convey all the effects of the firm and their individual property, and the third has none, they may require a release both of the firm and all the members, by the creditors who accept the deed.

4. **Same—Same—Schedule of Goods to Be Annexed—Recordation without Schedule.**—A deed conveys a stock of goods of the grantors, and refers to a schedule of the goods, which when made out is to be considered as annexed to the deed, and to be taken as a part of it. Though the schedule is not annexed before the recording of the deed, the deed is valid without it.

5. **Same—Same—Authority to Appoint Agents—Liability of Trustee for Acts of Agents.**—A deed of trust for payment of debts authorizes the trustee to appoint agents, and provides that he shall only be

v. Durham, 8 Gratt. 464; *Quarles v. Kerr*, 14 Gratt. 48.

Where, however, no release is required the failure to convey all the property does not vitiate the deed. *Williams v. Lord*, 75 Va. 400. And the debtor cannot assail the deed on the ground that all his property was not conveyed thereby. *Robinson v. Mays*, 76 Va. 708.

Any omission of property for the purpose of securing a substantial benefit to the debtor (except such property as may be exempt by law from distress or levy) conclusively shows an intention to hinder and defraud creditors. *Paul v. Baugh*, 85 Va. 961, 9 S. E. Rep. 329; *Long v. Meriden, etc., Co.*, 94 Va. 597, 27 S. E. Rep. 499.

But the omission of a comparatively small amount, where all is substantially conveyed does not avoid the deed in the absence of fraudulent intent; for "the deed essentially complies with the requirements of the law." *Gordon v. Cannon*, 18 Gratt. 387; *Paul v. Baugh*, 85 Va. 961, 9 S. E. Rep. 329; *Long v. Meriden, etc., Co.*, 94 Va. 607, 27 S. E. Rep. 499; *Skipwith v. Cunningham*, 8 Leigh 271, 292; *Phippen v. Durham*, 8 Gratt. 465.

Same—Same—Same—Need Not Appear on Face of Deed.—It is not necessary that a conveyance should show on its face that it embraces all the estate of the grantor, but it is competent to prove that fact by evidence *aliunde*. *Long v. Meriden, etc., Co.*, 94 Va. 597, 27 S. E. Rep. 499.

In *Didier v. Patterson*, 93 Va. 535, 25 S. E. Rep. 661, the court said: "Fraud may appear from the provisions of the instrument itself, or be proved by evidence *aliunde*. Whenever it is apparent on the face of the instrument, it is called constructive or legal fraud; and in such case, the fraud is adjudged by the law to be conclusively established by the provisions of the conveyance itself, and cannot be disproved by other evidence. *Gordon et als. v. Cannon et als.*, 18 Gratt. 387; *Hughes, Effinger & Co. v. Epling, ante*, p. 424; and *Bump on Fraud. Con.* (4th Ed.) section 338. But mere badges of fraud, whether they appear on the face of the instrument or from evidence *aliunde*, may always be repelled by other evidence. *Gordon et als. v. Cannon et als., supra*; and *Hickman's Ex'or v. Trout*, 83 Va. 478, 8 S. E. Rep. 181."

§**Same—Same—Continuation of Business by Trustee.**—In *Harden v. Wagner*, 22 W. Va. 364, it was said: "That it was provided the business should be carried on under the supervision of the trustee, by agents employed by him, until the property could

liable for the money that comes into his hands, and shall not be liable for the omissions or de-

be disposed of in an advantageous manner is rather an evidence of good faith than of a fraudulent intent or purpose. *Gordon v. Cannon*, 18 Gratt. 387; *Sipe v. Earman*, 26 *Id.* 563; *Marks v. Hill*, 15 Gratt. 400." See, in accord with this view, *Ruffner v. Mairs*, 33 W. Va. 662, 11 S. E. Rep. 7; *Williams v. Lord*, 75 Va. 401.

Same—Same—Retention of Possession of Property by Grantor.—In *Shattuck v. Knight*, 25 W. Va. 508, the court said: "If the property conveyed was a stock of goods, wares and merchandise, a provision on the face of the deed of trust, that the grantor should retain the possession thereof till sale, which is not to take place for a considerable time, would render the deed *per se* fraudulent, for the obvious reason that the mere holding possession of such a stock of goods could be of no possible advantage to the grantor or any one else, and he must have, when he executed such deed, intended to defeat its professed objects by selling the goods, wares and merchandise while in his possession and devoting the proceeds to his own use. The only object, which he could have had in making such a deed of trust, must have been to delay and hinder his creditors by preventing them from seizing the property to pay their debts. (Kuhn v. Mack, 4 W. Va. 186; *Garden & Co. v. Bodwing's Administratrix*, 9 W. Va. 121; *Klee v. Reitzenberger*, 28 W. Va. syl. 2, p. 749; *Lang v. Lee*, 3 Rand. 410; *Janney v. Barnes*, 11 Leigh 100; *Sheppards v. Turpin*, 3 Gratt. 374; *Spence v. Bagwell*, 6 Gratt. 444; *Addington v. Etheridge*, 12 Gratt. 436.)

"But if the provision in the deed of trust be, that the trustee in such a case may continue the business in order to realize the trust-fund and wind up the business, the deed is not fraudulent *per se*; and if the deed further provides, that the grantor shall attend to the business under the control and direction of the trustee, that provision will not render the deed of trust *per se* fraudulent. (*Harden v. Wagner*, 22 W. Va. syl. 8, p. 357; *Marks v. Hill*, 15 Gratt. 400; *Gordon v. Cannon*, 18 Gratt. 387)."

See, in accord, *Landeman v. Wilson*, 20 W. Va. 725, 2 S. E. Rep. 215; *Conaway v. Stealley*, 44 W. Va. 169, 28 S. E. Rep. 796.

Same—Same—Postponement of Sale—Reservation of Profits to Grantor.—The deed is valid though the sale be postponed for two years and the grantor reserves the profits to himself in the meantime. *Dance v. Seaman*, 11 Gratt. 778. Indeed the time may be much longer and the grantor take the profits meanwhile. *Lewis v. Caperton*, 8 Gratt. 148.

Same—Same—Right of Partner to Make Conveyance without Consent of Co-Partner.—In *Hill v. Postley*, 90 Va. 202, 17 S. E. Rep. 946, the court said: "This case (*Anderson v. Tompkins*, 1 Brock. 456) was cited with approval in *McCullough v. Sommerville*, 8 Leigh 415, in which case JUDGE CARR said: 'Following this high authority, I conclude that a partner has a right to convey the social effects (save real estate) to trustees, to pay specified creditors of the firm, and this without the assent of his co-partner, where (as here) that co-partner resides out of the state, and the grantor is sole manager of the concern.' The same principle was recognized in *Gordon v. Cannon*, 18 Gratt. 387. But in no case, of which we are aware, has the general rule, above stated, been impugned."

See also, as to this point, *Williams v. Gillespie*, 30

faults of the agents. This does not discharge the trustee from the obligation to select fit agents, and to hold them to a strict and prompt responsibility for their acts. And this is the extent of his liability without such a provision in the deed.

6. Same—Trustee a Creditor—Effect.—The fact that in such a deed the trustee is a creditor secured in it, does not affect the validity of the deed, but only the power of the trustee to act. If the debtor does not object to his acting, it is no reason why another creditor should object; if that is the only objection to him.

7. Same—Same—Release Required by Debtor—What Deed Should State.—When the debtor in such a deed requires a release, the deed should give to the creditors all the information in the power of

W. Va. 590, 5 S. E. Rep. 212. But in *Baer v. Wilkinson*, 26 W. Va. 423, 14 S. E. Rep. 2, the court said: "I will remark that neither that case (*Scruggs v. Burruss*, 26 W. Va. 670) nor the leading case of *Anderson v. Tompkins*, 1 Brock. 456, nor the case of *Sommerville v. McCullough*, 8 Leigh 415, nor *Forkner v. Stuart*, 6 Gratt. 197, nor *Gordon v. Cannon*, 18 Gratt. 387, can be quoted as authority to sustain the position that an assignment like this, where there are two partners, one of whom has undertaken to convey the whole property of the firm by deed in which his individual debts, or debts other than that of the firm, are given priority, will be sustained. If made at a time when the co-partner, who is present or within easy reach, is not consulted, and does not concur in such deed. I find no authority in this state or in Virginia which would justify us in holding that such an assignment would be valid and effectual to deprive the creditors of the firm of their right to have the social assets applied to pay the social debts."

Same—Same—Some Debts Invalid—Effect as to Valid Debts.—In *Craig v. Hoge*, 95 Va. 282, 28 S. E. Rep. 317, it was said: "Though one or more of the debts secured be eliminated from the deed for any cause, or the deed be set aside as to them, it remains unimpaired as to the valid debts which are secured. *Skipwith v. Cunningham*, 8 Leigh 371; *Billups v. Sears*, 5 Gratt. 31; *Gordon v. Cannon*, 18 Gratt. 423; and *Burrill on Assignments* (6th Ed.), sec. 82, and note 2." See also, *Ruffner v. Welton, etc., Co.*, 26 W. Va. 229, 15 S. E. Rep. 53.

Same—Same—Release Required by Debtor—What Deed Should State.—In *Fink v. Patterson*, 21 Fed. Rep. 606, it was said: "A debtor may require of creditors a release from that part of their claims not provided for in a deed of assignment, if he conveys in the deed all his property; and if in the deed he gives the creditors all the information in regard to his condition which they ought to have in order to determine whether or not to accept the terms of the deed and to release what it does not provide for. Unless a deed requiring such a release does do this, the law pronounces it invalid and void. *Gordon v. Cannon*, 18 Gratt. 388."

And also, in *Shufeldt v. Jenkins*, 22 Fed. Rep. 357, the principal case was cited as holding that a deed imposing a release should show upon its face all that the creditors ought to know.

The principal case is cited as authority for each of the propositions above laid down, and in many of the cases given above. See generally, monographic notes on "Deeds of Assignment" and "Fraudulent and Voluntary Conveyances." See also, note in 8 Va. Law Reg. 297, 298.

the debtor, as to the nature and value of the property conveyed, and the amount of the debts intended to be provided for, and time to obtain information not given in the deed; and to determine whether they will accept or reject the offer made to them. In this case sixty days were allowed, and held sufficient.

8. Same—Same—Partnership—Case at Bar.—R A & Co. stopped business, and R & R, two of the members of that firm, and P. formed the firm of R R & Co. They failed, and conveyed all the assets of both firms, and the individual property of R in trust to pay indiscriminately a debt of R and the debts of the two firms; and they required a release. The deed is valid; but it will be re-formed, so as to apply the property of each to pay first the debts of that person or firm from whom or which the property was derived.

By deed bearing date the 30th of November, 1866, William H. Rogers, James E. Riddick and J. Pendleton Rogers, merchants and partners trading under the name and style of Rogers, Riddick & Co., in the city of Richmond, and Mary Jane Rogers, wife of William H. Rogers, conveyed to Edward Y. Cannon two tracts of land in the State of Texas, containing four thousand two hundred and fourteen acres, the property of William H. Rogers, all their stock of goods, "an inventory of which stock will, as soon as practicable, be taken and be annexed to this deed as a schedule, to be marked schedule A, and which schedule, when so annexed, is to be treated as a part of this deed; also all debts of every description due to the firm; also all the assets of every kind of the late mercantile firm trading in Richmond under the style of Rogers, Adams & Co., which firm was composed of the said William H. Rogers,

Samuel R. Adams and the said James E. *Riddick; and all the interest of William H. Rogers in said last mentioned firm; and all other assets and effects of the firm of Rogers, Riddick & Co., wherever they may be. Upon trust forthwith to take possession of the said stock of goods, and to sell the same either at public or private sale, and upon such terms of cash or credit, and as a whole or in part, as he may deem most judicious and best calculated to realize the best prices for said goods; and for this purpose the trustee was authorized to employ such agents, auctioneers or salesmen as he might deem necessary, and to pay them a reasonable compensation for their services out of the trust fund. That the said trustee should proceed, as soon as practicable, to collect all debts due Rogers, Riddick & Co., or which form a part of the assets of Rogers, Adams & Co.; and for this purpose to make such compromise adjustment of doubtful or disputed debts as might seem judicious under the circumstances; and also to sell and convey the real estate in Texas, in such parcels and on such terms as to cash or credit as might best realize the highest price for said real estate. And after paying all the expenses of executing the trust, to apply the trust fund to pay in full, if the

fund was sufficient, and if not, pro rata, the debts mentioned in schedule B, annexed to the deed as preferred debts of the first class. Second, if a surplus should remain after paying the debts in schedule B, the trustee should distribute such surplus, pro rata, among all of such of the creditors of the firm of Rogers, Riddick & Co. and of the late firm of Rogers, Adams & Co. embraced and enumerated in the schedule marked C, and annexed to the deed, as should within sixty days after the deed should be admitted to record in the clerk's office of the Hustings Court of Richmond, either in person or by some duly authorized agent, sign this deed, and thereby accept such ratable dividend in full satisfaction and discharge of the debt or debts due *to the person so signing by the said firms of Rogers, Riddick & Co. or of Rogers, Adams & Co.; and thereby agree to release said several firms and the members thereof from all obligation in law or equity for said debts. And if any of said creditors should fail to sign the deed, and a surplus should remain after satisfying the debts embraced in schedule B, and such of the creditors in schedule C as should sign the deed, then such surplus was to be distributed, pro rata, among the creditors mentioned in schedule E, annexed to the deed. And the deed provided that the trustee should not be liable for any moneys other than such as should actually come to his hands in the execution of this trust; and that he should not be liable for any default or omission of any of the agents whom he might employ to aid him in the execution of the trust.

The schedule B, annexed to the deed, embraced debts amounting to a little over six thousand dollars; all of which were the debts of Rogers, Riddick & Co., except one of \$325, which was a debt of William H. Rogers for house rent; and there was included in these an unascertained amount due to the trustee for money paid out by him for costs and for legal services, &c., for Rogers, Adams & Co. and Rogers, Riddick & Co.; the whole amount did not exceed three hundred dollars, as stated by the trustee in his answer. The debts of Rogers, Riddick & Co. embraced in schedule C, of which the amounts are given, come to about \$24,000, but there are a number of creditors named whose debts are not specified; the debts of Rogers, Adams & Co. amount to about \$4,200. There is no schedule E annexed to the deed; but there is a schedule D, the debts embraced in which are estimated at between eight and ten thousand dollars.

This deed was admitted to record in the clerk's office of the Hustings Court of the city of Richmond on the 30th of November, 1866.

391 *On the 29th of December, 1866, Gordon, Fellows and McMillan, and a number of others who were creditors of Rogers, Riddick & Co. filed their bill against Cannon the trustee, Rogers, Riddick & Co., Rogers, Adams & Co., Mrs.

Mary Jane Rogers, and the creditors secured in schedule B of the deed, in which they charged that the deed was incomplete, fraudulent in law and void, and tended to hinder, delay and defraud the plaintiffs. That it was incomplete in this, that it refers to and makes schedule A a part of the deed without appending it thereto. They charged that the deed was fraudulent in law: First—That it requires the creditors in schedule C to release and discharge the grantors, and also Samuel R. Adams, who is charged to be the only solvent member of the said firms, not himself being a party to the deed, or conveying any property to meet the liabilities of said firms; and though the said grantors had not conveyed in the deed all their social and individual property. Second—In undertaking to satisfy the debts of Rogers, Adams & Co., which firm the plaintiffs averred were solvent and able to pay their debts, out of the assets of Rogers, Riddick & Co., believed to be insolvent; and at the same time to require a release by the creditors of the members of both firms. Third—In authorizing the trustee to appoint agents, &c., and at the same time relieving him from liability for any money or other thing received by them. And it was charged that the trustee had employed the grantors, or one of them, as his agents to take possession of the stock of goods and sell the same and receive the money. Fourth—That schedule A not being annexed to the deed, the creditors have no means of forming an opinion as to the propriety of accepting or rejecting said deed; and that the power of appointment vested in the trustee gives to the grantors, or one of them, full control of the assets of Rogers, Riddick & Co., 392 and takes from the trustee the position he should occupy for the protection of the interests of debtors and creditors, and defeats the pretended object sought to be secured by the execution of the deed. And the bill further charges, that the trustee Cannon was a beneficiary under the deed, and a creditor of the two firms; and as such, preferred to the plaintiffs. And they insist, that the deed thereby becomes a mortgage, with all the equities of a mortgage attached to it. And they pray, that the trustee, his agents, &c., may be enjoined from selling any of the property attempted to be conveyed by said deed; that the sheriff of the city of Richmond be appointed a receiver to take possession of said property unless the trustee, or some one else, should give security to have the property forthcoming to abide the decree of the court; that the plaintiff's debts might be paid out of the property; and for general relief.

An injunction was awarded to enjoin E. Y. Cannon, his agents, and all others from paying or otherwise parting with the money derived from sales, or acquired in other manner, under the deed of trust mentioned in the bill, until the further order of the court.

Rogers, Riddick & Co. answered the bill

on the first Monday in January, 1867. They deny all fraud charged in the bill. They say, that immediately upon the execution of the deed, the doors of their warehouse were closed, and, under the direction of the trustee, a complete inventory of their stock, at cost prices, was at once commenced, and has been since completed; a copy of which is exhibited with their answer; and they state the nature of their business and the circumstances which rendered some delay in preparing the schedule A unavoidable. That in the deed they endeavored to describe their assets as fully as possible; and that a complete schedule of the assets would have been annexed long since but for the proceedings instituted by the plaintiff; and that they had made every 393 effort, by letter, verbal communication and otherwise, to give the fullest information in regard to the assets, to every creditor interested in the deed. They deny that the members of the firm have kept back any part of their individual property; in fact, William H. Rogers is the only one who had any property, and the Texan land mentioned in the deed is all that he possessed. They deny that the assets had been put into the hands of any one than by the trustee; all that he did was to employ William H. Rogers, under his own direction, to superintend the inventory of the stock, and the other two members of the firm were employed in arranging the goods for sale at auction.

They say further, that Samuel R. Adams, when he withdrew from the firm of Rogers, Adams & Co., took with him but fifty dollars; that he has no property; and the assets of Rogers, Adams & Co. were all conveyed in the deed. That this firm is indebted to Rogers, Riddick & Co. for advances made to pay their debts; and is not solvent.

They say that the stock of goods conveyed in the deed, and which was inventoried at cost prices, at \$12,008.45, has since been sold at auction, and has brought the gross sum of \$9,200.

The trustee, in his answer, says, that as trustee, he took immediate possession of the stock of goods, and proceeded to sell the same on the best possible terms; and that he now has the whole net proceeds of sale under his control as trustee; that all the bills receivable of said firm were endorsed to him, and have been placed in bank for collection. That it is true he did employ William H. Rogers, as stated in the answer of the firm, because it was physically impossible for him to execute the trust without some agent; and that the authority given to Rogers has been most faithfully executed.

394 *The whole property of Rogers, Riddick & Co., and Rogers, Adams & Co., appears to have been conveyed in the deed. The partners, except Wm. H. Rogers, seem to have had no property of their own, and Riddick and Pendleton Rogers put no capital into the concern. Adams also appears to have had no property.

As to the relative condition of the two parties, that of Rogers, Riddick & Co. seems to have been considerably the best.

On the 14th of March, 1867, the court, on the motion of the defendants, dissolved the injunction; and thereupon the plaintiffs applied to a judge of this court for an appeal, which was allowed.

Turner, Johnson & Guigon, for the appellants.

Steger & Sands, and Cannon, for the appellees.

MONCURE, P. Whatever may be the law and course of judicial decision in other States on the subject, there can now be no doubt but that in this State, a debtor in failing circumstances may make a valid assignment of his whole estate (subject, however, to existing liens thereon), for the benefit of his creditors, in such order of priority as he may choose to prescribe in the assignment; and though his estate be insufficient for the payment of all his debts, he may lawfully subject it, in the first place, to the payment in full of such of his debts as he may choose to prefer, and then to the payment pro rata of the claims of such of his other creditors as may, in a limited period, (which should be reasonable,) accept the terms of the assignment, and release him from all further or other liability on account of said claims. And such an assignment may be valid, even though it do not direct any surplus which may remain after satisfying the claims of the accepting and releasing creditors to be applied to the payment of his other debts, or any of them; or even though

395 "it direct any such surplus to be paid to the debtor himself.

That such is the settled doctrine in this State, is abundantly shown by the cases of *Skipwith's ex'or v. Cunningham, &c.*, 8 Leigh 271; *Kevan & als. v. Branch*, 1 Gratt. 274; and *Phippen v. Durham & als.*, 8 Id. 457. Whether the doctrine be sound in its origin or not, it ought to govern our courts until otherwise provided by the legislature. As was said by Allen, P., in an opinion concurred in by all the other judges, in *Dance & als. v. Seaman & als.*, 11 Gratt. 780: "It would disturb many titles if the principles heretofore established and sanctioned by the practice of the country were now to be questioned. If inconvenience results from the construction heretofore given to the statute against fraudulent conveyances, the remedy should be administered by the law-making power. An act of the legislature would operate prospectively, and men could regulate their transactions so as to conform to its provisions. But a decision of the court giving a new and different rule of construction, would have a retroactive, and, therefore, an unjust operation."

Of course, if there be any intention on the part of the debtor, in executing the assignment, to delay, hinder or defraud creditors, &c., it is void as to such creditors, by the express declaration of the

statute; saving only the title of a purchaser for valuable consideration, and without notice of the fraud. No appearance of fairness on the face of the assignment can give effect to it in such a case. Fraud may be proved by the deed itself, or by evidence aliunde. When proved by the deed itself, it is called constructive, or legal fraud, and cannot be disproved by evidence aliunde. Mere badges of fraud, which sometimes appear on the face of the deed, and sometimes from evidence aliunde, unlike constructive or legal fraud, may always be repelled by other evidence.

396 "In this case it certainly does not appear that there was any actual intention to delay, hinder or defraud creditors. If actual fraud be charged in the bill, it is positively denied in the answer, and there is no evidence in the record tending to prove it, but the contrary. Indeed, the bill seems to state a case only of constructive or legal fraud.

Then the question we have to consider is, Whether the deed of trust in this case is void according to the doctrine settled by our decisions before referred to?

In order to maintain the validity of such a deed, or, at least, that part of it which provides for the payment of debts on the terms of the execution of a release by the creditors, it is necessary that all, or substantially all, the debtor's estate should be conveyed by the deed. *Skipwith's ex'or v. Cunningham, &c.*; *Phippen v. Durham & als.*; *ubi supra*. The debtor is permitted by such arrangement to protect his future earnings from the pursuit of such of his creditors as may enter into it, but not a portion of his present property. "He may protect his person, indeed, by a fair composition, and a surrender of all his property, but he cannot protect a part of that property by giving up another part. Such an attempt is fraudulent and void." 8 Leigh 292; *Quarles & als. v. Kerr & als.*, 14 Gratt. 48. But it is not necessary for the deed to show on its face that all the estate of the debtor is conveyed. That fact may be proved by evidence aliunde. In neither of the cases of *Kevan & als. v. Branch & als.*, and *Phippen v. Durham & als.*, did it appear on the face of the deed that all of the property of the debtor was conveyed. In *Phippen v. Durham & als.* all of the debtor's property was not in fact conveyed, yet so nearly all as to bring the case within the operation of the rule. The amount omitted was too small to show that it was omitted for the purpose of securing any benefit to the debtor. The omission

397 "must have been from inadvertence. What invalidates a deed in such cases is, an intention to delay, hinder or defraud creditors, &c.; and unless there be such an omission of property in the deed as shows such an intention, it is not material. Any omission of property for the purpose of securing a substantial benefit to the debtor (except such property as may be exempt by law from distress or levy), conclusively shows such an intention. In the

case we have in hand, it plainly appears on the face of the deed that all of the partnership property of the grantors was conveyed, but not that all of their individual property was conveyed. In order to bring the case within the operation of the rule before referred to, it was necessary for the deed to convey all of the individual property of the grantors, as well as all of their social property. For though the debts provided for were only partnership debts, yet they bound the partners personally, and the release stipulated for by the terms of the deed was a release not only of the firm of Rogers, Riddick & Co., and Rogers, Adams & Co., but of the members thereof individually. It sufficiently appears on the face of the deed, that the two tracts of land in Texas thereby conveyed, were the individual property of W. H. Rogers; but it does not appear on the face of the deed that he had no other property, nor that his companions had no individual property. The evidence in the record shows that W. H. Rogers had no other individual property than the land in Texas, and that his co-partners in the said firms had no individual property at all of any value. The deed, therefore, strictly complies with the rule which requires that all the property of the grantors should be conveyed in such a case.

But it is objected, that the deed not only requires that the grantors should be released, but also that Samuel R. Adams, who is not a grantor, should be released.

If the property of the firm of Rogers, 398 Adams & Co. was properly *conveyed for the purposes of the deed—a question which will be hereafter considered—it seems to follow that he ought to be released from the debts of that firm, as well as the other partners.

Again it is objected, that the deed is incomplete in this, that it refers to and makes schedule A a part thereof, whereas it was not attached or appended thereto before the execution of the deed. There was no necessity for such a schedule to give effect to the deed—the property thereby conveyed being sufficiently described therein for that purpose. *Skipwith's ex'or v. Cunningham, &c.*; *Kevan & als. v. Branch*; *Phippen v. Durham & als., supra*; *Lewis & als. v. Caperton's ex'or & als.*, 8 Gratt. 148; *Brashear v. West*, 7 Peters R. 608, 614; *Burrill on Assignments*, 276-278, and cases cited. The deed does not refer to schedule A as being actually annexed thereto, but only states that an inventory of the stock will, as soon as practicable, be taken and marked schedule A, and annexed to the deed, "which schedule, when so annexed, is to be taken as a part of this deed." It was inconvenient to make out the schedule in time to be annexed to the deed before its execution, but it was made out immediately thereafter, and filed with the answer of Rogers, Riddick & Co. in this case within about a month after the execution of the deed, and nearly a month before the expiration of the period of sixty days named in the deed.

Again, it is objected to the deed, that it "undertakes to release the trustee from all liability except for money actually received by him; thus releasing him from all responsibility in the selection of his agents, or for the supervision of their actions; enabling him to be guilty of gross and wilful negligence, to appoint incompetent and corrupt assistants without any responsibility; and attempting to compel the creditors to sanction this unlimited 399 grant *of power over the effects, under penalty of being excluded from any enjoyment of the fund." And it is said that, under the deed, the trustee has the power to employ, "and actually does employ, one of the grantors to manage and control the business, to sell the assets and collect the moneys due; his employee admitting himself by the deed to be insolvent and irresponsible. These clauses in the deed they claim to be inconsistent with, and tending to defeat, the objects of the deed, and as such render the deed fraudulent and void."

The deed does authorize the trust "to employ such agents, &c., as he may deem necessary, and to pay them a reasonable compensation for their services out of the trust fund;" and does provide, "that the said trustee shall not be liable for any moneys, other than such as shall actually come to his hands in the execution of the trust; and that said trustee shall not be held responsible for the default or omission of any of the agents whom he may employ to aid him in the execution of the trust."

There is nothing very unusual in these provisions, which are inserted out of abundant caution, at the instance and for the protection of the trustee; and they do not vary materially, if at all, the legal liability of the trustee. *Burrill on Assignments*, 227. The employment of agents by a trustee is often necessary to enable him to execute the trust, and such necessity existed in this case. He is bound to select fit agents, and to hold them to a strict and prompt responsibility for their acts; and having discharged this obligation, he is not liable for any loss arising from their acts or defaults, even though there be no clause of exemption from such liability in the deed. Such a clause of exemption as is contained in the deed in this case does not discharge him from his obligation aforesaid. While he is not responsible "for any moneys other than such as shall actually come to his hands in the execution of 400 his *trust," he is responsible for his negligence in not appointing fit agents, and in not holding them to a proper account.

But, after all, such a clause could only be material as a badge of fraud, and as tending to prove that there was an understanding between the debtor and trustee, that the debtor should continue to use and enjoy his property, notwithstanding the deed. If such was the fact, the deed would of course be fraudulent. But if such was not the fact, if the clause was only inserted out of

abundant caution on account of the trustee, it could have no effect on the validity of the deed. If the creditors were not satisfied with it, or with such an exemption as it might be supposed to afford to the trustee, they might have another trustee appointed in his place. In this case it clearly appears in the record that the clause was not inserted in the deed for any undue or unlawful purpose, and that no evil whatever has resulted from it. The trustee has a right to employ agents, when necessary, even without an express power in the deed for that purpose, and being bound to employ the most suitable persons as such, may employ the debtor himself when he is the most suitable person for the purpose. In *Marks & als. v. Hill & als.*, 15 Gratt. 400, it was expressly stipulated in the deed that one of the grantors should be the agent of the trustee to make sale of the goods, which agency might be terminated at any time by either one of the preferred or any three of the deferred creditors, and yet the deed was held to be valid. See also *Burrill on Assignments*, 185, 472, and cases cited in the notes. In this case, the debtors were employed as agents by the trustee, and the record clearly shows that they were the most suitable persons for the purpose, and that benefit, and not injury, resulted to the trust fund from their employment.

Again it is objected, that the deed, 401 being made to a *creditor in trust to secure his own demands, is a mortgage, to which the right of redemption is incident, and the creditor trustee cannot sell by the mere authority of the deed, and without resorting to a court of equity.

This is an objection which does not strike at the validity of the deed, but only at the power of the trustee to act as such. The trustee, being the agent of both parties, debtor and creditor, ought to be an impartial person; and generally the creditor is supposed not to be such a person, and will not be permitted to act as trustee, especially in regard to real estate, though the deed provide for his doing so. *Chowning v. Cox & als.*, 1 Rand. 306. It seems not to have been yet decided by this court that this principle extends to personal estate. 1 *Lomax's Dig.* last ed. 423. *Moore's ex'or v. Aylett's ex'or, &c.*, 1 Hen. & Mun. 29. Though the reasons assigned by the court in *Chowning v. Cox* apply as strongly to personal as to real estate. 1 *Tuck. Com. book 2*, p. 104. But the debtor may sanction and confirm a sale, even of real estate, made by his creditor as trustee, and will be considered as having done so by being present at the sale, and making no objection. *Taylor's adm'rs, &c. v. Chowning*, 3 Leigh 654. And it is not perceived why, if the debtor has no objection, the co-creditors of the trustee should have any. Generally the interest of all the creditors is the same, so far as relates to the execution of the trust, and would be safe in the hands of any of them as trustee. In this case the trustee had a comparatively small claim, which was included in the first or preferred

class of debts secured by the deed, and there seems to be no good ground of objection to his acting as trustee. There can be no doubt about the sufficiency of the trust fund to pay the preferred debts. The sale of the goods has already been made, with the sanction and concurrence of the grantors in the deed, and the proceeds are more than enough to pay the preferred debts.

402 *So that whatever just ground of objection, if any, might once have existed to the action of Cannon as trustee, it can now no longer exist.

Again it is objected, that the deed requires the creditors to release without information as to the assets or liabilities.

When creditors are put to their election, whether they will accept the provision made for them by the debtor in an assignment of his property, and give him a release, or be excluded from the benefit of the assignment, it is reasonable that the deed should give to the creditors all the information in the power of the debtor, as to the nature and value of the property conveyed, and the amount of the debts intended to be provided for, and a reasonable time to obtain such information as the deed may not afford, and to make up their minds deliberately and understandingly whether they will accept or reject the offer made to them. If this be not, when it can conveniently be, done, the omission might at least be a badge of fraud, though it might not in itself amount to legal or constructive fraud. In this case, it seems that all the information was given by the deed which could, under the circumstances, conveniently be given in regard to the subject conveyed and debts provided for; and the necessary means were immediately taken and diligently pursued by the trustee and grantors to give the speediest and fullest information in their power to the creditors, who might easily have obtained, within the period limited by the deed, all the information necessary to enable them to make their election properly. The period limited by the deed, sixty days from the date of its recordation, seems to have been reasonable under the circumstances, and as long as was given in some other cases in which the deed has been sustained. In *Skipwith's ex'or v. Cunningham, &c.*, four months after the date of the deed

403 was the period limited. *In *Kevan & als. v. Branch*, three months was the period. In *Phippen v. Durham & als.*, the period was but thirty days from the date of the deed. In neither of these cases was there any schedule annexed to the deed; nor, in the first, were the creditors, except those of the first class, named in the deed. There seems, therefore, to be no good ground of objection to the deed in this case on account of any defect of information which it gives as to the assets or liabilities.

The next and last objection is, "that by the terms of the deed the partnership assets of Rogers, Riddick & Co. go pro rata to pay the debts of Rogers, Adams & Co., without any estimate of the debt or assets of

either;" so that the plaintiffs, "creditors of Rogers, Riddick & Co. were, therefore, either compelled, by signing the deed, to consent to the misappropriation of the social assets of the debtors to the payment of the debts of Rogers, Adams & Co., or by refusing to sign, to cut themselves off from all benefit of the assets of the debtors."

The counsel for the appellees "admit that it was a defect in the deed to dispose indiscriminately of the assets of these two concerns," but they say that "it is a mistake to suppose that such a defect invalidates the deed. For precisely this mistake was corrected in the case of McCullough & als. v. Sommerville, 8 Leigh 415; and the deed was so reformed as to apply properly the several kinds of assets." On the other hand, the counsel for the appellants insist, that that case differed essentially from this; that "in that case, there was no requisition for release; the creditors were not required to sign the deed under penalty of entire exclusion from the assets of their debtor." "The creditors of Rogers, Riddick & Co. were cut off, by the very terms of the deed, from obtaining such an equitable reformation of the deed as obtained in McCullough & als. v. Sommerville. They were required to release their debtors,

404 "Rogers, Riddick & Co., and at the same time to consent (by their acceptance of the deed) that the assets of Rogers, Riddick & Co. should go, pro rata, to the payment of the debts of Rogers, Adams & Co., and that, too, without even knowing what the debts of Rogers, Adams & Co. were."

There can be no doubt but that it was competent for the grantors in this deed to convey the said effects of Rogers, Adams & Co., notwithstanding Adams, one of the firm, did not join in the deed, in trust to secure the payment of the debts of the firm, or any of them, either pro rata, or in such order of priority as they thought fit to prescribe. McCullough & als. v. Sommerville, 8 Leigh 415; Anderson v. Tompkins, 1 Brock. R. 456; Harrison v. Sterry, 5 Cranch's R. 389; Burrill on Assignments, pp. 43-64, and the cases cited.

Nor can there be any doubt but that it was competent for the grantors in this deed to convey the social effects of Rogers, Adams & Co. in trust for the payment pro rata of the debts due by said firm, to such of its creditors as should, within the period limited, sign the deed, and thereby accept such ratable dividend in satisfaction of said debts, and agree to release the said firm and the members thereof, from all liability on account of the said debts respectively. If partners convey all their social and individual property for the payment of their debts, there is the same reason for authorizing them to prefer such of their creditors as will give them a release, as there is for authorizing an individual, who conveys all his estate for the payment of his debts, to give such a preference. It cannot be necessary to cite authority to sustain so plain a proposition. The case of Pearpoint v.

Graham, 4 Wash. C. C. 232, stated in Burrill on Assignments, p. 47, assumes the proposition without question, and is decided upon such assumption. There was

405 a question in that case whether "the assignment was valid, being executed by one only of the partners; but the learned judge thought it had been ratified by the other partners, and so became the act of the firm; and on that ground it was sustained.

Nor can there be any doubt but that it was competent for the grantors in this deed to convey by one and the same deed, instead of by different deeds, the individual estate of W. H. Rogers and the social effects of Rogers, Riddick & Co. and of Rogers, Adams & Co., in trust for the payment of a debt of W. H. Rogers and debts of the said two firms respectively. If authority be required for so plain a proposition, it may be found in the case of McCullough & als. v. Sommerville, 8 Leigh 415; so that if in this case the net proceeds of the effects of Rogers, Riddick & Co. had been devoted in the first place to the payment of debts of that firm, and the net proceeds of the effects of Rogers, Adams & Co. had been devoted in the first place to the payment of debts of that firm, the arrangement would have been legal and valid, notwithstanding the condition of release on which the payments might be directed to be made.

Nor can there be any doubt but that if there had been no release clause in this deed, it would have been legal and valid, notwithstanding it directs the proceeds of the individual property of W. H. Rogers, and the social effects of Rogers, Riddick & Co. and Rogers, Adams & Co. to be applied indiscriminately to the payment of a debt of W. H. Rogers and debts of said firms. McCullough & als. v. Sommerville, 8 Leigh 415, is an express authority for that proposition, according to which case, the court of chancery in such a case will reform the deed, according to the probable intent of the grantors and the justice of the case, and apply the individual fund in the first place to the payment of the individual debt, and the partnership funds in the first place

406 to the payment of the partnership debts "respectively, observing the order and preference established by the deed. The court held in that case, that though the deed neither mentioned the partnership, nor distinguished the social effects and social creditors from the individual property and individual creditors of the grantor, but purported on its face to convey his individual property, for the payment of individual creditors named in the deed, in two classes, according to a certain order and preference therein established, yet it was not fraudulent, either in fact or in law. "Was this deed fraudulent?" enquired Judge Carr in that case. "There is no evidence in the record to establish the fact; nothing to show an intention to withdraw the effects of the firm from the creditors, or by any covin or collusion to disappoint their claims. On the contrary, the whole property, of

every kind and description, not only of the firm, but of the individual partner McCullough, is conveyed; thus stripping himself and the firm (so far as the grantor could), of every atom of property, and subjecting it to the payment of the creditors named. And when the bill is filed, to take this fund from the trustees and put it under the guardianship of the court, to be administered by the court, he promptly answers, assenting to the measure, and praying that the court would forthwith order a sale of the whole subject; stipulating only that the proceeds shall be applied to the favored creditors. This surely evinces that there was no fraud in fact, either perpetrated or intended. But it is said that there is fraud in law—fraud in the attempt by one partner to convey all the property of the firm, and to devote this property to the payment of specified creditors, without giving his co-partner any voice in the matter; and moreover, in jumbling together the separate and social funds, and directing the separate and social creditors to be indiscriminately paid according to the list. Let us look at these objections in their order."

407 *And after disposing of the 1st, he proceeds thus in regard to the 2d: "And though the deed does not devote the social fund exclusively to the social creditors, and the separate fund to the separate creditors, does it comport with the mild and beneficent spirit of equity, for this cause (the result, doubtless, of ignorance and mistake), to annul the deed? Is it not better to reform it, by throwing each class of creditors upon its own fund, and thus reach the real justice of the case, and probable intention of the grantor? This is a power of frequent exercise in equity; one instance of which is in reforming joint bonds and making them operate as joint and several; upon the reasonable presumption that either through fraud, ignorance or inadvertence, the meaning of the parties has not been carried into effect."

Now the only remaining question—and the question on which this cause depends—is, Does the release clause, as it is called, make any difference? There was certainly, in this case, no fraud in fact, "either perpetrated or intended." There was certainly none in law, in the conveyance being made by two only of the three members of the firm of Rogers, Adams & Co., nor "in jumbling together the separate and social funds, and directing the separate and social creditors to be indiscriminately paid," or, rather, to be paid without expressly discriminating between these classes of creditors; for the deed does not direct them to be paid "indiscriminately." Is there any in law, in requiring the deferred creditors to give a release, as the condition on which they are to be allowed to participate in the benefit of the deed? Why should there be? Why may not a court of chancery reform the deed in this case as well as in the case of McCullough & als. v. Sommerville, according to the probable intent of the grantors and the justice of the case, and

apply the individual fund in the first place to the payment of the individual debt, 408 and *the partnership funds in the first place to the payment of the partnership debts respectively? The counsel for the appellants argue that that case differs essentially from this, in the fact that "in that case there was no requisition for a release; the creditors were not required to sign the deed under penalty of entire exclusion from the assets of their debtor." "The court, in deciding upon the deed (in that case), found no difficulty in separating the social from the individual assets, and the social from the individual debts. But no such question," as the counsel further argue, "can arise or be adjudicated here." "The creditors of Rogers, Riddick & Co. were cut off, by the very terms of the deed, from obtaining such an equitable reformation of the deed as obtained in McCullough & als. v. Sommerville. They were required to release their debtors, Rogers, Riddick & Co., and at the same time to consent (by their acceptance of the deed), that the assets of Rogers, Riddick & Co. should go pro rata to the payment of the debts of Rogers, Adams & Co., and that, too, without even knowing what the debts of Rogers, Adams & Co. were." Now this is a plausible argument; but is it not a petition principle? When the grantors made the deed in the terms in which it is written, the case of McCullough & als. v. Sommerville fixed its construction, and required it to be read as if it had been written so as to apply the individual fund in the first place to the payment of the individual debt, and the partnership funds in the first place to the payment of the partnership debts respectively. Suppose it had, in fact, been so written—can there be a doubt but that the deed would have been valid? But the legal construction of the deed as actually written is the same. Why, then, should there be any more doubt in this case than there was in that, but that the deed is valid? What reason can there be for saying that the intention of the grantors is different where there is a requisition for a 409 release, from what it is *where no such requisition exists—that the intention is literal in the one case, and not in the other? The deed in McCullough & als. v. Sommerville could not legally take effect if construed literally, and therefore it was construed according to the probable intent of the grantor and the justice of the case. The deed in this case cannot legally take effect if construed literally, and for the same reason it ought to be construed according to the probable intent of the grantors and the justice of the case. If it was proper in McCullough & als. v. Sommerville to act upon the rule of construction which was established in that case, a fortiori, it is proper to follow it in this case, after the lapse of more than thirty years since that decision was made. It is a fair and reasonable, and not a forced or strained rule of construction. The deed conveys the assets of two firms in trust to secure the

payment of the debts of both, without expressing any discrimination. Why may it not be construed distributively—*redendo singula singulis*—so as to require the assets of each firm to be applied, in the first place, to the payment of the debts of that firm? Such a construction would seem to be consistent with the terms of the deed, and is necessary to make it valid and effectual. It ought, therefore, to be adopted—*ut res magis valeat quam pereat*. In *McCullough & als. v. Sommerville* there was no bill filed to have the deed reformed on the ground of mistake. The deed was treated in the pleadings as devoting the social and individual effects indiscriminately, according to its apparent literal import, to the payment of the social and individual debts. But to have so construed it would have been to make it void, and therefore it was construed distributively, according to the probable intent of the grantor and the justice of the case. To be sure, the court in that case speak of reforming the deed, but that seems to be an inapt expression, and what was done was rather to construe

410 *than reform the deed. The court has no more right to change the contract of the parties in a deed which contains no condition of release than in one which does, and has no such right in either case. But if the court did intend to reform the deed in that case, to "reach the real justice of the case and probable intention of the grantor," by analogy to the instance referred to by Judge Carr of "reforming joint bonds, and making them operate as joint and several," then the same principle applies to this case, notwithstanding the condition of release contained in the deed.

Before I close this opinion, I beg leave to remark, that I came into court with strong predilections against that course of our own decisions which has tended to maintain the validity of such a deed as that which is now in question—I mean a deed containing what is called "the release clause," or a condition for a personal release of the debtor upon a conveyance of his estate for the payment of his debts. I was strongly inclined to concur in the views expressed on this subject by Chancellor Kent and Justice Story, besides other distinguished jurists. Perhaps my previous practice had tended to lead me into this line of thought and preference. In the case of *Phippen v. Durham & als.*, which came up for decision shortly after I came into the court, I took occasion to express this original inclination of my mind, but I felt myself bound to bow to the authority of the case of *Skipwith's ex'or v. Cunningham, &c.*, and I therefore concurred in the decision which was made in *Phippen v. Durham & als.* The longer I have remained in the court, the more convinced I have become of the value of the rule of *stare decisis*. And I regard the rule as especially valuable in its application to cases arising under the statute of fraudulent conveyances. No man can read *Burrill on Assignments*, in which all or nearly all the cases on

411 this subject are collected, *without

being struck, if not confounded, by the great conflict among them. Not only does this conflict exist between the decisions of one State and those of another, but often the decisions of the same State are conflicting in themselves. Courts, after going in one direction, have veered about and gone in another until the Legislature has had to interpose and solve the difficulty. Now it seems to me to be wise for us to follow the course of our previous decisions, and leave it to the Legislature, if that course be wrong, to make a change. The propriety of doing so is clearly shown by the remarks of Judge Allen, in *Dance & als. v. Seaman & als.*, 11 Gratt. 780, which I have already quoted.

I will further remark, that I feel in full force the argument founded on the supposed hardship of excluding the plaintiffs and other non-accepting creditors from any participation in the benefits of the deed in this case, when there was so much apparent doubt and difficulty as to the construction and effect of the deed, and the consequence of accepting its terms. But the supposed hardship arises, not from the peculiar terms and effect of the deed in this case, but from the law, which authorizes a debtor in failing circumstances to give preferences in the distribution of his estate among his creditors, and to require a personal release as a condition of receiving the benefits of any such preferences. Such a debtor, not having estate enough to pay all his debts, may, of his own mere will and caprice, convey his estate for the payment of a portion of them, leaving the rest wholly unprovided for; and the creditors thus excluded would have no legal right to complain. A fortiori, it would seem, creditors to whom an election is given to participate in the benefits of the deed, but who decline to accept its terms, have no such right to complain. No doubt which may exist as to the construction of the deed, nor any diffi-

412 culty which may arise in *making an election, can affect the case, if the meaning of the deed can be ascertained, and it was not intended to delay, hinder and defraud creditors. The circumstances which create the doubt or difficulty may tend to prove, and even be in themselves sufficient to prove, such an intention, and make the deed void; but if no such intention existed, the deed is valid. It is not enough, therefore, for the appellants to show that it was doubtful, or at least not certain, when the deed in this case was executed, whether the principle decided in *McCullough & als. v. Sommerville* would apply to it. Parties are presumed to know the law. And though the presumption is often not founded in fact, it is yet necessary, and well established in law. The deed being valid, and its construction settled by the decision just referred to, the accepting creditors are entitled to the benefit thereof accordingly, to the exclusion of the non-accepting creditors.

The foregoing views bring me to the conclusion that there is no error in the

order dissolving the injunction which was awarded in this case, and that it ought to be affirmed; which is the only question presented for the decision of this court on this appeal.

JOYNES, J. I concur in the opinion delivered by the President, and do not propose to add anything to his discussion of the case. I wish to say a word, however, to explain my views of the case of McCullough & als. v. Sommerville, which gave rise, on a former occasion, to considerable discussion and difference of opinion in this court. *Morriss' adm'r v. Morriss' adm'r*, 4 Gratt. 293. In that case, Judge Daniel, with whom Judge Brooke concurred, considered the case of McCullough & als. v. Sommerville as decided on the assumption, as a general principle of equity, that in the case of an insolvent partnership, the partnership assets must be applied to
413 the payment of *the partnership debts, and the separate assets of the partners to payment of their separate debts, in accordance with the rule which prevails in bankruptcy. Judge Allen, with whom Judge Cabell concurred, did not consider the case as proceeding on this principle, and confessed himself unable to understand on what ground the court undertook to reform the deed, which was admitted to be fair and bona fide.

The case, as it seems to me, may either have proceeded on the ground supposed by Judge Daniel, or on the ground that as Gillespie, the partner of McCullough, did not execute the deed, the partnership creditors had an equity through him to charge the partnership assets with the payment of their debts. Upon either ground, the partnership assets were misapplied by the deed, so far as they were appropriated to the payment of the individual debts of McCullough equally with the debts of the firm. This right of the partnership creditors was treated as in the nature of an equitable lien, which the separate act of one partner could not defeat. It became necessary, therefore, to reform the deed, so as secure the preference of the partnership creditors in respect to the partnership debts. The arrangement made by the deed being thus disturbed in respect to the partnership assets, justice to the individual creditors required that a corresponding change should be made in respect to McCullough's individual property. This was so, even if there was no general rule requiring that the separate property of each partner should be devoted first to his separate debts.

It was said in that case, that this reformation of the deed would effect the "probable intention of the grantor." This expression is obscure. For there is no evidence in the case that McCullough did not really intend exactly what he effected by the terms of the deed, namely, a blending
414 of both classes of property and of both classes *of debts, without discrimination. But I suppose the meaning of the court to be only this, that McCullough

intended, by means of the two classes of property, to provide for the payment of both classes of debts, and that he probably considered that the substantial effect of the arrangement was, to apply his individual property to the payment of his individual debts, and the partnership property to the payment of the partnership debts. The intention was not the ground on which the court proceeded in reforming the deed.

Whatever was the ground on which the court proceeded in reforming the deed in that case, it equally applies in this. If it was the ground supposed by Judge Daniel, it of course applies equally in the present case. If it was the other ground, above suggested by me, it also applies in this case, because Adams did not execute the deed, and the creditors of Rogers, Adams & Co. have, therefore, a right, through him, to have the assets of that firm applied first to the payment of their debts. I do not think it necessary, therefore, to determine on which of these grounds McCullough & als. v. Sommerville proceeded. In either case, it is a direct authority for the decision which we now make, in reference to the construction and effect of the deed in the present case.

But if McCullough & als. v. Sommerville proceeded on the ground that the partnership assets must, by a general rule of equity, be applied first to the payment of the partnership debts, and that this right could not be controlled by the execution of a deed of trust, I do not think it can be considered as necessarily holding a corresponding doctrine in reference to the separate property and separate debts of the partners. For, as I have already said, justice to the individual creditors required that the deed should be reformed for their benefit, when it was reformed for the benefit of the partnership creditors. It
415 *would have done violence to the intention of the grantor, as well as to the claims of his separate creditors, to reform the deed in one part and let it stand as to the other. Besides, whatever may be the general rule of equity in the application of individual and partnership assets, it is very doubtful, to say the least, whether it ought to control the power of a partner to appropriate his separate property, by deed of trust, to the payment of his debts as a partner in preference to his separate debts. They are equally his debts, and equally binding on him in law and conscience. In *Jackson v. Cornell*, 1 Sanf. Ch. R. 348, it was held by Vice-Chancellor Sanford, that a partner cannot make a valid assignment of his individual property for the payment of debts, for which he is bound as a partner, in preference to his individual debts. He rested the decision on the ground that there is a general rule of equity which requires that, in case of insolvency, the separate property of a partner shall be applied first to the payment of his separate debts, as in bankruptcy, and that the partner could not control the operation of this rule by an assignment. In the case of

Whitely, McConkey & Co. v. May & als., decided in the Circuit Court of Petersburg in 1850 by Judge Scarborough, and reported in 1 Liv. N. S. Law Mag. 442, the case of Jackson v. Cornell was expressly overruled, on the ground that there is no such rule of equity as supposed by the Vice-Chancellor, and it was held, that a deed of trust made by an insolvent merchant, by which he conveyed his individual property to secure the payment of debts for which he was bound as a partner, in preference to his individual debts, was valid. I applied to this court in term for an appeal, citing Jackson v. Cornell and McCullough & als. v. Sommerville, but the application was denied.

With these explanations, I am content to follow the authority of McCullough & 416 als. v. Sommerville in this *case. It removes the only difficulty I have felt. The hardship complained of by the appellants is chargeable to the doctrine long since fully established by the decisions of this court, that an insolvent debtor may convey his property in trust for such of his creditors as he may choose to prefer, and exact a release as a condition of participation in the trust fund.

RIVES, J. There is only one provision of the deed of trust in this case which admits of serious question and debate. It is the second clause, whereby the trustee is required to "distribute ratably any surplus remaining after the discharge of the debts in schedule B, among such of the creditors of the firm of Rogers, Riddick & Co. and of the late firm of Rogers, Adams & Co. embraced in the schedule marked C as shall, within the period named, sign the deed—thereby accept such ratable dividend in discharge of the debt due them, by the said firms of Rogers, Riddick & Co. and of Rogers, Adams & Co., and thereby agree to release said several firms and the members thereof from all manner of obligation or liability at law or in equity on account of said debts." That it is the right and privilege of a debtor, devoting his whole property by deed to the payment of his debts, to prefer one creditor or class of creditors to another; and to exact a release of them, is fully established by the decisions of this court. I, also, fully concur with the President in the satisfactory and conclusive replies he has given to the other exceptions of the appellants to this deed. But after mature reflection, I am unable to give my assent to his treatment of this particular provision of the deed, that I have just cited. I cannot, therefore, avoid with propriety a concise statement of the grounds of my dissent.

All of the debts provided for in this deed, with the exception, perhaps, of house 417 rent, are partnership debts; *and the effects, partnership effects, with the exception of the Texas lands belonging to Wm. H. Rogers individually. But the vice of the deed, consists in the confusion of the social assets and social debts of two separate firms, namely, of Rogers, Riddick

& Co. and Rogers, Adams & Co. This is more startling upon a comparison of the respective conditions of these firms; the former, exhibiting a surplus of assets beyond liabilities of \$25,279.59; and the latter, a similar surplus of only \$4,414.19. The competency of Wm. H. Rogers and James E. Riddick to convey by this deed, the assets of Rogers, Adams & Co. is not contested; but where do the parties to this deed get the right to bring the creditors of Rogers, Adams & Co. into a ratable participation with the creditors of Rogers, Riddick & Co. in the assets of the latter firm? It is conceded, no such right exists; and that if such is the true legal effect of this provision, it is invalid. But it is claimed that his court has a right to reform the deed in this respect, and require these partnerships to be settled separately and apart, by devoting to each its own particular account of social assets and social liabilities. It would be too monstrous to suppose that the individual members of the firm of Rogers, Riddick & Co. could by any device bring the creditors of another firm into the distribution of their social effects. It would be a voluntary provision, without consideration, and therefore void, to attempt thus to create a lien in favor of creditors of another concern, to which some of the grantors in the deed chanced to belong.

But it is asserted, that while such is the plain and unmistakable declaration of the deed, the law ascribes to it a different effect, and construes it distributively in reference to the two partnerships. This pretension seems to me to proceed from a misconception of the case of McCullough & als. v. Sommerville, 8 Leigh 415, which is relied upon for this position. The 418 grounds of discrimination are *not obscure. In that case, the confusion was of private, with social debts and assets. On the face of that deed, there was no mention or appearance of a partnership; the evidence of it was extrinsic; and it was due to subsequent revelations that it appeared that the grantor had by his deed jumbled his individual with his social funds. But here it is not a question of that kind; there is no mingling of individual with partnership funds in the sense in which I am now treating this case; but the attempt is made to throw into hotch-potch the respective assets of two separate firms, and bind the creditors of each to a ratable distribution thereof. In that case, the reformation of the deed was predicated of the intention of the grantor. Judge Carr imputes this commingling of private with social funds to "ignorance and mistake;" and the decree of the court conclusively shows that this distributive construction was resorted to as the means of arriving at "the justice of the case and the probable intent of the grantor." Its language is, "that as the purpose of the deed was to provide for certain bona fide creditors of the firm, as well as for individual creditors of said Edward McCullough, although the deed does not devote the social fund exclu-

sively to the social creditors, and the separate fund to the individual creditors; yet it will be proper for the court, in the exercise of its undoubted powers, to reform the deed in this respect, by throwing each class of creditors upon its own fund, and thus reach the justice of the case and the probable intent of the grantor." No wrong or injury could result from this course. It was the dedication of the individual property to individual debts, and of social assets to social debts; and could not be said to contravene the intentions of the grantor, if it did not promote them, as was alleged. But no such principle exists here; the intention here is clear that creditors of two separate firms

shall be required to assent to the ratable *distribution of the respective assets among them in common, and the acceptance of such ratable dividends in discharge of their debts, under the penalty of forfeiting all interest in the trust. If, therefore, this clause is to be reformed in the case at bar, let be done so as to preclude injury to the complainants in this suit, by not leaving them exposed to this penalty. The language held out to them is virtually this: "Your objection to the provision entitling the creditors of another firm to share with you in the assets of Rogers, Riddick & Co. is proper; this provision is invalid and operative; but yet you must abide the penalty you have incurred by failing to sign the deed in the prescribed time; and while the deed is reformed in this respect, you take nothing by it, but the benefit enures to others." What is the excuse for this partial emendation of the deed? It is that the legal effect of it should have been known to the complainants, and they should have signed the deed and relied upon obtaining this redress. But in my view, this case of McCullough & als. v. Sommerville is authority only for this position, namely, that where the effects of a firm and its acting partner are promiscuously devoted by trust deed to individual and social debts, the court will throw each class on its peculiar fund; and is, by no means, authority for this other position, that the court will proceed a step further, and uphold, by analogy thereto, the jumbling of two partnership concerns through this ingenious function of construing distributively such a different provision for the adjustment of partnerships. Rogers, Riddick & Co., if they had made a common provision for social debts and the debts of the individual members of that firm, could have been well understood by their creditors, or, at least, the legal advisers of such creditors, under the treatment of such a provision in this case of McCullough v. Sommerville;

but when they undertook, as by this deed, to bring *the creditors of another partnership, namely, Rogers, Adams & Co., into the distribution of their social assets, namely, the effects of Rogers, Riddick & Co. and e converso, what countenance is afforded by that case to the wholly different pretension here? It is allowable, under that decision, to confound

in a trust, private with social funds and debts, and the apparent wrong is rectified by an equitable adjustment thereof in the mode already indicated; but I most respectfully submit, it is no more allowable for one partnership to charge its assets with the debts of another partnership, than it would be for an individual to charge his assets with the debt of another.

Let us look into the principle of that decision. McCullough was responsible in solido for the partnership debts no less than for the individual debts; and there was, therefore, no objection to reform the deed in this particular, either in conformity with the legal presumption of his intention, or with a fixed rule of equitable construction or relief. But Rogers, Riddick & Co. were not responsible, as a firm nor as individual members, for the debts of Rogers, Adams & Co., and it was not competent for them to dedicate the respective assets of each interchangeably to the common ratable satisfaction of the respective creditors of each. Such an attempt is simply nugatory; it is voluntary and without consideration moving from the creditors of Rogers, Adams & Co. to the grantors in the deed. Especially should this attempt be avoided, when we consider the feature of a release, which did not exist in the case of McCullough & als. v. Sommerville. In the case of Phippen v. Durham & als., 8 Gratt. 478, Judge Baldwin, in treating of this condition of a release, uses this language: "The effect of such a condition is to give the whole benefit of the trust to the creditors who comply with it, to the exclusion of those who fail to do so within the prescribed period.

It has somewhat the nature of a *forfeiture; and there ought to be perfect fairness and good faith on the part of the creditors seeking to avail themselves of it." It seems to me scarcely consistent with "fairness and good faith" to give to the signing creditors alone, the benefit of the reformation of the deed accorded in this case; and to exclude therefrom the victims of this forfeiture. The penalty is an integral part of this clause; it cannot be separated from it; and, in my view, should share its fate.

This case of McCullough & als. v. Sommerville subsequently became the subject of examination and discussion in Morris' adm'r v. Morris' adm'r & als., 4 Gratt. 293. Judges Daniel and Brooke united in considering this case as establishing that the rule in bankruptcy affecting separate and joint creditors in their resort to individual and joint funds was to be regarded as a general rule of equity prevailing in this Commonwealth. On the contrary, Judges Allen and Cabell did not so interpret this authority; but considered the reforming of the deed, by throwing each class of creditors in its appropriate fund, as the means adopted by the court of "reaching the justice of the case and the probable intention of the grantor." The court was thus divided in opinion; and the instruction of the Judge below to the commissioner stood, namely,

"that joint or partnership creditors were not entitled to credit out of the separate estate of a partner until separate creditors were paid." This is conformable to the doctrine of the Supreme Court of the United States in the case of *Murrill et al. v. Neill et al.*, 8 How. U. S. R. 414.

So far as this present case is concerned, it is not, in my view, material to settle the question growing out of these discussions upon the case of *McCullough & als. v. Sommerville* in the later one of *Morris' adm'r v. Morris' adm'r & als.* Whether the reference of such classes of creditors to their respective funds is a fixed rule
422 of equitable interposition *in all cases, or fluctuates with the actual or presumed intention of the grantor in each case, is a question that has no bearing upon this commingling of the accounts of one partnership with the accounts of another partnership. For the present, therefore, I may content myself with the convenient refuge, "non nostrum, tantas componere lites."

It is pertinent to our present inquiry to cite a striking criticism of Judge Allen upon this case of *McCullough & als. v. Sommerville* in these words: "Where the court found their authority to reform a deed so as materially to change its operation, after just determining it was made in good faith and by a party having full authority to convey, I am at a loss to conceive; and this, too, without any evidence of mistake on the part of the grantor." How much more questionable is this intervention in the case at bar, when it is in contravention of the clear intention and the whole scheme of the deed; and of the justice of the case in excluding the penalty or forfeiture from the scope of the decreed reformation of the deed?

I do not object to the reforming of the deed; I may question and doubt the authority to do so; such relief, so far as it goes, meets my concurrence; but it stops short of the full redress to which, I think, the complainants are entitled.

This brings me to consider the most material point of my dissent. It consists in my view and treatment of this obnoxious clause of the deed. I cannot agree in ascribing to it a legal import in conflict with its terms. I have endeavored to show there is no authority for doing so. I cannot defeat its operation by such a construction, however ingenious; nor can I consent, while overruling it as to signing creditors, to leave it in full force against the non-signing, whose objections to it are virtually sustained by the court here.

I regard the whole clause, inclusive
423 of the penalty, as *invalid and inoperative. I do not impeach the bona fides of the grantors—I do not stigmatize the clause as actual fraud; it is, doubtless, constructively so, because of foisting upon one partnership creditors of another partnership, and therefore strangers to it. The question therefore arises, whether it can be separately annulled without setting aside

the whole deed. Actual fraud, within the cognizance of the parties, would vitiate the whole deed; but no principle of law or reason seems to me to inhibit the setting aside of an illegal and, therefore, an inoperative clause, at the same time that other parts of the deed are sustained. Even in the case of actual fraud affecting some of the debts secured by the deed, this court has declined to pronounce a conveyance thus tainted void as to a fair and bona fide creditor, having no notice of any dishonest purpose to the part of the grantor, so far as his indemnity was concerned. This was the case of *Billups v. Sears & als.*, 5 Gratt. 31. This doctrine lodges with the court a virtual function of expurgation, and is far ahead of the modest pretension I advance, to annul an inoperative clause of a trust deed. But this question has been so fully examined, and the authorities so satisfactorily cited and reviewed by Judge Tucker in the case of *Skipwith's ex'or v. Cunningham & als.*, 8 Leigh 271, I cannot better set forth and corroborate my views than by a copious extract from his opinion in that case. It will save any exposition of my own views upon this point, or any comment upon the authorities he cites. It will also be seen that he foreshadows and justifies by anticipation the decision I have just quoted of *Billups v. Sears & als.* He says, on page 293: "I cannot agree that all the creditors are to lose the benefit of this security for the payment of their debts because an improper provision, deemed fraudulent by construction of law, has been inserted in the deed. I am aware that a distinction has been taken and sustained

424 *in some cases between a deed avoided by statute and one which is only constructively fraudulent upon equitable principles. 14 Johns. R. 458; 20 Id. 442. But I think there is another distinction. Where a deed is made for the security of various creditors, whose claims are distinct and unmingled with each other, and where part are illegal and fraudulent, and another part are fair and untainted with fraud, the security shall not be avoided as to the latter, provided they have given no aid any way to the concoction of the fraud. A deed of that character ought to be considered distributively, and, while it is avoided in part, it should be effectual as far as it is good. If it were otherwise, then a deed of trust to secure the payment of ninety-nine just debts would be avoided by the fact that the hundredth was for usury or gaming; for the statute has declared all gambling or usurious securities to be void. This cannot be; and accordingly this court, in the case of *Kemper v. Kemper, &c.*, 3 Rand. 8, decided that where the transaction is of such a nature that the good consideration can be separated from the bad, the court will separate them, and consider the deed valid so far as it is entirely distinct from and unaffected by the illegal consideration. So, in *Skipwith v. Strother, &c.*, 3 Rand. 214, where part of a bond was for gaming, and so in *Fleetwood v. Jansen*, 2 Atk. 467, there

cited, a mortgage, in part for money lost at play, was avoided as to that, but held as a security for what was justly due. I am aware, indeed, that in *Garland v. Rives*, the deed was avoided in toto; but there a gross fraud was committed upon the creditor, and the case affords no precedent for the case at bar. But even in that case, Judge Green admits that a deed may be good as to part of the grantees and void as to others. 4 Rand. 309. As where a deed is made to secure a just debt, and the equity of redemption is reserved to a stranger or to the family of the debtor; such a deed would be valid as to the creditor, but void in respect to other creditors as to the reservation of the equity of redemption. *Ibid*. So here the deed is truly of no effect as to other creditors in so far as the surplus goes; but it is valid and available as a security to the creditors specified, and those assenting to the composition."

The authority of this opinion, and the force of its reasoning, justify the conclusion that the obnoxious provision of this deed can be separated from its other provisions and annulled without affecting them. I do not understand my brothers as disagreeing with me upon the illegality of subjecting the assets of two concerns interchangeably to the creditors of each; but they remedy it by a reformation of the deed, which I think questionable, and not sanctioned by the authority of *McCullough & als. v. Sommerville*, which they invoke to that end. Besides, they leave in force the condition of forfeiture annexed to this invalid provision. The relief which I am disposed to grant would be the abrogation of the whole clause as illegal and inoperative, while the bona fides of the deed, and its obligations in other respects, are not assailed. In this difference of opinion, therefore, I may be permitted to take to myself the consolation of believing that, in my disposal of this case, no hardship or injustice would ensue upon the failure to sign a deed with a provision admitted to be illegal, but claimed here to be susceptible of an equitable interpretation at war with its terms.

For these reasons, I cannot concur in the affirmance of the decree below.

Decree affirmed.

426 *Dearing's Adm'x v. Rucker.

April Term, 1868, Richmond.

1. **Jury Waived—Trial by Court—Inferences by Court.**—Where the parties to a cause waive a jury and submit the whole case to the decision of the court, upon a statement of facts agreed, this statement is not to be treated as a special verdict or a case agreed in lieu of a special verdict; but the court may make any inferences from the facts stated that a jury might have made.

***Jury Waived—Trial by Court—Inferences by Court.**

—In *Ramsburg v. Erb*, 16 W. Va. 786, it is said: "Where a jury is waived, and the whole matter of

2. **Account Stated—Case at Bar.**—R owes D for money received of or for D at several periods before June 14th, 1862. On that day the account is stated, interest charged, amount ascertained, and check given for it: which if presented at bank, would have been paid in Confederate money; and R makes entry on his books, closing the account. On same day, D returns the check and takes R's note for the amount, payable January 1st, 1863. **HELD:**

1. **Bonds—Confederate Money.**—The bond is a new transaction, unaffected by the previous dealings between the parties; and is a bond for the loan of Confederate money.

2. **Statute—Scaling.**—Under the act of March 3, 1866, for scaling Confederate debts, the time for the payment of the debt is the date at which the scale of depreciation should be ascertained and applied.

3. **Same—Same.**—To the value of Confederate notes, thus ascertained, nothing should be added on account of the present depreciation of current paper money compared with gold.

On the 15th of January, 1866, Jane E. Dearing, executrix of William Dearing, brought an action of debt against A. B. Rucker, in the Circuit Court of 427 Lynchburg, "on a bond for \$3,822.74, dated 14th June, 1862, payable on the 1st of January, 1863, with interest at the rate of 4 per cent. from the date. Issue was joined on the plea of payment, and the parties waived a jury and agreed their case to the following effect: that the defendant was indebted to the plaintiff's decedent on the 1st of January, 1862, in the sum of \$1,362.13 for transactions before that time had between them; that on the 13th of February, 1862, he received cash of said decedent, \$1,491.81; that on the 14th of June, 1862, he received for said decedent, on account of sales of wool and other articles sold by defendant as the commission merchant of said decedent, \$822.74; and upon a settlement between the parties on that day, the defendant was found indebted to said decedent in the sum of \$3,822.74, which included some interest that had accrued on the sums which had remained in the hands of the defendant; that the defendant drew his check on one of the banks of the city (Lynchburg) for the said sum, in favor of the decedent; that the check, if presented

law and fact is referred to the decision of the court, the court may make any legitimate inferences from the evidence that a jury might make. *Dearing v. Rucker's Adm'r*, 18 Gratt. 426." See also, *Elys v. Wynne*, 23 Gratt. 232, where the principal case is cited.

†**Scaling.**—On the subject of scaling, see the principal case cited in the following cases: *Jarrett v. Nickell*, 9 W. Va. 353; *Bierne v. Brown*, 10 W. Va. 750, 761; *Rexroad v. McQuain*, 24 W. Va. 37; *Gilkeson v. Smith*, 15 W. Va. 60; *Omohundro v. Crump*, 18 Gratt. 707; *Lohman v. Crouch*, 19 Gratt. 341; *Town of Danville v. Sutherland*, 20 Gratt. 564; *Caldwell v. Craig*, 21 Gratt. 142; *Moses v. Trice*, 21 Gratt. 567; *Carter v. Ragland*, 21 Gratt. 577; *Caldwell v. Craig*, 22 Gratt. 345; *Dinwiddie County v. Stuart*, 23 Gratt. 542; *Moon v. Richardson*, 24 Gratt. 223; *Wrightsmann v. Bowyer*, 24 Gratt. 435.

at the bank, would have been paid in currency, as the defendant had the same to his credit on the books of the bank; which check the plaintiff's decedent accepted, and the defendant balanced the accounts upon his books; that after the decedent had so accepted the defendant's check, he represented to defendant that he had no use for the money, and that it would be an accommodation to him for the defendant to retain it; which, at length, the defendant agreed, as an accommodation to the decedent, to do; but upon condition that he should be allowed to pay it off on the 1st of January next following, and should pay interest at the rate of 4 per cent. per annum only; that the bond in the declaration mentioned (which, with the endorsement of a credit of \$400, October 24th, 1865, thereon is set out in *haec verba*), was then executed and delivered, and the check returned to the

428 defendant. That *in December, 1861, and in 1862, and down to the close of the war in April, 1865, the treasury notes of the Confederate States were in general circulation as currency in the said city; that they were constantly diminishing in value from the 1st of January, 1862, to the end of the war; that a table, which is set out in the record in *haec verba*, shows the value of said currency in gold at various times in the said city; (from which table it appears that a dollar in gold was worth in said currency \$1.25 in January and February, 1862, \$1.50 in June, 1862, and \$3 in January, 1863); that on the day of the trial, the premium on gold, in legal tender notes of the United States, was 50 per centum in said city; that the decedent died before the bond became due, and there was no administration on his estate on the 1st of January, 1863; and that on the 24th of October, 1865, defendant paid to plaintiff \$400 in United States currency, on account of said bond.

The Circuit Court was of opinion, upon the case agreed, that even if the bond aforesaid should be scaled at all, on account of the fact that it was understood between the parties, although nothing was said as to the kind of currency in which the same was payable, that it was payable in Confederate currency; yet inasmuch as \$1,361.13 of said bond was due on the 1st day of January, 1862, and \$1,491.81 on the 13th of February, 1862, and the residue on the day of the date of the bond, part of which residue was interest on said first mentioned sums; and inasmuch as the interest to be paid was only at the rate of 4 per cent. per annum, the defendant would have no reason to complain if the date of the bond was taken as the time at which the scale should be applied. And it appearing by the case agreed that \$100 in gold was, in the month of June, 1862, and at the date of the bond, worth \$150 in Confederate treasury notes, and that \$100 in gold was, on the day of the trial, worth \$150 in legal tender

429 *notes of the United States; so that, if the scale were applied and the amount due by the defendant were reduced

to United States national currency, the amount of the bond would be the sum for which judgment should be rendered; for it seemed to the court that if the judgment were rendered only for the amount ascertained, after applying the scale, in gold, the same might be discharged by the payment of legal tender notes, while the gold is actually worth 50 per cent. premium in legal tender notes. Therefore, the court rendered judgment for the amount of the bond, with 4 per cent. interest from its date, and costs, subject to a credit of \$400 paid October 24, 1865, as per endorsement on the bond.

To this judgment of the Circuit Court, a supersedeas was awarded by the District Court holden at Lynchburg; and the cause having been heard in that court, it was of opinion:

1st. That upon the facts stated in the case agreed, the bond aforesaid ought to be regarded, for the purposes of the action, as a new transaction, unaffected by the previous dealings between the parties, which had been fully closed and settled before the execution of said bond.

2d. That if, according to the true intent of the parties to the bond, the sum was payable in Confederate States treasury notes, then, upon the facts agreed, the defendant in error in that court was entitled to recover judgment in the action for the value of the amount of such notes, payable on said bond, scaled according to the value of said notes in reference to gold, on the 1st day of January, 1863, the case agreed not furnishing the materials for applying any other scale, if any other ought to be applied in this or in any case; as to which the court expressed no opinion; and that to the value so ascertained nothing should be added on account of the present depreciation of paper money as compared with gold. The court can only render

430 *judgment for money generally, without designating what is to be regarded as money; and no question can arise as to the obligation on the part of the defendant in error to accept payment in United States treasury notes, as being, under the act of Congress, the legal equivalent of coin, until such notes shall have been tendered in payment of said judgment and refused; and the effect of so adding to the money value of said notes, a sum equal to the difference, at the date of the judgment, between coin and paper money, would be to make the debtor pay more or less than he ought to pay, in proportion to the rise or fall in value of paper money, with reference to coin, between the date of the judgment and the time of its payment. And

3d. That the case agreed is too uncertain to enable the court to pronounce judgment upon it, because it does not state whether the said bond, according to the true intent of the parties, was or was not payable in Confederate treasury notes.

Therefore, the District Court reversed the judgment of the Circuit Court, set aside the case agreed, and awarded a *venire de novo*

for the trial of the issue joined. To which judgment of the District Court, a superseas was awarded by this court, on the petition of the plaintiff in error.

The case was argued by Garland, for the appellant, and Goggin & Kean, for the appellee; but it is fully discussed by the judges.

JOYNES, J. I think it may fairly be inferred from the facts stated by agreement of the parties, that the bond on which this action is founded was, according to the true understanding and agreement of the parties, to be paid in Confederate treasury notes; or, to speak more accurately, that these note were the sort of dollars and cents for which the bond was given. The

431 District Court, proceeding *upon the familiar principle applicable to a special verdict and to a case agreed to be argued in lieu of a special verdict, held that it was not competent for a court to make this inference from the facts stated. But this was not a case agreed to be argued in lieu of a special verdict, as in *Sawyer v. Corse*, 17 Gratt. 220, where the court could not do otherwise than apply to the case the same rules that would have been applied to a special verdict. In this case the whole matter of law and fact was submitted to the court in pursuance of the statute. The facts stated by agreement of the parties were submitted to the court, without any restriction as to the mode in which they should be treated. It was, therefore, competent for the court to make such inferences from the facts thus submitted to it as the jury might have made from the same facts, if they had been submitted to them. There was, therefore, no necessity for a venire de novo, and it was error in the District Court to award it.

The first point decided by the District Court is thus stated in the judgment:

"That upon the facts stated in the case agreed, the bond, executed by the plaintiff in error to the testator of the defendant in error, on the 14th day of June, 1862, and on which this action is founded, ought to be regarded, for the purposes of this action, as a new transaction, unaffected by the previous dealings between the parties, which had been fully closed and settled before the execution of said bond."

The obvious meaning of the court was, that no part of the consideration of the bond should be regarded as a specie debt, and that no part of it should be scaled as of a time anterior to the date of the bond. The parties had a full settlement, in which interest was credited to Dearing upon the money that had remained in Rucker's hands. The sum found due to Dearing,

432 principal and interest, was \$3,822.74; for this sum Rucker gave Dearing his check, which he accepted in payment, and Rucker balanced the accounts on his book.

Subsequently, on the same day, this check was handed back to Rucker, who executed his bond for the said sum of \$3,822.74, with interest thereon from that

day. All previous interest was thus aggregated with the capital, and made to bear interest. The settlement was not cancelled in effect, for then interest should have run upon each separate part of the consideration from its date, as if there had been no settlement. On the contrary, the bond was given on the footing of a settlement completely made, remaining undisturbed, and affording a new starting point for interest. If we should hold that one part of the aggregate sum for which the bond was given should be treated as a specie debt, and that other parts of it should be scaled as of different dates, or that any part of it should be scaled as of a date prior to the date of the bond, we should undo what the parties have agreed between themselves. The agreement of Dearing to accept the check in payment, which if presented at the bank would have been paid in Confederate notes, was an agreement to accept such notes, as of that date, in satisfaction of his claim. The case must be treated, therefore, as a loan of Confederate notes at the date of the bond, payable in Confederate notes on the 1st day of January, 1863, with four per cent. interest.

The next point decided is thus stated in the judgment:

"2d. That if, according to the true intent of the parties to the said bond, the same was payable in Confederate States treasury notes, then, upon the facts agreed, the defendant in error is entitled to recover judgment in this action for the value of the amount of such Confederate notes, payable on said bond, scaled according to the value of said notes, with reference to

433 gold, on the 1st day of *January, 1863; the case agreed not furnishing the materials for applying any other scale, if any other ought to be applied in this or in any case, as to which the court expresses no opinion; and that, to the value so ascertained, nothing should be added on account of the present depreciation of paper money as compared with gold. The court can only render judgment for money generally, without designating what is to be regarded as money; and no question can arise as to the obligation, on the part of defendant in error, to accept payment in United States treasury notes as being, under the act of Congress, the legal equivalent of coin, until such notes shall have been tendered in payment of said judgment and refused; and the effect of so adding to the money value of said notes a sum equal to the difference, at the date of the judgment, between coin and paper money, would be to make the debtor pay more or less than he ought to pay, in proportion to the rise or fall in value of paper money with reference to coin, between the date of the judgment and the time of its payment."

This involves two distinct propositions: 1. That the Confederate notes should be reduced to their value in gold on the 1st day of January, 1863; the day on which the bond was payable. 2. That to the value of the Confederate notes, thus ascertained,

nothing should be added on account of the present depreciation of current paper money compared with gold.

I do not understand that the latter proposition is controverted, and I think it manifestly sound for the reasons assigned by the District Court. The same views were held in an analogous case by the Supreme Court of Missouri, in *Henderson v. McPike*, 35 Mo. R. 225.

No question has been raised as to the propriety of adopting gold as the standard with reference to which the Confederate notes should be valued. The facts 434 agreed do not *furnish the materials for applying any other standard in this case, if any other would be proper, and they indicate that the parties intended that the gold standard should be applied, if the debt was to be scaled at all. Gold, it is well known, was not a currency, but an article of traffic, during the late war. Scarcely any article had a value that was less stable and uniform. It went up, and sometimes went down, for short periods, very suddenly, according to the vicissitudes of the war and the demands of speculation and adventure. Its value was not uniform in different places at the same time. At points remote from the cities, the people paid little or no attention to its fluctuations, and were not governed in their dealings by any reference to its value.

There would seem, therefore, to be strong ground for saying, that gold does not fulfil the conditions necessary for an absolute standard, the most essential of which are uniformity and stability. But it is a convenient and practicable standard, and answers the purpose as well as any other that can be found; perhaps better than any other. At any rate, it is the standard generally adopted, and will be adhered to from convenience, and almost from necessity; for the dispatch of business requires that some standard should be assumed, and one that is capable of prompt and easy application. While I think that gold is not legally or logically the true and only standard for the valuation of Confederate notes, I have no disposition, for the reasons which I have mentioned, to disturb the practice which prevails, as far as I know, in all parts of the State. The important question in this case relates to the time at which the value of the Confederate notes should be ascertained. The case is of the first impression in this court. To determine it properly, it will be necessary to examine with care the principles which are applicable to this class of contracts.

435 *The act of March 3, 1866, which was in force when this case was decided in the Circuit Court and in the District Court, provided that the court should, in every case, determine the time at which the value of the Confederate notes should be ascertained. By the act of 1781, (10 Hen. Stat. at Large 471), establishing a scale of depreciation for Continental money, and providing a rule for the adjustment of contracts made with reference to

that currency, an arbitrary rule was prescribed by which the scale was to be applied in all cases "at the days or times" the debts or contracts "were incurred or entered into." I take no notice now of the provision of the fifth section of that act, to which I will advert hereafter. That act was passed before the adoption of the Federal constitution. There was nothing in the then existing constitution of the State, or in the articles of confederation, to prevent the Legislature from fixing an arbitrary and uniform rule for all cases, though it might often have the effect of controlling the agreement of the parties. We shall see hereafter, however, when I come to consider this act more particularly, that it was designed to carry into effect the real contract of the parties, and it would probably not have been liable to objection, if this provision of the constitution had then been in force.

However this may be, it was certainly not competent for the Legislature, in 1866, to pass any law impairing the obligation of a contract. Where the rights of parties have been fixed by their contract, no legislation can modify or control them, in any manner or to any extent. This is equally true, whether the terms of the contract are expressed in words or implied by law. And, accordingly, the act of March 3, 1866, as I understand it, laid down no general rule, but provided that the scale should be applied at the date of the contract, or at another time, "as may to the court seem right in the particular case."

436 *The language of the act has been supposed to indicate that the Legislature intended to prescribe, as a general rule, that the notes shall be valued at the date of the contract, allowing an exception to be made when the justice of a particular case may require it. The form of expression may afford some support to this construction, but it does not by any means require it. And we are not at liberty, by "sticking in the bark" of a mere form of expression, to impute to the Legislature an intention to exceed the limit of its powers, when the language is consistent with a different construction.

It is apparent that, in referring the time at which the notes shall be valued to the decision of the court, the Legislature regarded it as a question depending on the legal rights of the parties. The Legislature had no authority to make contracts for parties, nor to alter their contracts when fairly made, and it could not confer such authority on the courts. All it could legitimately do was to provide the means of ascertaining what the real contract was, by such modifications of the rules of evidence as might be necessary for that purpose, and the means of giving effect to that contract when ascertained. It accordingly provided, in respect to contracts made after the 1st of January, 1862, for the introduction of parol or other evidence to ascertain the true intention of the parties in respect to the currency in which a contract for the

payment of money was to be fulfilled, or with reference to which, as a standard of value, a contract of any other sort was made.

It assumed that a contract for the payment of Confederate money was valid, and that a party might lawfully claim to have it enforced in substance, though it could not to any useful purpose, be enforced in form. No such question has been raised in this case. It left the contract, when its character was ascertained by its terms, 437 or *by evidence aliunde, to be enforced according to its true legal construction and effect, to be determined by the laws applicable to other contracts. It could not have done otherwise, without a violation of the constitution.

The act of March 3, 1866, was modified by the act of February 28, 1867, so as to provide that, in every "jury case," the jury shall determine the time with reference to which the Confederate money shall be valued. But it will appear, from what I have said, that the jury have not an arbitrary discretion to fix the time as they please. The Legislature could not confer such a discretion without a violation of the constitution. Whatever we may speculate about the real purpose of the Legislature, we must, if their language will allow it, impute to them a lawful purpose, and put such a construction upon the act as will make it consistent with the supreme law. There is nothing in the language to prevent such a construction in this case. The jury are only substituted, in reference to this matter, in the place of the court. The time is to be fixed, under this law, by the jury, as under the former law it was to be fixed by the court, in conformity with the true construction of the contract, and the legal rights of the parties under it. It would be a grave error to suppose that either the Legislature or the courts can disregard the fair and lawful contracts of parties, in order to mitigate their hardship in particular cases. I cannot be tempted by the hardship which often attends the strict enforcement of Confederate contracts, to sanction a principle in respect to them which is wrong in itself, and susceptible of indefinite abuse. If we relieve against such contracts, wholly or in part, we must do so in accordance with the rules of law applicable to other contracts. We cannot, in such a case, more than any other, substitute another contract for that which the parties have made, because it proves to be a bad bargain to one of them.

438 *Confederate notes were not money, in a legal sense, though they passed as such, like bank notes. In a legal sense, they were like bank notes—a mere commodity. They were a commodity which was measured or "enumerated in dollars and cents," like lawful money. A contract for the payment of so many dollars in Confederate notes, was a contract to pay so many dollars of Confederate notes, or so many Confederate dollars. The specification of dollars served only to measure the

quantity of the notes, so that in every such contract the quantity of notes to be delivered was ascertained, though their value might be uncertain. The contract was for quantity only, and not for value. The remedy for the breach of such a contract is by covenant or assumpsit to recover damages for the failure to deliver the specified quantity of notes, and the measure of damages is the value of the notes at the time when they ought to have been delivered. *Beirne v. Dunlap*, 8 Leigh 514; *Butcher v. Carlile*, 12 Gratt. 520. These cases fully establish these principles in reference to contracts for the payment of so many dollars in bank notes. I cannot imagine a reason why they should not apply equally to contracts to pay so many dollars in Confederate notes.

When, therefore, the contract is for the payment of Confederate notes, in express terms, or of so many dollars in Confederate notes, the sum to be recovered in an action upon it is the value of the quantity of notes called for at the day of payment, whether the payment was to be made presently, or, as we say, "on demand," or at a future day. In other words, the scale of depreciation must be applied at the day when the money was payable.

Then suppose that the real understanding and agreement of the parties is, that the sum to be paid is so many nominal dollars in Confederate notes, but it is expressed on the face to be so many dollars 439 generally, and the real *agreement is ascertained by evidence aliunde. Such was the form of almost every contract for Confederate notes. In such a case, I apprehend, debt will lie, because the bond on its face calls for money, and the act of Assembly which allows evidence aliunde to prove the real agreement, does not require that the plaintiff shall be turned out of court, and put to a new action. But the actual contract is the same, in the case now supposed, as if the bond called, on its face, for Confederate notes. In one case, this part of the contract is proved by words inserted in the bond; in the other it is proved by evidence aliunde. And as the object of the law is to give effect to the real contract of the parties, it would seem to follow, of necessity, that the contract must have the same effect in each of these cases. In the case of a bond calling, in terms, for so many dollars in Confederate notes, at a future day, a tender of that quantity of Confederate notes, or of that number of dollars in Confederate notes, on the day of payment, would satisfy the contract, though they might have depreciated since the date of the contract, for the contract is for quantity, not for value. *Beirne v. Dunlap*, *Butcher v. Carlile*, ubi supra. And I can imagine no reason why such a tender would not be equally good when the agreement for Confederate notes is not expressed in the bond, but is supplied by evidence aliunde. The agreement of the parties is in all respects the same; the only difference is in the form of proof. The rights and

liabilities of the parties depend on their agreement, and not on the evidence by which it is proved.

The result is, that the scale must be applied at the time of payment in all cases where the agreement is that the sum called for is so many nominal dollars in Confederate notes, whether that agreement is expressed on the face of the contract, or is established by evidence aliunde. In Ken-

tucky it was held, in reference to 440 contracts made *during the disastrous era of Commonwealth bank notes, that a contract for the payment of so many dollars in these notes was a contract to deliver a commodity of a fixed quantity, and that the measure of damages for the breach of it was the value of the notes in specie at the day of payment, in conformity with the decision of this court in *Beirne v. Dunlap*. The same rule was applied where the intention in respect to the currency was not expressed in the contract. Thus, where there was a judgment at law upon a note for "two hundred and ten dollars," dated March 17, 1819, payable April 1, 1820, and upon a bill in equity it was proved that the parties understood and intended that the note should be paid in bank notes, the court gave relief against the judgment on payment of the value of the notes in specie on the 1st day of April, 1820, when the note was payable. *Huston's ex'or v. Noble*, 4 J. J. Marsh R. 130; acc., *Davis & al. v. Phillips*, 7 Monr. R. 632. Where a note was for so many dollars in "current money of Kentucky," (*McCord v. Ford*, 3 Monr. R. 166), "in the currency of this State," (*Chambers v. George*, 5 Litt. R. 335), "in the common currency of Arkansas," (*Dillard v. Evans*, 4 Ark. R. 175), the courts took judicial notice that bank notes were the common currency at the time, and hence inferred that such notes were the currency or sort of dollars contemplated by the parties. But it was never intimated that the measure of recovery in such a case was different from what it would have been if the currency or sort of dollars had been expressed on the face of the contract.

These conclusions must be sound, unless a party who sues now upon a contract for the payment of so many dollars in Confederate notes, whether the agreement as to the kind of dollars is expressed or proved aliunde, is entitled to receive more, or is bound to accept less, at the hands of the court 441 than he was entitled to receive at the hands of *the defendant, if the contract had been fulfilled. To give him more would be to compel the defendant to pay more than he agreed to pay; to compel him to accept less, would be to discharge the defendant upon the payment of less than he bound himself to pay. To do either would be to change the contract, not to enforce it. And, accordingly, the general rule in actions founded on a breach of contract is, that "the amount which would have been received, if the contract had been kept, is the measure of damages if it be broken." *Broom Com.* 634.

In *Robinson v. Noble's adm'r*, 8 Peters' R. 181, the contract was for the payment of certain freight at so much a barrel, payable on delivery of the goods in paper of the Miami Exporting Company, or its equivalent. The Supreme Court held, that the plaintiff was only entitled to recover the value of the Miami Company's notes at the time at which they ought to have been paid. These notes purported to be money, and circulated as such, to some extent, in business transactions. The court said: "Robinson failed to make the payment at the time, and is he now bound to pay the nominal amount of these notes in specie? What damage has Noble sustained by the non-payment? Certainly not more than the value of the notes if they had been paid. Had these notes been equal to specie on the day of payment, Robinson was bound to pay them, or what was of equal value. If they had depreciated to fifty cents in the dollar, Noble was bound to receive them in discharge of the covenant. Each party incurred a risk in the fluctuations of the value of the notes specified, and nothing could be more unjust, or more opposed to the spirit and letter of the contract, than to require Robinson to pay in specie the nominal value of these notes. The law affixes no such penalty for default of payment. Robinson can only be held liable to make 442 good the damages occasioned through his default, and the "specie value of the notes, at the time they should have been paid, is the rule by which such damages are to be estimated."

It has been said that the principles applicable to commodities cannot apply to Confederate notes, because they had no intrinsic value, were not based on anything of value like the capital of a bank, or convertible into any thing of value like a bank note. But this is fallacious. A gold dollar has intrinsic value, because the metal is valuable without the impress which stamps it as coin. A bank note has no intrinsic value beyond that of the paper on which it is printed. But it has an actual value beyond that, in proportion to the ability of the bank to redeem it. It may not be yet payable, like a post-note, or it may not be possible to convert it into coin at the counter of the bank, but everybody attributes value to it, and will exchange other values for it. It may really be worthless from the insolvency of the bank, and yet pass current as possessing value, because it is not known to be worthless. A United States treasury note has no intrinsic value beyond that of the paper, and it represents no value which can be appropriated to its redemption by means of legal proceedings, like the assets of a bank. But it represents the faith and credit of the United States, in which people confide. So Confederate notes represented the faith and credit of the Confederate States, in which the people confided to the extent that they attributed value to the notes.

It is undoubtedly true, that the parties in this case, and the people generally, dealt

with Confederate notes, to a certain extent, as money. They regarded their relation as that of debtor and creditor, and not that of buyer and seller. But that was equally true in the case of *Beirne v. Dunlap*, where the contract was for the payment of so many dollars in "notes of the United States bank or *either of the Virginia banks." The notes of these banks were the common currency of the State, with which the people dealt as money. It was so in the Kentucky cases in reference to contracts payable in Commonwealth bank notes, which was the common currency, and in every other case in which the kind of notes specified is that which was current in the daily transactions of business, fulfilling the common offices of money as a medium of exchange and a measure of value. But this consideration was not allowed to overrule the legal principles applicable to such contracts. Though the people, for convenience or from necessity, treated Confederate notes, as they treated bank notes, as money in their business transactions, the law can only regard them, as it does bank notes, as commodities. And, indeed, it is only by so regarding them that any legal remedy can be afforded upon a contract for the payment of such notes. They cannot be recovered as money; all that can be done is to recover their value as commodities.

How can we say that the law in thus regarding Confederate notes disappoints the intentions or the reasonable expectations of the parties? While they dealt with such notes from necessity as money, they knew that they were depreciated in value, and might, and probably would, undergo still further depreciation. Is it possible for us, if we were at liberty to speculate on the subject, to assume that they did not take this into account in their transactions, or that, though they allowed for it, they did not allow enough? Every contract for the payment of Confederate notes was essentially a contract of hazard. When property was sold on a credit, the seller might, and probably would, indemnify himself against the risk of depreciation by an enhancement of the price. Hence, sales were generally made for cash after the depreciation had become considerable. A lender of

444 money could not thus *indemnify himself against the risk of depreciation, and hence loans of money were rarely made on long credits. And we can well understand how a man having money, and not knowing how to invest it, or being unwilling to incur the hazard or the odium of speculation, might be willing to put it out at interest, and thus avoid some portion of the loss he would otherwise incur by the depreciation. When we remember the confidence which for a long time was felt in the success of the Confederacy, and in the ultimate value of Confederate money and bonds, we can readily believe that, in the summer of 1862, parties would not feel much concern about the depreciation of the money. At any rate, I venture to affirm,

as a matter of fact, that nobody who took a note which was intended to be paid at a future day in Confederate notes, either for the sale of property or the loan of money, ever expected to receive, or ever did receive, more than the same nominal sum mentioned in the note, with the interest upon it, unless there was a special contract that he should have more.

It is fallacious, therefore, to assume that justice requires that the notes should be valued at the date of the contract, and not at the day of payment agreed upon, on a presumption that parties, in making their contracts, had reference only to the value of the notes at that time.

But suppose we could make this presumption. When a party sues upon a contract for the payment of money, or for the delivery of a commodity, we look to the promise, and not to the consideration of it, to ascertain the rights and obligations of the parties respectively. If, at a time when wheat is worth one dollar a bushel, a party agrees, in consideration of \$1,000 paid in cash, to deliver 1,000 bushels of wheat at the end of six months, will not 1,000 bushels of wheat satisfy the contract, though it should, at the end of the six months, be worth only fifty cents a bushel? And will not \$500

445 be the full measure of damages *for a breach of the contract? The cases cited from 8 Leigh and 12 Grattan show that the same rule applies to the case of a contract to pay so many dollars in bank notes, and proof of the consideration on which the promise was made would not vary the rule. In an action on a contract, the law does not undertake to give the party the value of the consideration which he advanced, but only to give him what the other agreed to pay for that consideration, whether equivalent to it or not. The position I am considering ignores the contract, and treats the action as if it was upon a quantum valebat, or an action of trover.

The lawful money of the country has a certain and uniform value attributed to it by law. Its actual value, in reference to other things, may fluctuate, by reason of a debasement of the coin, or by the substitution of paper for coin, or by the operation of extrinsic causes, such as an increase in the supply of the precious metals, or political disturbances, or the vicissitudes of commerce. But the legal value of the money, be it coin or paper, remains the same, and a contract for the payment of so many dollars at a future day, will be satisfied by the payment of that number of dollars on the day of payment agreed on, though they may be of less actual value than at the date of the contract. In other words, the depreciation in every such case falls upon the creditor. The authorities on this subject are fully collected in Story on Prom. Notes, sect. 390, and note, and sect. 399-395. The same doctrine is laid down in *Rhodes v. Bronson*, 34 N. Y. R., 649 (655). Whether we treat Confederate notes, therefore, as a commodity or as money, the general rule of

law is, that the depreciation in their value between the date of the contract and the day of payment agreed on, must be borne by the creditor. Those who insist that the value of the notes at the date of the contract is the true measure of recovery, regard them neither as a commodity nor as 446 *money, or rather they regard them partly as money and partly as a commodity. They say that a contract on any given day during the war, to pay so many dollars at a future day, has reference to dollars bearing a certain actual value at the date of the contract, and binds the party to pay an equivalent value on the day of payment. Thus far they treat the notes as money, and hold the contract to be a contract for value, and not a contract for quantity. But when the contract is to be fulfilled by payment, or when redress is sought for a failure to fulfill it, they refuse to treat the notes as money. They deny that the contract can be satisfied, or the breach of it compensated for, by the same nominal sum on the day of payment agreed upon, unless it is of the same actual value as at the date of the contract. For the purpose of fixing the liability, they regard the notes as money; for the purpose of discharging it, they regard them as a commodity, to be received only at its actual value.

In order to maintain the right of the Legislature to fix the date of the contract as the time when the scale should be applied, as a general rule, it has been said that this class of contracts should be regarded as foreign contracts, and that such contracts are enforceable in our courts by comity only, and upon such equitable terms as the Legislature may prescribe. I shall not stop to inquire whether these contracts can be justly regarded as foreign contracts, or how far the Legislature may impose terms upon the privilege of enforcing such contracts in our courts. Conceding all that is assumed in this view, it does not serve the purpose for which it is advanced. If the Legislature may require a plaintiff who comes into our courts to enforce a Confederate contract, to submit to equitable terms for the relief and protection of the defendant, how can this authorize the Legislature to enlarge the plaintiff's rights against the defendant, beyond the legal effect of

447 the contract? *That is what must be maintained to entitle the Legislature to give to the plaintiff the value of the notes at the date of the contract, though by the legal effect of the contract the defendant was only bound for the value at the day of payment agreed on, which might be, and generally was, less than the value at the date of the contract. To do this, the Legislature must have power to do more than impose equitable terms on the plaintiff; it must have power to change the contract by holding the defendant bound for more than he undertook.

The right of the Legislature to refuse a remedy in our courts upon contracts made in another State, or in a foreign country,

which, though lawful and valid where made, are inconsistent with our policy, or in fraud of our laws, or of the rights of our citizens, or against good morals, or the like (Story Conf. § 244), is not in conflict with the constitutional provision which forbids the Legislature to impair the obligation of a contract. A contract made in another State, or in a foreign country, is as much within the protection of that provision as a contract made here.

It has been objected, that the views I have been maintaining in reference to these contracts, would result in giving the creditor nothing in those cases in which, at the day of payment agreed on, Confederate notes had ceased to circulate, or to be of any value. If this was so, it would have no legitimate tendency to prove that those views are unsound. It must be observed, however, that the subject of contract, in this class of cases, is paper circulating as currency. It is not merely the paper itself, without its attribute as a currency or circulating medium. If, at the day of payment fixed in such a contract, Confederate notes had ceased to circulate, or to have value as a currency, a tender of such notes in payment would not satisfy the contract. It does not follow, therefore, from what I have said, that, in the case supposed, 448 the creditor *would recover nothing.

A different rule must be applied in such cases from that which applies in the cases I have been considering, where, at the day agreed on for payment, the notes continue to circulate and to have value as a currency. There may be some difficulty in saying what rule should be applied in such cases. It would be premature and improper to determine it in this case, as the question does not arise.

The general rule, therefore, is, that in an action on a contract to pay so many dollars in Confederate notes, the plaintiff is entitled to recover the value of such notes at the day of payment fixed by the contract, and the rule is the same whether the kind of dollars contracted for is specified on the face of the contract, or is proved by evidence aliunde. The fourth section of the act of March 3, 1866, indicates clearly that such was the understanding of the Legislature. But the statute authorizes the court or the jury, as the case may be, to give the value of the notes at such time as may "seem right" in the particular case. This has reference to the actual understanding and agreement of the parties. Nothing less than such an understanding or agreement, assented to by both parties, is sufficient to overrule the intention of the parties implied by law from the terms of the promise to pay. What evidence may be received for this purpose, it is not now necessary to inquire. A like question, under the act of 1781, gave rise to much difference of opinion. *Watson, ex'or, v. Alexander*, 1 Wash. 353; *Smith v. Walker*, 1 Call 39; *Boyle & al. v. Vowles*, 1 Call 244; *Commonwealth v. Beaumarchais*, 3 Call 122. Whatever be the range of evidence allowable, the court

or the jury must be governed by the agreement and understanding of the parties, and not by their opinion of what is called the "natural justice" of each case.

There is nothing in the facts of this case to show that there was any understanding or agreement between the parties inconsistent with that which the law implies from the terms of the bond, nor anything from which it can be inferred or implied. It is true, that the sum lent consisted of Confederate notes having a certain value at the date of the loan. But there was no contract to return that value at the day of payment. The contract was to return, on the day of payment, the same nominal sum in Confederate notes, let their value be what it might. Besides, it appears that Dearing had no use for the money, and urged Rucker to take it as an accommodation to him. If Dearing, having no use for the money, had kept it by him, he would have incurred the loss by depreciation, and also the loss of interest. Rucker was reluctant to take it, and only did so at last for the accommodation of Dearing, and at four per cent. interest, with an express stipulation that he should be allowed to pay it on the 1st day of January, 1863. Rucker evidently doubted his ability to make a profit on the money, and had little or no use for it. It would be unreasonable to suppose, under these circumstances, that Dearing expected Rucker to assume the risk of the depreciation, or that Rucker intended to do so. As there had been, according to the table, but little depreciation in the value of the money since the beginning of the year, and none at all since the month of April, it may have been that neither party contemplated that any material depreciation would occur before the first day of January, 1863.

It remains to refer briefly to the act of 1781, already cited. I will not prolong this opinion by stating all its provisions, or by comparing them in detail with those of the act of March 3, 1866. A few remarks will suffice to show that the latter act departed from the former in some of its leading features, and that the Legislature, in making these departures, was governed by a clear and definite purpose.

Thus the act of 1781 established an arbitrary scale for each month, from January, 1777, to December, 1781, inclusive. The act of March, 1866, establishes no arbitrary scale, but leaves the value to be ascertained by the jury. The history of the act of March, 1866, is this: It was first reported to the House of Delegates with an arbitrary scale, not based on gold, for each month from January, 1862, to March, 1865, inclusive. This was struck out, and another scale substituted, by a close vote. This latter scale put the value of the notes at considerably less than the other, and was doubtless based on gold. The bill passed the House in this form. The Senate asked a committee of conference, which recommended that the scale should be struck out entirely. Their recommendation was

adopted, and the bill passed into a law without any scale at all. From inadvertence, probably, the preamble was retained as originally reported, when the bill provided an arbitrary scale for each successive month.

It is impossible to misunderstand the view which thus finally prevailed. An arbitrary scale was inconsistent with the only just object of the law, which was merely to provide means for enforcing, justly and effectually, this class of contracts, according to the rights of the parties, without usurping the functions of the courts and juries, by determining in advance the extent of those rights in any particular. The act of 1781 assumed, as a general rule, that the scale ought to be applied at the date of the contract, and so provided. This act was described by Chief Justice Marshall, in *Few v. Marsteller*, 2 Cranch R. 10, (27,) as "interfering with contracts, and ascertaining their value by a rule different from that adopted by the parties themselves." The Court of Appeals admitted the scale to be unjust as to some of the periods,

(*Hite & als. v. Sutherland's ex'or*, 1 Wash. 133,) but it sustained it as "a law dictated by imperious State necessity, and even by justice, its object being to give to creditors the real value of their nominal contracts." *Commonwealth v. Beaumarchais*, 3 Call 127. The act of March 3, 1866, avoided the objections that were made against the act of 1781, by leaving both the value of the notes and the time of valuation to be determined in each case by the proper legal tribunals, according to the rights of the parties under the general rules of law.

In consequence of the manifest injustice of applying an arbitrary scale in all cases, the fifth section of the act of 1781 gave the court authority to depart from it, under circumstances which, in its opinion, would render its application unjust. It was held that this provision was designed to meet the real contract where the parties, by their contract, contemplated a different rate of depreciation from that fixed by the act. The circumstances must be such as arise in the contract sued upon, showing that the parties, at the time, contracted on the idea of no depreciation at all, or of one different from that fixed by the act, and the scale would not be departed from except in a strong case. *Begle & als. v. Vowles*, 1 Call 244; *Commonwealth v. Beaumarchais*, 3 Call 122. In other words, the act assumed, as a general rule, that the parties contracted with reference to the value of the money at the date of the contract, but if the contract itself showed that such was not the fact, the general rule might be departed from. A similar provision would not have been appropriate in the act of 1866, because that act prescribed no fixed scale, and laid down no rule as to the time of valuing the notes. But the same ends of justice were accomplished by leaving the time and the value to be determined in each case according to the real agreement

of the parties. There was only this substantial difference, that under the act of 1781 the value at the date of the 452 contract was assumed to be *the proper one, unless it appeared that the parties actually contracted with reference to a different one. Under the act of 1866, nothing is assumed, but the legal construction of the contract will fix the time of valuation unless it appears that the value of a different time was really contemplated and agreed on by the parties; in other words, that the risk of depreciation was to be borne in a different manner from that implied by law from the terms of the contract.

There is a fundamental distinction between Continental money and Confederate money, which will account for the diversities between the act of 1781 and the act of 1866. The former was the lawful money of the country and a legal tender in payment of debts, until the act of December 24, 1781, (10 Hen. Stat. at Large 456,) by which it was called in, and declared to be no longer a legal tender. It had, therefore, a certain and uniform value attributed to it by law. Every contract for the payment of that money was a contract for value, and not a contract for quantity only. But as the value of the notes was always the same, in contemplation of law, the law considered that the payment of the same nominal sum called for by the contract was a payment of the same value, though the actual value of the notes may have been less at the time of payment than at the date of the contract. When the act establishing the scale of depreciation provided a new mode of "settling and adjusting" such contracts, justice required that their true character as contracts for value should be adhered to, and that the creditor should receive what the contract entitled him to, the value of the notes at the date of the contract.

But as I have said before, Confederate notes were never lawful money, or a legal tender. They were never so declared to be even by the laws of the Confederate States.

They were a substitute for money, like 453 bank notes, and *like them were only a commodity. A contract to pay Confederate notes, like a contract to pay bank notes, was a contract for quantity, and not for value, and entitled the creditor only to the value at the day of payment of the quantity of notes called for by the contract. It was reasonable and just, apart from all questions of constitutional power, that the Legislature should conform to the true character of the contract in providing the means of enforcing it.

Upon the whole, I am of opinion that the judgment of the District Court should be reversed for the error in awarding a venire de novo, but with costs to the defendant in error as the party substantially prevailing, inasmuch as there was no error in the principles laid down in the judgment of said District Court as applicable to the facts of the case, upon the supposition that the bond in the declaration mentioned was pay-

able in Confederate treasury notes; that the judgment of the Circuit Court should be reversed, with costs to the plaintiff in error in the District Court, and judgment rendered in favor of the plaintiff in error here for the sum of \$1,274.42, the value in gold, as of January 1, 1863, of the amount in Confederate notes called for by the bond, with interest at four per cent. per annum from June 14, 1862, the date of the bond, subject to the credit of \$400 paid, and his costs in the Circuit Court.

MONCURE, P. I concur in the first opinion expressed by the District Court, that the bond "on which this action is founded ought to be regarded, for the purposes of this action, as a new transaction, unaffected by the previous dealings between the parties; which had been fully closed and settled before the execution of said bond." No doubt a large portion of the amount for which that bond was given was a specie debt, in payment of 454 which specie *might have been required; and most of the balance of said amount was cash received of the decedent of the plaintiff in error on the 13th of February, 1862, when a dollar in gold was worth only one dollar and twenty-five cents in Confederate notes. So that, on the 14th day of June, 1862, when the bond was executed, the defendant in error was indebted to the decedent of the plaintiff in error in a much larger amount than \$3,822.24, in Confederate notes, as of their value at that time, which was, in comparison with gold, in the proportion of one and a half to one. The said decedent was, therefore, not bound to receive the amount then due him in Confederate notes at their par value. Still he had a right to do so, and I think did do so. If he had merely taken the bond of the defendant in error, without more, it would probably not have been such a novation of the debt as to render it improper to look back to the period of its origin as the date at which its value was to be estimated. But he did something more. He had a full settlement of his account with the defendant in error, and received his check for the amount due. This was a payment in full of the amount, the defendant in error then having a greater amount to his credit in the bank on which the check was drawn. If the check had been presented at bank, it would have been paid in Confederate notes, which were then in general circulation as currency in the city of Lynchburg, where the defendant in error resided, and the settlement was made. It may fairly be presumed, that the decedent of the plaintiff in error knew, when he received the check, that it would be paid in Confederate notes; and in consenting to receive it, he therefore consented to receive such notes at their then par value in payment of his debt. After the check had been accepted, and it seems after the defendant in error had balanced the account on his books, the 455 said decedent represented to *him that he had no use for the money, and that

it would be an accommodation to him for the defendant in error to retain it; which at length the latter agreed, as an accommodation to the former, to do; but upon condition that he should be allowed to pay it off on the 1st of January next following, and should pay interest at the rate of four per cent. per annum only; and accordingly the bond was executed and delivered, and the check returned. I regard the substance of the transaction as a loan of the amount in Confederate notes upon the bond of the defendant in error.

In regard to the second branch of the opinion of the District Court, I concur in it in some respects, but in others I do not. I concur in the latter part of it (and for reasons therein sufficiently set forth) which declares, that to the value which may be ascertained of the Confederate notes due on said bond, nothing should be added on account of the present depreciation of paper money as compared with gold; "the court can only render judgment for money generally, without designating what is to be regarded as money; and no question can arise as to the obligation on the part of the defendant in error (plaintiff in error here) to accept payment in United States treasury notes as being, under the act of Congress, the legal equivalent of coin, until such notes shall have been tendered in payment of said judgment, and refused; and the effect of so adding to the money value of said notes a sum equal to the difference at the date of the judgment between coin and paper money, would be to make the debtor pay more or less than he ought to pay, in proportion to the rise or fall in value of paper money, with reference to coin, between the date of the judgment and the time of its payment."

In regard to the former part of the second branch of the said opinion, which declares, "that if, according to the true intent of the parties to the said bond, the same was payable in Confederate States treasury notes, then, upon the facts agreed, the defendant in error is entitled to recover judgment in this action for the value of the amount of such Confederate notes, payable on said bond, scaled according to the value of said notes, with reference to gold, on the 1st day of January, 1863, the case agreed not furnishing the materials for applying any other scale, if any other ought to be applied in this or in any case, as to which the court expresses no opinion," there can be no doubt but that it was competent for the parties to the bond to agree that it should be paid in Confederate notes at their par value at the time at which the bond should become payable. The obligee could take upon himself the risk of the depreciation of the notes between the date of the bond and the period of its maturity. But such a contract would be a contract of speculation and of hazard, which ought not to be presumed, but ought to be proved expressly, or by strong implication. The facts agreed in this case show no such contract of speculation or hazard. If the de-

cedent of the plaintiff in error, on the 14th of June, 1862, had sold goods to the defendant in error, on a credit until the 1st day of January following, and intended to assume the risk of the depreciation of the currency in the meantime, he would of course have indemnified himself against such risk by the increased price of the goods. And an inference of such intention might have been drawn in such a case from the amount of the price of the goods. Or if the bond in this case, though for money loaned, had been expressly for the payment of the amount at the maturity of the bond in Confederate notes, (which were depreciating), as of their value at that time, strange and improvident as such a bargain would be, it would, nevertheless, be legal and binding. But this is a very different case from either of those supposed.

457 The bond *was given here for the loan of Confederate money, which had just been received at par by the lender from the borrower, in payment of a debt, a large portion of which was a specie debt. The loan was at four per cent. interest, and the bond was for the payment of the amount loaned in numero, without specifying that it was to be paid in Confederate notes or currency. The amount received from the lender by the borrower was the value of the amount in Confederate notes at the time of the loan, and that was the just measure of the benefit derived from the loan. There is nothing in the case to indicate a contract of speculation or of hazard; but everything to indicate a contract to return a subject of the same value with that which had been loaned, with the reduced interest of four per cent. upon it. It may be said, that as the money loaned must be considered to have been Confederate money, which was then the common, if not the only, currency of the country, the money mentioned in the bond must be regarded as Confederate money, and the bond should therefore be read and construed as if it had expressly been for the payment of the amount in Confederate money. On the other hand, it may be said, that the contract, being obviously not one of hazard, but a mere loan, in which it was contemplated that the same amount in value loaned should be returned with a reduced interest thereon, the bond should therefore be read and construed as if it had expressly been for the payment of the amount in Confederate notes, as of their value at the time of the loan; or for the payment of so much specie as would be equivalent to the amount of the bond in Confederate notes, as of their value at the time of the loan. It can make no difference that the plaintiff's decedent "represented to the defendant that he had no use for the money, and that it would be an accommodation to him for the defendant to retain it; which at length the

458 defendant *agreed, as an accommodation to the plaintiff's decedent, to do; but upon condition that he should be allowed to pay it off on the 1st of January next following, and should pay interest at

the rate of four per centum per annum only." Certainly it was not intended, by either party, that the money should be kept by the defendant without being used, until the 1st of January following, and then returned. Had such been the intention of the parties, then of course the plaintiff's decedent would have been entitled only to the amount of the bond in Confederate notes at the time of its maturity, as of their then value. But he certainly intended to make no such improvident bargain. No man in his senses would ever have thought of treasuring up a depreciating currency. The plaintiff's decedent had no use for the money, and rather than keep it idle and at his risk, would no doubt have loaned it to one who had use for it, without any interest at all, and upon condition only that its value at the time of the loan should be returned to him at the expiration of the credit. Less than that would, to the same extent, have been a certain loss to him, which he could easily have avoided by buying gold, and keeping that instead of Confederate notes. The consideration stipulated for by the defendant for accommodating the plaintiff's decedent in retaining his money was, the "condition that he should be allowed to pay it off on the 1st of January next following, and should pay interest at the rate of four per centum per annum only." The defendant intended to use the money, or he would not have agreed to pay any interest for it. The presumption is, that he did use it, and that it was worth to him the full amount of its value at the time of the loan; and that amount, with interest at the rate of four per centum per annum from the date of the loan, seems to be the just measure of his liability to the plaintiff.

459 *This view would, I think, not only attain the justice of the case, but conform to the provisions and spirit of the act of Assembly passed March 3, 1866, entitled "An act providing for the adjustment of liabilities arising under contracts and wills made between the 1st day of January, 1862, and the 10th day of April, 1865." Sess. Acts 1865-6, p. 184, ch. 71. The extraordinary and anomalous condition of things produced by the war occasioned the necessity for such an act, as is plainly shown by the preamble, which recites, that "Whereas, a depreciated currency, known as Confederate States treasury notes, constituted the only or principal currency in the greater part of this State during the late war; and whereas, the result of said war involved the total destruction of said currency; and whereas, there are many contracts which were made, or obligations which were incurred, before the termination of said war, predicated on said depreciated currency, still remaining wholly or partially unadjusted, in respect to which great uncertainty exists, perplexing alike to debtor or creditor, as to the present measure of their liabilities and rights respectively; and it thus appearing useful that some uniform and equitable rule should be established for

the adjustment of such mutual demands and liabilities: therefore;" and then follow the provisions made on the subject by the act. The first and second sections are as follows:

"1. Be it enacted by the General Assembly, That in any action or suit, or other proceeding for the enforcement of any contract, express or implied, made and entered into between the 1st day of January, 1862, and the 10th day of April, 1865, it shall be lawful for either party to show, by parol or other relevant evidence, what was the true understanding and agreement of the parties, either expressed or to be implied, in respect to the kind of currency in which the same was to be fulfilled or performed, 460 *or with reference to which, as a standard of value, it was made and entered into; and in any action at law it shall not be necessary to plead the agreement specially in order to admit such evidence.

"2. Whenever it shall appear that any such contract was, according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value, the same shall be liquidated and settled by reducing the nominal amount due or payable under such contract, in Confederate States treasury notes, to its true value at the time they were respectively made and entered into, or at such other time as may to the court seem right in the particular case; and upon the payment of the value so ascertained, the party bound by such contract shall be forever discharged of and from the same: provided, that in all cases where actual payment has been made of any sum of such Confederate States treasury notes, either in full or in part of the amount payable under such contract, the party by or for whom the same was paid, shall have full credit for the nominal amount so paid, and such payment shall not be reduced."

The only other section which need be noticed is the fourth, which is as follows:

"4. In any case wherein it shall appear, that on any contract made, or liability incurred, on or after the 1st day of January, 1862, and before the 10th day of April, 1865, the debtor, on or after the maturity of the claim against him, and within the period above mentioned, made to the creditor, his agent or attorney at law, a bona fide and actual tender of the amount due in the said Confederate States treasury notes, or other equal or better currency, and that the creditor then refused to accept the same, a court of equity may grant relief to 461 the debtor, unless it *appear that the creditor was justified in refusing to accept the amount tendered, in consequence of a substantial and decided depreciation of said currency after the time at which payment ought to have been made, and before the time at which the tender was made, or unless it otherwise appear to be inequitable to grant such relief."

The first section provides, that in a proceeding for the enforcement of a contract made between the periods therein mentioned, either party may show what was the true understanding of the parties in respect to the kind of currency in which the same was to be performed, or with reference to which, as a standard of value, it was made. Confederate notes being the principal, if not the only, currency of the country during the period aforesaid, it is fair to presume, in the absence of evidence to the contrary, that any contract made during that period was intended to be performed in that kind of currency, or was made with reference thereto as a standard of value.

The second section provides, that any such contract, intended to be performed in that kind of currency, or made with reference thereto as a standard of value, shall be liquidated and settled by reducing the nominal amount due under such contract, in Confederate notes, to its true value at the time the contract was made, or at such other time as may to the court seem right in the particular case; and upon the payment of the value so ascertained, the party bound by such contract shall be forever discharged from the same. The court is thus authorized to do justice between the parties in this matter, according to the circumstances of each particular case. Where a contract was made on the 14th of June, 1862, for the loan of Confederate States treasury notes until the 1st day of January following, such notes being a continually depreciating currency, the date of the contract, and not the time of its maturity, is the period in reference to which the

462 value, *of such notes should be ascertained, in order to do justice between the parties in a proceeding instituted upon such contract. Of course the creditor might have received Confederate money at par in payment of the debt; and if he received it without objection on account of the debt, the presumption is that he received it at par. The proviso to the second section, therefore, properly declares, "that in all cases where actual payment has been made of any sum of such Confederate States treasury notes, either in full or in part of the amount payable under such contract, the party by or for whom the same was paid shall have full credit for the nominal amount so paid, and such payment shall not be reduced."

The fourth section provides, that in any case of a contract made, or liability incurred, between the periods aforesaid, and of a tender and refusal of the amount due in Confederate States treasury notes, or other equal or better currency, on or after the maturity of the claim, and within the said period, a court of equity may grant relief to the debtor, unless it appear that the creditor was justified in refusing to accept the amount tendered, in consequence of a substantial and decided depreciation of such currency after the time at which payment ought to have been made, and before

the time at which the tender was made, or unless it otherwise appear that it would be inequitable to grant such relief. This section might seem, at first glance, to admit the right of a debtor in such case, as a general rule, to make payment in such notes at their par value at the maturity of the claim. But this would, I think, be inconsistent with the second section, which seems to fix upon the period when the contract was made as that at which, as a general rule, the value of such notes were to be ascertained in determining the amount to be paid by the debtor. At all events, the conclusion of the fourth section shows, that

the court must determine on all the 463 circumstances *of the case, whether it would be equitable to grant the relief which the section contemplates.

The first and second sections of the act of March 3d, 1866, were amended by an act passed February 28, 1867. Sess. Acts 1866-7, p. 694, ch. 270. The only amendment which it is necessary to notice is, a proviso added to the first section, "that when the cause of action grows out of a sale, or renting or hiring of property, whether real or personal, if the court, or (where it is a jury case), the jury think that, under all the circumstances, the fair value of the property sold, or the fair rent or hire of it, would be the most just measure of recovery in the action, either of these principles may be adopted as the measure of the recovery instead of the express terms of the contract." This amendment serves still further to show that the Legislature, in providing a measure of relief on contracts made during the latter years of the war, having reference to the then depreciating currency as a standard of value, sought to do justice between the parties under all the circumstances of each case.

The state of things which existed in regard to the currency during the late war, and the consequent legislation before referred to, are very similar to the state of things which existed on the same subject during the revolutionary war, and the legislation which it occasioned. The currency of the State commenced depreciating as early as January, 1777, when it stood at the rate of 1½ to 1, compared with silver and gold, and continued to depreciate, gradually at first, and then more rapidly, until December, 1781, when it stood at the rate of 1,000 to 1, and ceased to be a currency! In November, 1781, an act was passed, entitled "An act directing the mode of adjusting and settling the payment of certain debts and contracts, and for other purposes."

This act was manifestly and naturally the model of our act of March 3, 1866, before referred to, *and is, substantially, like it in most respects, both of them having been occasioned by a similar state of things. When the Legislature, in March, 1866, undertook to legislate on the subject, it was proper that they should look, and they did look, for their guidance and direction, to the legislation on the same subject which followed the revolutionary

war. Hence the act of November, 1781, and the decisions of the Court of Appeals thereon, have an important bearing in the construction of the act of March 3, 1866, and upon the decision of this case. The first section of the act of November, 1781, is its preamble, setting forth the causes which led to its passage. The second section recites, that "the good people of the State will labor under many inconveniences for want of some rule whereby to settle and adjust the payment of debts and contracts entered into and made between the 1st of January, 1777, and the 1st of January, 1782, unless some rule shall be by law established for liquidating and adjusting the same, so as to do justice as well to the debtors as creditors;" and then proceeds to enact, that "all debts and contracts entered into or made in the current money of this State, or of the United States, excepting at all times contracts entered into for gold and silver coin, tobacco or any other specific property, within the period aforesaid, now remaining due and unfulfilled, or which may become due at any future day or days, for the payment of any sum or sums of money, shall be liquidated, settled and adjusted agreeable to a scale of depreciation hereinafter mentioned and contained; that is to say, by reducing the amount of all such debts and contracts to the true value in specie at the days or times the same were incurred or entered into; and upon payment," &c., the debtors shall be forever discharged, &c. And then follows a proviso, that actual payments in paper currency, in whole or in part, shall stand good for the nominal amount. Note here

465 the resemblance *between this section and the second section of the act of March, 1866. Both of them fix upon the time at which the contract was made as the time at which the value of the depreciated currency is to be ascertained; but in the latter these words are added, which are not in the former: "or at such other time as may to the court seem right in the particular case." The substance of these additional words, however, is embodied in the fifth section of the act of 1781, and the two acts may be regarded as substantially the same in this respect. The fourth section of the act of 1781 adopts a scale of depreciation including every month from January, 1777, to December, 1781, inclusive, as the rule to determine the value of the several debts, &c., compared with silver and gold. The fifth section of the act of 1781 provides, that where circumstances arise which would render a determination agreeable to the above table unjust, the court may award such judgment as to them shall appear just and equitable.

Upon the construction of the act of 1781 there have been several decisions of the Court of Appeals, some of which only will be noticed.

In *Pleasants v. Bibb*, 1 Wash. 8, the bond on which the action was brought was dated the 1st of February, 1780, payable on or before the 17th of December, 1781, and to

carry interest from the 16th of February, 1779. The court held that these latter words, with other circumstances in the case, fixed the latter as the period at which the scale of depreciation ought to be applied, being the period at which the debt arose, though not reduced to a specialty until 1780. Thus we see that, to attain the justice of the case, the court here went even behind the date of the bond on which the suit was brought.

In *Wilson & McRae v. Keeling*, Id. 194, the reporter's marginal abstract of the case is this: "In April, 1778, a sum of paper money was lent, not to be re-paid in 466 less than *twelve months thereafter.

The money was tendered shortly after the expiration of the twelve months, and was refused. A mortgage having been given to secure the debt, the mortgagee brought an ejectment, and recovered possession of the mortgaged premises. Upon a bill filed for relief, the mortgagee will be decreed to re-convey, upon payment of the debt according to the scale of depreciation of the day when the money was lent, (notwithstanding he had received the identical money in discharge of a specie debt, and notwithstanding the mortgagor employed the same in the discharge of a specie debt), without interest from the time of the tender to that of a new demand." This case, in its circumstances, bears a resemblance to the present. The money was loaned for twelve months, and yet nobody contended that the time of the maturity of the debt was the period for applying the scale. The most the debtor contended for was, that it should be applied at the date of the loan; but the creditor contended that the debt should be regarded as a specie debt, as the money was borrowed for the purpose of discharging a specie debt, and was actually so applied. And this was the main controversy in the case. Lyons, J., delivering the opinion of the court, said: "The case is too clear to be argued. This is a downright attempt to evade the law, directing the mode of settling debts contracted in paper money, without a single circumstance to countenance it."

In *Ambler v. Wyld*, 2 Wash. 36, Ambler sold to Wyld, in September, 1778, houses and lots in Yorktown, the price of which was to be settled by valuers to be chosen by the parties, one-half of which price was to be paid at the time of the valuation, and the other in a year afterwards. Ambler obtained a judgment at law against Wyld, which the latter enjoined, upon the ground that the trial was not a fair one. The Court of Chancery directed an issue, and the Court of Appeals affirmed the decree. The 467 *president, Pendleton, delivering the opinion of the court, said: That in October, 1778, "as soon probably as the parties met together after the valuation. Mr. Ambler received £500, the first instalment, without objection, as according with the principles of the valuation then recently made. In autumn, 1779, when the other payment became due, the depreciation

was so visibly great as to make a more serious impression upon parties to former contracts; and though no rule was then established by which to graduate the scale of depreciation, every person was struck with the injury which would be sustained by a payment according to the nominal amount. Mr. Ambler, therefore, might well think himself justifiable in evading the receipt of the £500 nominal money, which Mr. Wyld then offered to pay him." "Here the matter rested until the 10th of February, 1781, when the act for scaling paper money contracts had passed, fixing a general rule for adjusting those contracts, according to the rate of depreciation at the time they were made, but allowing a departure from that rule in particular cases, so as to meet the ideas of the parties at the time of the contract." Mr. Ambler supposed that the valuation, as explained by a subsequent certificate of the valuers, "entitled him to claim £500 specie, and he demanded that sum of Mr. Wyld, who, on the other hand, conceived that this nominal sum was to be reduced by the legal scale of September, 1778, which would bring it to £100 only." "It was pressed by the appellant's counsel, that if a new trial were directed, a special direction should accompany it, pointing the jury's inquiry to the value of the property at large, independent of the valuation fixed upon it by the persons who had made the estimate. This would be highly improper. It was not the intention of the Legislature to let men loose from their contracts, but to allow a departure from the established scale in cases where it was necessary, in order to
468 *meet the real contract of the parties."

Here it will be observed that the utmost extent of the claim of the purchaser was, to have the deferred instalment scaled as of the time, not at which it became payable, but at which the contract was made; and that the court construed the act for scaling paper money contracts as "fixing a general rule for adjusting those contracts according to the rate of depreciation at the time they were made, but allowing a departure from that rule in particular cases, so as to meet the ideas of the parties at the time of the contract. If this general rule applies to a scale on credit, in which the vendor may compensate himself for the risk of depreciation of the currency by demanding an increased price, a fortiori it applies to a loan of money—especially a loan at less than legal interest.

In *White v. Atkins*, 2 Wash. 94, which is the last case I will notice, "an agreement was made to sell land, during the existence of paper money, part of the money to be paid in June, 1780, when a conveyance was to be made, and the residue in twelve months thereafter. The money was not paid, or tendered at the day, nor was a conveyance made. Upon a bill by the vendee for a specific performance, he was, under the circumstances of the case, decreed a conveyance, upon his paying the value of the land at the time of the contract, instead

of the value of the purchase money agreed upon, according to the scale of depreciation." Such is the reporter's abstract of the case. This decision is founded on obvious reasons. The purchaser having forfeited his contract at law, could obtain the land in equity only on such terms as the court deemed equitable, under all the circumstances. The views expressed by some of the judges in delivering their opinions, in regard to the act of 1781, are appropriate to the present occasion, and I will briefly notice some of them. Judge Roane said:

"The Legislature have established
469 this *scale as a just rule whereby to settle paper money contracts in specie.

It was no doubt made after due deliberation, and upon good information. It has been generally acquiesced in by the people of this commonwealth, and has prevented much litigation. It affords, I suppose, the best rule for ascertaining the value of the paper money, having been made by those who represented every part of the State, and had the best opportunity of judging." Judge Roane also speaks of the date of the contract, and not the time when the money is payable, as the period in reference to which the scale is to be applied, at least as a general rule. Id. 99. Judge Lyons said: "The Legislature have established a scale by which to ascertain the sum in specie which should be paid in discharge of contracts entered into at particular periods whilst paper money was in circulation. This law was very properly passed; for otherwise the value in each particular case must have been ascertained by a jury, in the same manner as in actions for foreign money. This would have produced infinite trouble and litigation, which this law (affording, I believe, the best general rule), is wisely calculated to prevent. It is of more consequence that the law should be fixed and known, than that it should always be strictly just. The debtor is to pay according to the scale at the date of the contract," &c. Id. 103. The President said: "The act of 1781 furnishes a good general rule for scaling paper money contract; perhaps the best which could have been made. But it is certainly not just in all cases." Id. 104.

I am, therefore, of opinion, that upon the facts agreed between the parties, the plaintiff in error is entitled to recover judgment in this action for the amount of the bond, scaled according to the value of Confederate States treasury notes with reference to gold on the 14th day of June, 1862.

(the date of the loan, and of the bond
470 on *which the action is founded), with interest thereon at the rate of four per centum per annum from the said 14th day of June, 1862, until payment.

Suppose that in this case the principal, instead of being payable on the 1st of January, 1863, had been made payable on the 1st of January, 1865, when the current value of Confederate notes had depreciated to the rate of 45 or 50 to one; would the creditor have been compelled to receive less than one

hundred dollars, the value in gold of \$3,822.74 in Confederate notes at that time, in discharge of a loan of that amount of such notes on the 14th of June, 1862, then worth \$2,548.50 in gold? Suppose the principal had been made payable on the 14th of June, 1865, three years after the date of the loan, when Confederate notes had ceased to be of any value; how then would the matter have been adjusted, if the time fixed by the contract for the payment of the debt be the true period for ascertaining the value of the notes? Would it be said that the borrower, who had received and enjoyed what was equivalent to \$2,548.50 in gold, was bound to pay nothing in return? Such a solution of the difficulty would shock the understanding and the feelings of mankind. And yet, it seems to me, that a rule which makes the day for the maturity of the debt the period for fixing the value of its amount in Confederate notes, must inevitably lead to such a result. What intermediate period between the date of the contract and the maturity of the debt can be fixed upon, with any reason or propriety, for the purpose of ascertaining such value? We are driven by necessity to an election between these two periods as a general rule. By electing the date of the contract, I think perfect justice, or as near an approach to it as possible would be attained in most cases. The debtor would pay the value of what he received, and the creditor would receive the value of what he parted with. This result, if not precisely what the parties intended or contemplated, is yet as near an approximation to it as can be made in the extraordinary condition of things in which the war has left us. It is, we may well suppose, what the parties would have expressly prescribed by their contract had they foreseen what was to happen. The general rule for which I contend conforms, as we have seen, to the act of 1781 and the adjudications under it, and thus is sustained by the wisdom, experience and example of our ancestors under the same trying circumstances. And it also conforms, I think, to the true construction of the act of March 3, 1866, passed in imitation of the same example, and under the same circumstances. On the other hand, by electing the time of the maturity of the debt instead of the date of the contract as the period, the rankest injustice would be done in a large majority of the cases, and a result arrived at which neither party could have contemplated. I therefore think the date of the contract is the proper period for applying the scale of depreciation in such cases, as a general rule. Of course there are exceptions to it, which must be left to the determination of the court or jury under all the circumstances. Sometimes an earlier, and sometimes a later, period than the date of the contract may be the proper period for applying the scale. Where it appears that the parties, in making their contract, contemplated a continued depreciation of the currency, and it was understood that the creditor was to run that risk, then

it was a contract of hazard on his part, and he must abide the consequences, even though they involve a total loss of the money. I do not regard the contract in this case as a contract for the sale of a commodity, and therefore I do not think that the principle recognized in the cases of *Beirne v. Dunlap*, 8 Leigh 514, and *Butcher v. Carlile*, 12 Gratt. 520, apply to the case. The lender had no idea of selling, nor the borrower of buying Confederate notes, *but the transaction was purely one of a lending and borrowing of money, having reference to Confederate notes as a standard of value, and as a medium and measure of the loan, because, and only because, it was then the only, or almost only, currency of the country.

But if, as a general rule, the day when the debt became payable is the period at which the scale must be applied, I am of opinion that this case is an exception to that rule, and that in this case the date of the contract is the proper period. Indeed, I have great difficulty in saying that, in my opinion, this is not a specie contract. The money loaned was derived chiefly from specie funds, and the loan was at a time when there was comparatively slight depreciation in the value of Confederate notes. When, therefore, money thus derived, and derived from the borrower himself, was loaned out for six or seven months at four per cent. per annum interest, the borrower giving his bond for so much money, precisely as if it were a specie debt, and without any reference to Confederate notes; it may well be argued, that it was intended by both parties to be a specie debt. They doubtless supposed, as most people in the Confederate States then supposed, that the war would soon terminate favorably to them, and that Confederate notes would soon be equivalent, or nearly so, to specie. I doubt not it was contemplated, however, that if, when the money became payable, Confederate notes were still the currency, and of the same or nearly the same value as at the date of the contract, they should be received at par in payment of the debt, and I doubt not they would have been so received if tendered. Perhaps, notwithstanding the great depreciation in the meantime, if the lender had been alive when the debt became payable, and the borrower had then tendered the amount in Confederate notes, the lender would have received them, as some continued to receive such notes in payment of *specie debts down almost to the end of the war. If that had been done, the transaction would have been settled by the voluntary act of the parties. But as that was not done, and the transaction was left unsettled at the end of the war, we must now settle it according to the rights of the parties, and the mode, in my opinion, of doing so has already been indicated.

In regard to the third branch of the opinion of the District Court, to wit, "that the case agreed is too uncertain to enable the court to pronounce judgment upon it, be-

cause it does not state whether the said bond, according to the true intent of the parties, was or was not payable in Confederate treasury notes," I have shown by what I have already said that I do not concur in it. I think the case agreed is sufficiently certain to enable the court to pronounce the judgment upon it which I have before indicated. All the facts which actually occurred in the case, and which are material, are no doubt included in the case agreed; and according to those facts, the case comes within the general rule which fixes the date of the contract as the period at which the scale of depreciation is to be applied.

It cannot be presumed that any other facts existed which would make the case an exception to the general rule. If such facts existed, they ought to have been included in the case agreed, and not being so included, it must be presumed that they did not exist. If it be said, that the fact that the contract sued on was entered into with reference to Confederate States treasury notes as a standard of value, though it be necessarily inferable from the facts agreed, is nevertheless a fact which ought itself to have been expressly included in the case agreed, the answer is, that the parties waived their right to have a jury, and referred the case to the decision of the court; and although they agreed the

474 facts of the case, yet it was *incumbent on the court to draw all necessary and proper inferences from those facts which a jury would have drawn if the case had been tried by a jury on the same agreement of facts. It is not like the case of a special verdict or case agreed in lieu of a special verdict, in which the court, having no right to decide any question of fact, must award a venire de novo in order to ascertain a material fact, though it be properly, or perhaps necessarily, inferable from the facts found or agreed, but it is a case in which the whole matter of law and fact is to be heard and determined by the court.

My conclusion, therefore, is, that so much of the judgment of the District Court as is in conflict with the foregoing opinion is erroneous, and ought to be reversed, and the residue thereof affirmed, and a judgment entered in conformity with the said opinion. But as my brethren are of a different opinion, a judgment must be entered in conformity with their views.

RIVES, J., concurred in the opinion of Joyner, J.

Judgment of both the district and Circuit Courts reversed, with costs to the appellee.

475 *Williamson, Trustee, v. Paxton, Trustee.

April Term, 1888. Richmond.

RIVES, J. Absent.*

1. Contract for Sale of Land—Purchaser in Possession—Unlawful Detainer—Parties.—A husband, trustee

*He was related to some of the parties interested.

+Contract for Sale of Land—Purchaser in Possession—Contract Executory—Recovery of Possession.—The

for his wife, contracts for the purchase of land for her; but the contract is in his own name. He is put into possession, but he fails to comply with the terms of the contract. In a proceeding by unlawful detainer by the vendor to recover possession, the wife is not a necessary or proper party in the action.

2. Same—Same—Contract Executory—Recovery of Possession.—A vendor of land, who has put the purchaser in possession whilst the contract remains executory, has the legal title, and (unless the provisions of the Code ch. 135, § 20, apply to the case), may recover possession by an action at law, at least after making demand of possession, even though the vendee may be entitled in equity to a specific execution of the contract.

3. Same—Same—Parol Agreement, to Waive Forfeiture of Contract—Effect.—In such a case, a parol agreement on the part of the vendor, however explicit, to waive the forfeiture of the contract which the purchaser had incurred, would be of no effect at law; and could be enforced in equity only where there has been part performance.

4. Same—Same—Same.—*QUERE*: What facts will not be considered as the waiver by the vendor of land of the forfeiture of the contract by the purchaser, so as to entitle the purchaser to retain possession of the land according to the terms of the contract?

5. Same—Same—Forfeiture of Contract—Case at Bar.—P, trustee for B, a *feme covert*, with power to sell and reinvest at his discretion, sells to W, on conditions which W fails to comply with, and thus forfeits the contract. No unauthorized dealing of B with W can entitle W to hold the land against his vendor P after forfeiting his right to the possession by violating the contract of sale.

476 *6. Same—Same—Same—Tenant from Year to Year.—The contract provides for the payment by W in cash of a sum of money, and that if W fails by a day certain within the year to do a certain act, that he shall hold for a year, and the sum paid shall be the rent for the year; W having failed to do the act, and holding as tenant for the year, and then holding over does not thereby become tenant from year to year, and so entitled to the legal notice to quit. And though during the second year the purchaser paid rent for that year, it would not of itself constitute him tenant from year to year, so as to entitle him to notice to quit.

7. Landlord and Tenant—Holding Over after Expiration of Term—Presumption.—It is a mere presumption of

second headnote of the principal case is quoted in *Dobson v. Culpepper*, 23 Gratt. 356.

Sale of Land—Possession—Ejectment—Notice.—For the proposition that, one who is in possession upon an agreement to purchase land cannot be ousted by ejectment or unlawful detainer before his lawful possession is determined by demand of possession or otherwise, the principal case is cited and followed in the following cases: *Twyman v. Hawley*, 24 Gratt. 514; *Hays v. Altizer*, 24 W. Va. 507; *McClung v. Echols*, 5 W. Va. 214; *Jones v. Temple*, 87 Va. 213, 12 S. E. Rep. 404; *Pettit v. Cowherd*, 83 Va. 25, 1 S. E. Rep. 392.

Suits in Equity and Action at Law—How Objection Should Be Made.—The law as laid down in the last headnote of the principal case is quoted with approval in *Priddy v. Hartsook*, 81 Va. 69.

See generally, monographic note on "Unlawful Detainer" appended to *Dobson v. Culpepper*, 23 Gratt. 352; also, monographic note on "Ejectment."

law, in the absence of evidence to the contrary, that a tenant who holds over after the expiration of his term, by permission of the lessor, is a tenant from year to year. And this presumption may be repelled by evidence which may show that the holding over, though by the permission of the lessor, is not as tenant from year to year, but in some other character, or for some other purpose.

8. Contract for Sale of Land—Purchaser in Possession—Ejectment.—One who is put in possession upon an agreement to purchase land cannot be ousted by ejectment or unlawful detainer before his lawful possession is determined by demand of possession or otherwise.

9. Suit in Equity and Action at Law—How Objections Should Be Made.—Where a suit in equity and an action at law, for the same cause of action, are pending at the same time, it is not ground of defence at law, either under the general issue or a plea in abatement; but the proper mode of making the objection is by a rule in the chancery suit to put the plaintiff to his election between the two suits.

This is a supersedeas to a judgment in an action of unlawful detainer, brought by James G. Paxton, trustee for Rachael E. M. Buckner, against Samuel D. Williamson, trustee for Marian R. Williamson, to recover possession of a tract of land called Oakland, lying in Campbell county, near Lynchburg. Issue was joined on the plea of not guilty, on which a verdict and judgment were rendered for the plaintiff in the court below; to which judgment the defendant in that court obtained the supersedeas aforesaid.

The only errors assigned are founded 477 on two *bills of exception taken by the defendant to opinions of the court given upon the trial, the first of them being to the opinion of the court excluding a certain paper offered in evidence by the defendant; and the second being to the opinion of the court refusing to give certain instructions asked for by the defendant, and giving certain other instructions of its own instead of those asked for by either of the parties. In the second bill of exceptions was set out all the testimony introduced by the parties.

By articles of agreement entered into between them in April, 1860, Paxton trustee agreed to sell to Williamson trustee the said tract of land, but the agreement was not to be binding on Paxton trustee until Williamson should obtain from some court authorized to make it, a decree authorizing him to contract legally for and to purchase the said property, and to guaranty the payments for the same by appropriating thereto such portion of the fund in his hands, as trustee as aforesaid, as might be necessary therefor. Williamson, on his part, agreed to pay to Paxton for the property \$7,555.83, by instalments, of which the first, amounting to \$260, was payable in cash, and the others were payable annually on the 1st day of May in the years from 1861 to 1867 inclusive, respectively. And Williamson further agreed to obtain, at the next term of the Circuit Court of Campbell county, or at the next term of the said court

for the city of Lynchburg, a decree authorizing him so to change and invest the fund in his hands as trustee as aforesaid, as to guarantee and carry into full effect the agreement on his part. The said Williamson reserved to himself the privilege of paying the entire amount of the purchase money at any time, making the legal discount on any of it which may not then have become payable, for the time the same might have to run respectively. Paxton agreed to put Williamson in immediate possession of the said property. And it

478 was further *agreed between the parties, that should Williamson fail to obtain a decree at the time aforesaid, which will empower him to comply with the said agreement, to wit: to purchase the said property legally as trustee aforesaid, so as entirely to protect the said Paxton, and to ensure the payments aforesaid, then, and in that event, the said Williamson should occupy and use the said property as tenant of the said Paxton trustee as aforesaid, for the period of one year from the first day of May, 1860, at the rent and for the sum of \$260, and the said cash payment for said amount should be kept and considered as payment therefor; and the said Williamson, in such event, agreed to keep the property in good repair, and to use for fencing and fire wood only such timber as had already been cut or belted, and not to cut down or injure any of the growing timber then standing on said land. Should the said Williamson obtain such decree as aforesaid, and comply fully with the terms of the agreement on his part, the said Paxton trustee covenanted on his part to make to the said Williamson as trustee as aforesaid, or in whatever character the said court might require, a good and valid title, with general warranty, for the said property; but the said Paxton was not to be required to execute a deed therefor, but, on the contrary, was to retain the title thereto, until the whole amount of the purchase money should be paid. There was a further stipulation in the agreement in regard to an old negro man and woman residing on the land, which is not material to be stated.

It seems that immediately after the date of this agreement, Williamson was accordingly put in possession of the land; and he has remained in possession ever since; or, at all events, was in possession at the time the summons in this case was sued out; but no such decree as that mentioned in the said agreement was ever obtained or rendered in either of the courts mentioned

479 therein. The cash payment *of \$260 was made. The first annual instalment of the purchase money became due on the 1st of May, 1861, and amounted to \$469.20. About the 1st of January, 1862, A. M. Trible, Esq., who had written the contract at the request of Messrs. Williamson and Paxton, was requested by Mrs. Buckner to see Mr. Williamson, who had proposed to her, she said, to make the payment then due under the contract in bonds. "I called on him accordingly," says Mr.

Tribble in his deposition, which is a part of the testimony in the case, "when he tendered me bonds, which I understood to be hire bonds for negroes belonging to Mrs. Williamson and her children, which they acquired under the will of Mrs. Tabb. I suggested to him then the difficulty that he had no authority thus to appropriate the money to be derived from these bonds; that he had not obtained the decree of the court as the contract required, and that without it I did not see how I could advise her to take the bonds at all. He then remarked that he and his wife were satisfied as to their right thus to appropriate the hires, and that they thought it unnecessary to ask the court to authorize them to do what they had a right to do without a decree. I then told him that we would see Mrs. B. together, which we did, I think, on the same evening; and after some conversation, I suggested that Mrs. Buckner receive bonds for an amount sufficient to pay what would be a reasonable rent for the property for the year; that I would look into the matter, and if satisfied that Williamson had the right to appropriate the profits of the trust fund belonging to Mrs. Williamson and her children in this way, I would advise her to take the bonds for the amount then due by the terms of the contract; to which she consented, took bonds enough to pay what would be considered reasonable rent, and executed, I think, a receipt therefor." The receipt was drawn by Mr. Tribble, signed by Mrs. B., and is in these words:

480 "Received January, 1862, of S. D. Williamson, five bonds, four executed by Sam'l B. Christian and Wm. A. Strother, amounting in the aggregate to \$200, and one executed by L. L. Armistead and J. W. Gordon, for \$75, which, when collected, are to be applied to the payment of rent due by said Williamson for Oakland, for the year ending 1st May, 1862, should the agreement for the sale of the said property (called Oakland), entered into between said Williamson trustee and J. G. Paxton trustee from any cause not be carried out; if said agreement is executed and carried out, then to be held by me as so much money received in payment of said property.

"R. E. Buckner."

"Upon examination subsequently, I became satisfied," says Mr. Tribble, "that a decree of the court, as contemplated by the terms of the contract, was necessary, and so informed Mr. W., and urged him to get the decree if possible; stated to him Mrs. B.'s great anxiety to have the matter settled, and my solicitude on the subject, as her importunities gave me much concern. Nothing further was done, however, and in the latter part of the summer of 1862, by direction of the plaintiff Paxton, the suit in chancery was brought to the then next October Circuit Court of Campbell county." That suit was brought on the 30th of August, 1862, when the summons was issued, which was returned executed on the 1st day of September, 1862, upon the defendants Williamson and wife. A copy of that bill, and

of the summons and return, is a part of the defendant's testimony in this case. The bill, after stating the title of Paxton to the land as trustee of Mrs. B., and setting out the contract made by him with S. D. Williamson, "who represented himself to be the trustee of his wife, Marian Williamson," contains the following charges and prayer:

"Your orator further represents and 481 charges, that the said S. D. Williamson has utterly failed to comply with any part of said contract, except the payment of the \$260, although your orator complied with his part of the contract by putting him in possession of the premises, but still holds possession of the same, refusing to comply with the terms of said contract, or restore the possession of the same to your orator.

"Your orator further represents that the said Williamson is himself insolvent, and cannot make or secure said payments, and he is doubtful whether a court of equity would authorize the appropriation of the property which he holds in trust, or its hires and profits, to the purchase of said tract of land.

"In this state of things, your orator prays, that the said S. D. Williamson and the said M. D. Williamson his wife, be made defendants to this bill, and answer all and singular its allegations, and that the court decree that the said S. D. Williamson and M. his wife specifically comply with the terms of said contract, or that it be declared void and annulled, or that the said tract of land be sold to meet the payments already due, and provide for those to become due, and that your honour afford to your orator all such aid and relief in the premises as may be just and equitable, &c."

It does not appear that any answer was ever put in to this bill, though the summons to answer it, as before stated, was executed on the 2d of September, 1862; nor that anything else was done in the suit (except it seems, that the aforesaid deposition of Mr. Tribble was taken by the plaintiff on the 11th of November, 1863, probably to be read as evidence in the suit), until the 12th of November, 1864, the day on which this action was tried, when the said bill was dismissed before the said action was tried, and probably before the plea of not guilty, on which the trial took place, was put in.

482 "Just before the session of the Circuit Court of Campbell, in October, 1862, Mr. Tribble further says: 'I gave to Williamson and wife notice to take depositions to be read in evidence in that suit, (meaning the said chancery suit,) and on the day before they were to be taken, he (Williamson) came to my office and expressed his readiness to make the payment then due for the property. I told him I was not authorized to receive the money without consulting Mrs. Buckner, and expressed my doubt of her willingness, at that late day, to receive it, but that I would consult with Mr. Alexander, her friend and connection,

and see what could be done. I did so, and told Williamson, I think on the next morning, that Mr. Alexander thought it improper that she should consent to receive the money. Williamson remarked, that he was very sorry that a suit had been instituted; that he wished to have no contest with a lady in court; that he would prefer to give up the property rather than have a suit about it; that he believed Mrs. Buckner was willing to take the money, and that it was some friend of hers who opposed it; but if he could be satisfied that she preferred to take back the property, he would give it up to her on the 1st of January then ensuing. He requested me to write to her at once to get her decision, and let the matter be ended. I requested him to put the agreement to that effect in writing, and that I would then write to her. He did so." The agreement is in these words:

"A suit having been instituted by J. G. Paxton trustee, for the recovery of Oakland, the estate bought by me of said Paxton, I have to state, that I am prepared to pay the whole amount of what may be now due, principal and interest, and comply with the contract entered into with said P. in every particular. If this be not satisfactory to the parties, that is, to Mrs. R. E. M. Buckner, for whose benefit the sale was made, rather than a suit should be
483 *prosecuted for the recovery of the possession, I agree to surrender the possession of the said estate known as Oakland at the end of the present year.

"October 17, 1862.

S. D. Williamson, trustee."

"I wrote to Mrs. Buckner," the witness proceeds further to say, "and very soon afterwards she came to Lynchburg. I called on her. Found Mr. Williamson present. She announced to him her determination to take back the property, in accordance with the proposition contained in said last named agreement. Williamson then remarked, that by the terms of the original contract, he had the right at any time to pay the whole amount of the purchase money for the land; that he had determined to do so, and declined to give up the property."

About the same time, to wit, on or about the 4th of November, 1862, another bill was filed by the same plaintiff against the same defendants in the same court, called the case to restrain waste. A copy of that bill is also a part of the defendants' testimony in this action. The bill refers to the contract for the sale of the land; states that the said W. having failed to comply with the said contract, or inaugurate any proceedings to entitle him to do so, the plaintiff instituted suit against him in the said court in August preceding, "to declare said contract void, and compel the restoration of the possession of said tract of land; when, to avoid the further prosecution of the said suit," the said Williamson entered into the said agreement of October 17, 1862, to surrender possession of the said land on the 1st day of January next ensuing;

charges that Mrs. Buckner is unwilling to reinstate said contract in any form or shape, but claims the surrender of the land on the 1st of January, as stipulated in said contract;" that the said defendant Williamson was committing waste on the land in violation of said contract, and, if not restrained, would so reduce the quantity of timber on the land as greatly to disparage the value of the land before the plaintiff could obtain possession of the same; and that the said Williamson was utterly insolvent, and any recovery in an action at law for the breach of said contract would be unavailable; and prays that the defendants be enjoined from committing waste, and for general relief. An injunction was accordingly awarded, but it does not appear that anything further was ever done in the case.

In the latter part of November, 1862, the land in question was advertised in one or more of the newspapers to be sold on the 15th of December following, "by order of the trustee," J. G. Paxton, but the sale was not made, for reasons stated by the witness Tribe as follows: "I remember that Mr. Mosby," counsel for Mrs. Williamson, "called on me and told me that the sale of the land would be objected to, and that if persisted in, there would be an application for an injunction to prohibit it; that I requested to see Mr. Alexander on the subject, and that I subsequently informed Mr. Mosby that the sale would not be attempted." "I think the interview with Mr. Mosby was early in December, 1862." In answer to a question, By whom was the advertisement made? he answered: "I think it was by Mr. Alexander, who was her (Mrs. B.'s) connection and friend."

In this connection, the witness further states: "I called at Mr. Mosby's office. I think shortly after the interview with him just spoken of, on some matter of business, when Mr. Mosby announced the readiness of the parties to pay the whole purchase money for the land, and he pointed me to a check then on his table, which he said was upon one of the city banks (I don't remember which) for the amount. I replied, I had no authority to receive it: Mr. Mosby said he would have to send it (the money) to Rockbridge, where Mrs. Buckner resided, unless there was some one authorized here to whom the tender could be
485 *made. I replied, I think in substance, that I had no doubt the necessity of sending it to Rockbridge might be avoided, and as I said in my examination in chief, it was my purpose to write to her and see if some satisfactory arrangement could not be made to avoid the necessity of taking the money to Rockbridge and making the tender there; but I was suddenly called away, and the matter escaped my attention. I think I said at the time that I was quite sure Mrs. Buckner would not receive it; but not that it might be regarded as having been sent and refused. I had no authority to say so. I have no doubt Mr. Mosby relied upon what I then said, and

would have sent the amount which the check would have commanded but for what then passed between us." The witness had said, in his examination in chief: "I have no doubt the check, which I believe was on one of the Lynchburg banks, would have drawn the amount it bore upon its face in Confederate money."

It seems that the check here referred to had been obtained from a Mr. Oyler, with whom a written contract was made by Williamson and wife on the 12th of December, 1862, for the sale to him of six of the trust slaves of Mrs. Williamson for \$6,800, subject to the confirmation of the court. And accordingly, there is in the record, as part of the defendants' testimony, a copy of the proceedings in a suit in chancery brought in the Circuit Court of Lynchburg on the 8th of June, 1863, by Mrs. Williamson by her next friend, against her husband, S. D. Williamson trustee, and her children and said Oyler, the object of which was to have the said sale to Oyler confirmed, and the purchase money invested in the land aforesaid. Among the reasons assigned therefor in the bill are the following: "In the present distracted condition of the country, negro property is, perhaps, of all other, the most insecure, the means of escape
486 abundant, the temptations *strong to abandon masters, and the enemy in our land, wicked, malicious, and bent by all means, good or bad (if possible) on destroying this species of property. It is specially the interest of persons like your oratrix, owning none other but negro property, under these circumstances, (apart from all other considerations,) to sell at least a portion of their negroes and invest in something more stable and permanent. This is what your oratrix proposes to do. After parting with the six negroes sold to Oyler, she has enough remaining to answer her wants and those of her children, and the land besides, if your honor approve and give effect to the sale. Again, she states, that the land (which was bought at a full price at the time of the sale, \$6,000) has greatly enhanced in value, and as she believes, is now worth double, perhaps three times that sum; and so, in every view, it is highly advantageous to her and her children that the sale be ordered or approved by the court, and the proceeds invested in the land." The defendants filed their answers to this bill, depositions were taken and filed to sustain its allegations; but nothing further appears to have been done in the suit.

In the course of the cross-examination of the witness Tribble, being asked, "How much purchase money was due when you called on S. D. Williamson, at Mrs. Buckner's instance, about the 1st January, 1862, and if he had paid you that amount, were you not directed by her to receive it, and would you not have received it?" he answered: "I do not know. I presume the first instalment was then due, and if Mr. Williamson had expressed his readiness to pay, I should have ascertained the precise

amount, and have no doubt I should have received it, although I was not directed by Mrs. Buckner to do so. Mrs. Buckner desired me to ascertain if Mr. Williamson was ready to pay, and expressed much anxiety to have the matter settled."

In answer to other questions, the witness
487 further *said: "I had frequent conversations with Williamson about that time, (the latter part of the winter of 1861-2, or first of the spring of 1862,) as Mrs. Buckner was very urgent on the subject. In several of these conversations he expressed his purpose, if he could, to raise the money in some other way than from the trust fund, and I often suggested to him that if it could be done in that way, some satisfactory arrangement might be made. I saw no probability of getting the decree required by the deed. Mr. Williamson was anxious to retain the land, Mrs. Buckner to have her money, and I was desirous, if possible, to satisfy them both, and I suggested to him (it was my own suggestion merely) that, by making some other arrangements, the necessity of obtaining a decree might be obviated." "I told him repeatedly that the contract on his part had been forfeited, because he had failed to obtain a decree at the time specified in the contract, but at the same time urged him still to obtain the decree, and that I had no doubt Mrs. Buckner would be satisfied. Nothing having been done, however, I said to him, some time before the June term of the Circuit Court at Lynchburg for 1862, that Mrs. Buckner would not wait any longer than that court for the decree to be obtained, and Williamson promised to see his attorney, Mr. Mosby, and have the decree at that court, if possible." "I claimed the payments due by the terms of the contract, and urged him to make them as directed by the contract. My object was, to get him to get the authority, and to pay the instalments of money required by the contract, and not rent." On further examination by the plaintiff, witness stated, that he had never had any authority from the plaintiff to modify or renew the contract between him and the defendant aforesaid, or to receive any part of the purchase money mentioned therein. And on further cross-examination, he stated, that "all the
488 interviews mentioned by him as having *been had with the defendant were had by him as the agent of Mrs. Buckner, and sometimes without any previous conversation with her in regard to the subject matter thereof. Witness frequently made suggestions of his own. Most of the conversations were by authority from her. Mrs. Buckner was a widow with children at the time of the transactions spoken of by witness. Mr. Williamson, the defendant, his wife and children, have been living upon the premises in controversy ever since the contract was made."

The deed from E. Paxton and wife to J. G. Paxton trustee, under which the latter derived title to the land, was a part of the testimony introduced by the defendant.

The trusts declared in the deed are, that "the said trustee and his heirs shall permit the said R. E. M. Buckner to possess and enjoy said interest in said real estate, (embracing the land in question,) and to receive any rents or profits which may accrue from the same for her livelihood and support during her lifetime, free and clear from all debts and contracts of every kind and description whatever of her said husband," &c., "and after the death of the said R. E. M. Buckner, said interest in said real estate shall vest in and be the absolute property of such child or children which the said R. E. M. Buckner now hath, or may hereafter have, by her said husband." And a power of sale and re-investment of the proceeds, at the discretion of the trustee, is then given to him by the deed.

The defendant's testimony also embraced sundry tax receipts, from which it appears that he paid the taxes on the said land from 1860 to 1863 inclusive. This is all the evidence in the case which is material, at least all which need be noticed. The instructions are stated in the opinion of Moncure. P.

489 *William Green, for the appellant.
Robert Johnston and Garland, for the appellee.

MONCURE, P., stated the case, and then proceeded:

I have been thus full in my statement of the testimony in the case in order that the questions arising in it may be the better understood, and I will now proceed to consider those questions, which are presented, as I have already said, by two bills of exceptions taken by the defendant to opinions given by the court during the progress of the trial. I will first notice the second bill of exceptions, which was taken to the opinion and action of the court in giving certain instructions of its own, instead of others asked for by the parties respectively. It will be unnecessary to take any notice of the instructions asked for by the plaintiff, as he took no exception, and the case was decided in his favor; but I will notice in detail the instructions asked for by the defendant, and those which were given by the court.

The instructions asked for by the defendant are four in number. The first asserts, that it was necessary to join Mrs. Williamson in the suit as a co-defendant with her husband. But it was certainly not necessary. The contract was made by the husband in his own name, though for the benefit of his wife. She, being a married woman, could not herself make a contract binding upon her at law, nor could she make such a contract through the agency of her husband or anybody else. He was put in possession of the land, and has ever since continued to hold it, and was the proper, and only proper, person to be made a defendant in the action.

The second instruction asked for by the defendant is in these words: "That not-

withstanding the stipulation in the contract with regard to said Williamson's obtaining, at the then next term of the Circuit Court of Campbell or city of *Lynchburg, a decree authorizing him to appropriate the trust property of his wife, derived from Mrs. Tabb, to the payment of said purchase money for said land, it was competent for the vendor to waive a literal compliance with said stipulation; and such waiver, if made, left the contract to stand as though the stipulation had not been inserted; and further, that the acceptance of the sum of \$275 on the 9th January, 1862, as shown by exhibit C D; the demand from time to time thereafter made of the said Williamson for the instalments of purchase money due up to the bringing of the plaintiff's first chancery suit in August, 1862, as all detailed by the witness A. M. Tribble, Esq., if the jury believe his statements in relation thereto to be true; the bringing of the said suit by the plaintiff in August, 1862, claiming a specific performance of the contract, &c.; and his second suit for restraining waste in November, 1862; and the prosecution of both suits down to the present time; constituted a waiver of said stipulation, and was a continued assent and claim made by the plaintiff as vendor to hold the contract binding on the defendant as vendee and as a sale of the land; that under these circumstances, and while seeking to enforce the contract as a sale, the defendant, as trustee for his wife, was by its terms entitled to possession of the land, and the plaintiff has no right to disturb that possession by this proceeding."

This instruction asserts, in point of fact, that at the time of the institution of the action, the defendant was in possession of the land in controversy by consent of the plaintiff under an executory contract of sale between them, which was then in full force and operation; and affirms, in point of law, that under these circumstances, the defendant, as trustee for his wife, was entitled to possession of the land, and the plaintiff has no right to disturb that possession by this proceeding.

491 *If the assertion of fact thus made had been true, the legal proposition thus affirmed as the consequence thereof would have been erroneous. A vendor of land, while the contract of sale remains executory, and before a deed is made to the purchaser, continues to be invested with the legal title, and (unless the provision in the Code ch. 135, § 20, applies to the case, as it does not to this), may recover possession by an action at law, at least after making a demand of the possession, even though the vendee may be entitled in equity to a specific execution of the contract, and to have the action at law in the meantime enjoined. If it be said that there can be no such recovery at law without a previous demand of possession, it is a sufficient answer to say, that the absence of such a demand is not embraced as a term in the legal proposition affirmed, though there is abundant evidence in the record proving,

or strongly tending to prove, that such a demand was made.

But the fact asserted as the foundation of this legal proposition is untrue. The fact asserted is, that a literal compliance with the stipulation in the contract in regard to said Williamson's obtaining, at the then next term of the Circuit Court of Campbell or city of Lynchburg, a decree authorizing him to appropriate the trust property of his wife, derived from Mrs. Tabb, to the payment of said purchase money for said land, was waived by the plaintiff, which waiver left the contract to stand as though the stipulation had not been inserted. It affirms that it was competent for the vendor to make such a waiver, and that the acts detailed in the instruction constituted a waiver of said stipulation, and amounted to a continued assent and claim of the plaintiff as vendor to hold the contract binding on the defendant as vendee, and as a sale of the land.

It is not pretended that there was
492 any written waiver of *the said stipulation, or any other waiver than what is imported by the acts detailed in the instruction. Even if there had been a parol agreement, however express, for such a waiver, it would have been of no effect at law, and could have been enforced in equity only on the ground of part performance.

But do the acts detailed constitute such a waiver, and amount to a continued assent and claim of the plaintiff as vendor, to hold the contract binding on the defendant as vendee and as a sale of the land? I think not.

By the express terms of the contract, the sale was conditional only, the condition being that the defendant should obtain at the next term of the Circuit Court of Campbell county, or of the city of Lynchburg, which terms it seems were in May and June, 1860, a decree authorizing him so to change and invest the fund in his hands as trustee aforesaid, as to guaranty and carry into full and legal effect the agreement on his part; and it was agreed between the parties, that should the defendant fail to obtain such a decree at the time aforesaid, then and in that event the defendant should occupy and use the property as tenant of the plaintiff, trustee as aforesaid, for the period of one year, from the 1st day of May, 1860, and the cash payment of \$260 was to be retained as rent for that year. The defendant having failed to perform the condition, he became tenant of the plaintiff for a single year; at the expiration of which, to wit, on the 1st of May, 1861, the plaintiff was entitled to the possession of the land and to recover it in an action of unlawful detainer. Although the plaintiff was so entitled, yet Mrs. Buckner, the beneficiary for life under the deed by which the land had been conveyed to him as trustee, was still anxious that the sale should be made, notwithstanding the breach of the condition by the defendant; and the latter was just as anxious to make the purchase. In consequence of this mutual

493 *anxiety, the defendant was permitted, for a while after the condition was broken by him, to retain possession of the land, and the negotiations between her and the defendant in regard to the payment of the deferred instalments of the purchase money, referred to in the deposition of her attorney Mr. Tribble, and the other transactions mentioned in the instruction took place. While this mutual anxiety existed, to wit, on the 9th of January, 1862, the bonds for the sum of \$275 referred to in the instruction were received by Mrs. Buckner from the defendant, and a receipt was accordingly given therefor. But it was plainly not intended by Mrs. Buckner, or her counsel Mr. Tribble, by this transaction, or any other which the record discloses, to waive the forfeiture of the contract, even if she had had the power to do so—which she had not; the contract having been made by her trustee, who only had the power to sell the land. Mr. Tribble, in his deposition, says: "I told him (the defendant) repeatedly that the contract on his part had been forfeited, because he had failed to obtain a decree at the time specified in the contract, but at the same time urged him still to obtain the decree, and that I had no doubt Mrs. Buckner would be satisfied. Nothing having been done, however, I said to him, some time before the June term of the Circuit Court at Lynchburg for 1862, that Mrs. Buckner would not wait any longer than that court for the decree to be obtained, and Williamson promised to see his attorney Mr. Mosby, and have the decree at that court, if possible."

It was not obtained at that court, and never has been obtained. It does not appear that after that time any application was ever made by Mrs. Buckner or her attorney to the defendant for any part of the purchase money.

The two chancery suits brought by the plaintiff, one of them in August and the other in November, 1862, and referred to in the instruction, do not, either in them-
494 selves *or in connection with the other matters referred to in the instruction, constitute any waiver of the stipulation aforesaid. The defendant having forfeited his contract by not obtaining a decree at the time specified, and having taken no step to obtain such a decree thereafter, though he continued to hold and enjoy the land, the plaintiff, to bring the matter to a close, filed the bill in August, 1862, which is called in the instruction a bill for specific performance. He was willing, it seems, even at that late period, to make the sale if the purchase money could be secured to him. But he wanted either the land or the money, or security for payment of the money, and he therefore prayed for alternative relief accordingly. It is manifest that the plaintiff did not intend, by the said bill or otherwise, to waive the benefit of any stipulation contained in the contract. It was expressly provided in the contract that it was not to be binding on the plaintiff until the defendant obtained a

decree as aforesaid, and the said bill charges, that the defendant has utterly failed to comply with any part of said contract, except the payment of the \$260, although the plaintiff complied with his part by putting the defendant in possession of the premises, but still holds possession of the same, refusing to comply with the terms of the said contract, or restore the possession of the land to the plaintiff. And the bill further represents, that the defendant "is himself insolvent, and cannot make or secure said payments, and he is doubtful whether a court of equity would authorize the appropriation of the property which he holds in trust, or its hires and profits, to the purchase of the said tract of land." The most that can be said is, that while the plaintiff had made but one contract with the defendant in regard to the sale of the said land, which had been forfeited as aforesaid, yet the plaintiff was willing, even down to the time of the filing of the said bill, to sell and convey the said

495 land to the defendant *at the price to be secured and paid as mentioned in the contract. But he knew that the defendant, being insolvent, was himself wholly unable to make or secure the payments, and he did not believe that a court of equity would then make such a decree as the contract required. The chief, if not the only, object of the suit, therefore, was to recover possession of the land. That the defendant himself so regarded the object of the suit is shown by the paper marked B C, signed by him, and dated 17th October, 1862, in which he says: "A suit having been instituted by J. G. Paxton trustee, for the recovery of Oakland, the estate bought by me of said Paxton, I have to state, that I am prepared to pay," &c. "If this be not satisfactory to the parties, that is, to Mrs. R. E. M. Buckner, for whose benefit the sale was made, rather than a suit should be prosecuted for the recovery of the possession, I agree to surrender the possession of the said estate at the end of the present year." Shortly after the date of that paper, Mrs. Buckner announced to the defendant her determination to take back the land, in accordance with the proposition contained in the said paper; but he then declined to give it up, saying that, by the terms of the original contract, he had the right at any time to pay the whole amount of the purchase money for the land, and that he had determined to do so. Very soon after this conversation, the second suit in chancery referred to in the said instruction was instituted, being the suit to restrain waste. In the bill in that suit, the plaintiff refers to his former suit as having been brought to declare the contract void, and compel the restoration of the possession of said tract of land; states that the said paper marked B C was executed to avoid the further prosecution of that suit; charges that his said cestui que trust is unwilling to reinstate said contract in any form or shape; and claims the

496 *surrender of the land on the 1st of

January, as stipulated in the said paper.

It does not appear that any answers were ever filed, or anything else was ever done in these suits, except that Mr. Tribble's deposition seems to have been taken in one of them, and except that the first of them was dismissed on the day of the trial of this action, but before it commenced. It appears that always, since October, 1862, Mrs. Buckner has been unwilling that the land should be sold to the defendant, and has claimed to have it restored to her. In November of that year it was actually advertised in the newspapers, in the name of the plaintiff as trustee, for sale at public auction in the city of Lynchburg, on the 15th of December following; but being threatened with an injunction by the counsel of Mrs. Williamson, the trustee declined to make the sale, and afterwards, to wit, on the 2d of January, 1863, he instituted this action. I think the court properly refused to instruct the jury that the transactions detailed in the instruction "constituted a waiver of said stipulation, and was a continued assent and claim made by the plaintiff as vendor, to hold the contract binding on the defendant as vendee, and as a sale of the land; that under these circumstances, and while seeking to enforce the contract as a sale, the defendant, as trustee for his wife, was by its terms entitled to possession of the land, and the plaintiff has no right to disturb that possession by this proceeding."

The defendant's third instruction is in effect the same with the sixth instruction given by the court.

The fourth and last instruction asked for by him is in these words: "That if the jury believe the contract A No. 1 was forfeited by the failure of said Williamson to comply literally with the stipulation as to obtaining the decree aforesaid, subjecting his wife's trust estate to the

497 *payment of the purchase money of the land in controversy, and that such forfeiture was not waived by the plaintiff; then the plaintiff, by allowing him to hold the premises over after the 1st of May, 1861, and accepting rent from said Williamson therefor, constituted him (on the terms of stipulated rent from 1st May, 1860, to 1st May, 1861,) a tenant from year to year, commencing on the 1st May, 1861; and the defendant having held for the year commencing 1st May, 1861, and ending 1st May, 1862, and then again having held over from the 1st May, 1862, was entitled as such tenant to hold for the year following, to wit, till 1st May, 1863, and so from year to year until the tenancy should be ended by notice given according to law; and that no such notice having been given, the defendant, at the bringing of this proceeding, (in January, 1863,) was lawfully in possession of the land, and the plaintiff not entitled to recover the possession thereby."

The substance of this instruction is, that if there was a forfeiture of the contract of

sale, and the forfeiture was not waived, the plaintiff, by allowing the defendant to hold over after the 1st of May, 1861, and accepting rent from him, made him a tenant from year to year until the tenancy should be determined by a notice to quit; and no such notice having been given before the action was brought, he was not entitled to recover.

It is true that if a tenant for a fixed term holds over after the expiration of the term, with the consent of the lessor, he is regarded as a tenant from year to year on all the terms of the original lease which are applicable to such a tenancy. The law favors such a tenancy, and infers it from such a holding over, in the absence of evidence to the contrary. And if that principle applied to this case, as supposed by the instruction, the conclusion to which it comes would have been proper.

498 *But there are several defects in the premises, which prevent the application of that principle to the case, and the conclusion, therefore, falls with its foundation.

The instruction assumes as matter of fact, without referring the question to the jury, that the plaintiff allowed the defendant to hold the premises over after the 1st of May, 1861, and also accepted rent from him therefor. Now if the evidence on these questions of fact can be considered as conflicting—which is the most favorable view to be taken of it for the defendant—still the court would have erred in assuming the facts, and instead thereof ought to have based its instruction on the hypothesis of the truth of the facts, which would thus have been referred to the jury. It may be doubtful whether the evidence as to these facts is even conflicting, and whether it is not altogether in favor of the plaintiff. There is no evidence which expressly or directly shows, or tends to show, that the plaintiff did allow the defendant to hold over, much less accept rent of him after the 1st of May, 1861, unless it can be said that the bills in chancery filed by him as before mentioned can have that effect. But they rather repudiate than show a tenancy from year to year. They show a wrongful possession under a violated contract of sale, and their main object, or that of the first of them, is to recover possession of the land. As to what is called an acceptance of rent after the 1st of May, 1861, that was the act of Mrs. Buckner, and not of the plaintiff. She signed the receipt for it in her own name, not professing to act as his agent, and there is no proof that she was. It is argued that she was tenant for life of the trust subject, and had a right to receive the rent. She certainly had not a right to sell the trust subject, nor to interfere with the sale of it by the trustee, who had such right. When he, in the exercise of his undoubted power, made a contract of sale, and put the purchaser in possession under *it, how could she, by any unauthorized dealing with the purchaser, entitle him to hold the land against

his vendor after forfeiting his right to the possession by violating the contract of sale? Can such a vendee deny the title of his vendor, and set up an adverse claim acquired while he was in possession under the vendor? It is said that it may be inferred, from the relation of the parties and the facts of the case, that she was the vendor's agent. Even if this were so, which is not admitted, still the inference could only be made as matter of fact, and not as matter of law. All the evidence on which this instruction is founded (with the exception, perhaps, of the bills aforesaid) is furnished by the testimony of Tribble and the papers filed with his deposition, the execution of which was obtained by him; and he testifies, that he never had any authority from the plaintiff to modify or renew the contract, or to receive any part of the purchase money mentioned therein, and that all the interviews mentioned by him as having been had with the defendant were had by him as the agent of Mrs. Buckner, and sometimes without any previous conversation with her in regard to the subject matter thereof.

But there is still another and greater defect in this instruction. It asserts that the plaintiff, by allowing the defendant to hold the premises over after the 1st of May, 1861, and accepting rent from him therefor, constituted him a tenant from year to year, and entitled him to continue to hold as such tenant until the tenancy was determined by a notice to quit; that is, by six months' notice to quit.

Now it is a mere presumption of law, in the absence of evidence to the contrary, that a tenant who holds over after the expiration of his term by permission of the lessor is a tenant from year to year. 500 But this presumption may *be repelled by evidence, which may show that the holding over, though by permission as aforesaid, is not as tenant from year to year, but in some other character, or for some other purpose. And such clearly is the case here.

Palpably, it was never intended that the relation of landlord and tenant should exist between the plaintiff and defendant, except as a mere incident to the contract of conditional sale. The defendant was insolvent, and the plaintiff would never have sold or rented land to him, much less a trust estate, upon his own responsibility merely. Hence it was that, when he made with him the contract of conditional sale and put him in possession, he took care to require the payment down of so much of the purchase money as would be equivalent to one year's rent, and to require the decree to be obtained within that year to sanction the purchase for the benefit of the *cestui que trusts* of the defendant, and to appropriate so much of the trust fund as was necessary for the security and payment of the deferred instalments of the purchase money. If such decree should not be obtained at the stipulated period, then the defendant was to be the tenant of the plaintiff for a single

year for the rent already paid him. The defendant, having failed to comply with the express condition of the sale, forfeited the contract, and was bound by its terms to surrender possession at the end of the year of his tenancy. If, instead of doing so, he held over by sufferance of the plaintiff, who still hoped and urged that he would soon obtain the decree, can it be inferred therefrom that such holding over by the defendant was as tenant from year to year? Both parties were then anxious that the sale should be made. The plaintiff wished to sell, and the defendant wished to purchase. The defendant, no doubt bona fide, intended very soon to obtain the decree; and the plaintiff, trusting in him, suffered the

land to remain in his possession,
501 *to give him an opportunity in the meantime of obtaining the decree—the plaintiff knowing or believing that he could at any time resume the possession. This possession of the defendant having continued until January, 1862, bonds to the amount of \$275 were then delivered by him to Mrs. Buckner, who gave her receipt therefor, stating that when collected they were “to be applied to the payment of rent due by said Williamson for Oakland for the year ending 1st May, 1862, should the agreement for the sale of the said property, &c., not be carried out; if said agreement is executed and carried out, then to be held by me as so much money received in payment of said property.” Now if the plaintiff can be held responsible for that receipt, it cannot have the effect of making the defendant a tenant from year to year, but at most can only make him tenant for a year ending May 1st, 1862. The defendant having occupied the property by sufferance for the greater part of that year, it was just that he should pay a year’s rent for it, on condition that he was permitted to hold it till the end of the year. But it would be very unjust to give to this transaction the effect of making the defendant a tenant from year to year. Certainly no such effect was in the contemplation of the parties. The plaintiff never recognized his defendant as his tenant except upon the terms of paying down the rent; and then only for the term for which the rent was paid. The defendant was as much a wrongdoer in holding over after the 1st of May, 1862, as he was in holding over after the 1st of May, 1861; and to infer from such holding over a tenancy from year to year, would be to infer a right from a wrong.

The foregoing reasons satisfy me that the court did not err in refusing to give the defendant’s fourth instruction. And now let us consider the instructions which were given by the court.

502 *The first three of these instructions are unexceptionable, and it is unnecessary to notice them any further. The fourth is in these words: “That if, from the testimony, the jury should believe the contract for the sale became void by reason of the failure of the defendant to do what, according to the foregoing instructions he

was required by said contract to do, and that therefore he became the tenant of the plaintiff, his tenancy expiring the 1st day of May, 1861; that the plaintiff had the right to maintain this action against the defendant at any time within three years after the said 1st of May, 1861, without giving notice to the defendant to quit, notwithstanding the said defendant continued in possession of the premises for more than one year, unless subsequently to said 1st of May, 1861, and before the bringing of this suit, the said tenancy became a tenancy from year to year; and that even if the payment of rent was made by the defendant to the plaintiff on the 9th of January, 1862, instead of to Mrs. Buckner, under the circumstances, according to the terms set forth in the receipt marked XX, signed by Mrs. Buckner, such payment of rent, under such circumstances, and according to such terms, was not such a payment and receipt of rent as to make the said tenancy a tenancy from year to year, so as to require notice from the plaintiff to the defendant to quit before he could maintain this action, and according to the legal import of said receipt said tenancy ceased the 1st day of May, 1862, and that after that time the plaintiff’s right of action accrued.”

The proposition asserted by this instruction is, that the contract of sale and breach of the condition only made the defendant a tenant for a single year, expiring on the 1st of May, 1861, and his holding over thereafter did not of itself make him a tenant from year to year; that if the payment of the rent for the next year, made to

Mrs. Buckner on the 9th of January,
503 1862, according to the receipt *given by her on that day as aforesaid, can be considered as a payment to the plaintiff, it only made the defendant a tenant for another single year, ending on the 1st of May, 1862, and his holding over thereafter did not of itself make him a tenant from year to year, so as to require notice from the plaintiff to the defendant to quit, and that after that time the plaintiff’s right of action accrued.

I can see no error in this instruction, construing it as we ought and as the jury must have done, in connection with the context and the *res gestæ*. The defence on which the defendant mainly relied to defeat the plaintiff’s action was, that he was a tenant from year to year when the action was brought, and had not received the six months’ previous notice to quit, to which such a tenant is entitled, and to that defence the fourth instruction asked for by him directly pointed. He made no point in his instructions, as his counsel did in arguing before this court, that before a vendor can maintain an action for possession against his vendee, the latter’s right of possession must in general be determined by a demand and refusal. He did maintain before the court and jury, as his second instruction shows, that, according to the facts of the case, the contract of sale was a subsisting, executory contract, under

which he was entitled to possession; but that defence did not involve the question of notice to quit, or of demand and refusal. Therefore the court, refusing to give the instructions asked for by the parties, and undertaking to cover the same ground by its own instructions, propounded the fourth in the series as a substitute for the defendant's fourth. Both have reference to a tenancy from year to year and the notice to quit, which is incident to such a tenancy, and neither has any reference to the relation of vendor and vendee, or the question as to the necessity of a demand and refusal, to determine the vendee's right of possession. The defendant's instruction

504 maintains, that "he is a tenant from year to year, and not having received any notice to quit, no right of action ever accrued to the plaintiff. The court's instruction takes the ground, that the defendant was not a tenant from year to year, but only for a single year, ending either on the 1st of May, 1861, or 1st of May, 1862, and that, after that time, the plaintiff's right of action accrued, without any notice to quit.

But the plaintiff's counsel in this court argues, that the court's instruction, in effect, also decides that if the relation of the parties was that of vendor and vendee, instead of that of landlord and tenant, the plaintiff may maintain his action without any proof of a previous demand and refusal. As this question more directly arises under the seventh instruction given by the court, I will defer any other remarks upon it until I come to that subject. As I have already said, I think there is no error in this instruction.

The fifth and sixth instructions given are unexceptionable. The seventh and last is in these words: "That the filing by the plaintiff of the bills No. 1 and No. 2, which were in evidence before the jury, do not affect the plaintiff's right to recovery in this case."

These bills were not offered in evidence to show that the plaintiff was prosecuting two remedies at the same time for the same cause of suit, the one in equity and the other at law, and therefore that the remedy last commenced, to wit, the action at law, cannot be maintained. Such a defence could only have been made, in the action at law, by a plea in abatement, if at all; and there was no such plea. Besides, the first bill was dismissed before the trial was commenced, which would have rendered such a defence unavailable, if it would otherwise have been available, under the general issue. But it seems that such a defence could not have been made at all at law, even if the causes of suit had been the same, and the suit in equity had been

505 *pending at the time of trial; and that the proper mode of making the objection would have been by a rule in the chancery suit to put the plaintiff to his election between the two suits.

The object of the defendant in offering these bills in evidence was to show, that

at the time the action was brought he was lawfully in possession of the land in controversy as vendee of the plaintiff, who was then prosecuting a suit in chancery for the specific execution of the contract of sale. And the defendant contended, that being thus lawfully in possession, there could be no recovery against him in this action, which is founded on the right of the plaintiff to such possession, and that before such an action can be maintained against him, his right of possession, or rather his lawful possession, must be determined by a demand and refusal or otherwise.

The authorities cited by the learned counsel for the plaintiff in error (defendant in the court below) seem fully to sustain his legal proposition, that one who is put in possession upon an agreement for the purchase of land can not be ousted by ejectment before his lawful possession is determined by demand of possession or otherwise. *Right v. Beard*, 13 East's R. 210; *Doe v. Jackson*, 1 Barn. & Cres. 448, 8 Eng. C. L. R. 126. The action of unlawful detainer stands on the same footing in this respect with the action of ejectment, and is alike founded on the plaintiff's right of possession at the time of the institution of the action, except that where the plaintiff was turned out of possession by the forcible or unlawful entry of the defendant, he may regain the possession by an action for the forcible or unlawful entry without regard to the question of title or right of possession. Code 608, ch. 134.

But the record is full of evidence to show, and especially do the bills show, that when the action was brought the defendant was wrongfully in possession of the land, 506 *and had been for a long time previously thereto, and that the plaintiff was then entitled to the possession. They show, that if any demand and refusal were necessary to determine any right of possession of the defendant, there had been such demand and refusal. The bills themselves were such a demand, and the failure of the defendant to comply with this demand was such a refusal. The fact is, the defendant never had any right of possession, except for a single year, under the contract of sale, or for the next year under the arrangement made with Mrs. Buckner by the assignment of bonds in January, 1862, if the plaintiff can be considered as bound by that arrangement. The utmost effect which that arrangement could have had was, to set up by parol the contract of sale for another year upon the payment or security of what was equivalent to a fair rent for that year. And when the condition of this parol arrangement was broken by a failure of the defendant to obtain a decree within the year, and when that year was ended, the defendant had no longer any right, or semblance of right, to the possession of the land, and the plaintiff, without any previous demand or refusal, had a right of action to recover such possession. There is no evidence in the record tending to show that, after the arrangement aforesaid

in January, 1862, there was ever any contract, in writing or by parol, or any understanding or transaction, between the plaintiff and defendant, or Mrs. Buckner and the defendant, which could give to the defendant any right, or color of right, to the possession of the land after the expiration of the tenancy for the second year as aforesaid. That the plaintiff did not bring his action immediately thereafter, nor until the January following, and that the defendant in the meantime actually occupied the land against the will or by the mere sufferance of the plaintiff, can make no difference.

A wrong, however long continued, can never mature into a right, *except
507 under the statute of limitations, or the presumptions arising from lapse of time, which do not apply to this case. In this state of things these bills are filed, which, so far from admitting any right of possession in the defendant, show that he is wrongfully in possession, and seek to recover it of him. The first bill showed that he wrongfully withheld the land, and the second showed that he was committing waste upon it. That the defendant himself regarded the first bill as having been instituted for the recovery of the land, I have already fully shown. The plaintiff, being wearied out with the matter, filed his bill to have it ended. He was willing, it seems, even then to receive the money, or security for it, but did not believe it would or could be paid or secured, and therefore demanded the land. It does not appear that the defendant, though duly served with process to answer this bill, took any notice of it. And at all events, it cannot amount to any admission of his right to the possession of the land. The second bill expressly declares, that the plaintiff "is unwilling to reinstate said contract in any form or shape, but claims the surrender of the land on the 1st of January" following, which was before the institution of the action.

I am, therefore, of opinion, that the court did not err in instructing the jury that the filing of these bills "does not affect the plaintiff's right to recover in this case.

The only remaining question in the case arises on the first bill of exceptions, and is as to the admissibility of the receipt therein mentioned; being the receipt of A. Alexander "for account Mrs. R. E. Buckner, November 9th, 1861," for \$34.77, eight months' interest on \$869.20, the second instalment of the purchase money of said land. There is no evidence whatever in the record to connect the plaintiff with this receipt, nor is there any evidence in the record that

Mr. Alexander was authorized, even
508 by *Mrs. Buckner, to give it. But the question is of no consequence, and could not affect the result of the case.

I am of opinion, that there is no error in the judgment, and that it be affirmed.

JOYNES, J., concurred in the opinion of Moncure, P.

Judgment affirmed.

509 *Robinson & als. v. Gardiner & als.

April Term, 1868, Richmond.

1. Liquidation of Banks—Construction of Statute.*—

Upon the true construction of the act of February 12th, 1866, Sess. Acts 1865-66, p. 204, entitled "An act requiring the banks of this Commonwealth to go into liquidation," all the creditors of a bank, not having a specific lien upon property of the bank, are placed upon the same footing, and are entitled to share the assets ratably.

2. Same—Statute Constitutional.—The General Assembly having reserved the right to alter or repeal the charter of the bank, the act is not obnoxious to the charge of interfering with vested rights or impairing the obligation of contracts.

3. Banks—Character of Deposits.†—A deposit of money in bank is a loan, and not a bailment.

After the termination of the late war, the banks of circulation in the State were insolvent; their remaining assets were not sufficient to discharge their indebtedness; and their capital stock was worthless; they, therefore, generally commenced to wind up their affairs. To facilitate this process, and also to regulate it, the General Assembly, on the 12th of February, 1866, passed an act entitled "An act requiring the banks of this Commonwealth to go into liquidation." See Sess. Acts 1865-66, p. 204. The first section of this act provides, that the president and directors of any bank of circulation chartered by the General Assembly of Virginia may make a deed, conveying to such persons as they may select all the assets, real and personal, of the bank, providing in such deed that the proceeds of said assets shall be distributed
510 amongst all persons, *corporations and associations entitled to share in such distribution according to the legal rights and priorities of such persons, corporations and associations at the time such deed shall be executed. The other material provisions of the act are stated by Judge Joynes in his opinion.

On the 19th of January, 1867, the president and directors of the Farmers' Bank of Virginia executed a deed by which, after referring to the act of Assembly and reciting the first section, and reciting also, that the president and directors deemed it expedient and proper that a deed conveying all the assets of the said bank for the purpose in said act mentioned, should now be made, they conveyed to John M. Goddin and Samuel C. Robinson all the assets, real and personal, of the Farmers' Bank of Virginia upon trust, after paying all costs and expenses, to apply the proceeds of said assets to the redemption of the outstanding circulation or notes of the said bank ratably

*The principal case was cited and approved in *Exchange Bank v. Knox*, 19 Gratt. 745, 746; *Hall v. Bank of Va.*, 14 W. Va. 608; *Farmers' Bank v. Willis*, 7 W. Va. 48.

See also, monographic note on "Banks and Banking" appended to *Bank v. Marshall*, 25 Gratt. 378.

†See 6 Cent. Dig., p. 1193, § 289 et seq.

among the holders thereof; providing that all the noteholders should be put upon the same footing: "Provided, however, that if, according to the proper legal construction of the aforesaid act of the 12th of February, 1866, a ratable distribution among all the creditors of said bank, not having specific liens on the property of said bank, be required, then the parties of the second part shall apply and distribute the proceeds of the said assets according to the requirement of said act, and shall not make or attempt any distribution giving preference or priority to the noteholders as aforesaid."

In March, 1867, George J. Gardiner instituted a suit in equity in the Circuit Court of the city of Richmond against the president and directors of the Farmers' Bank of Virginia, and the trustees Robinson and Goddin, and in his bill he alleged, that the bank was indebted to him in the sum of two thousand dollars, collected 511 for him by the bank *in April, 1861, and which had not been paid to him; he set out the deed aforesaid, and insisted that the bank was not entitled to prefer the noteholders; but that all the creditors of the bank were equally entitled to share ratably the assets. The president and directors answered, contesting the construction of the statute insisted on by the plaintiff, and insisting that it was their right, and that it was but just, to give preference to the noteholders. This was the only question in the cause.

The cause came on to be heard on the 30th of November, 1867., when the court held, that the act required a ratable distribution of the assets of the bank among all the creditors not having specific liens upon the property of the bank; and that the plaintiff and others, who made deposits prior to the 1st of January, 1862, were entitled as general creditors of the bank to share in the distribution of the assets under said deed in proportion to the amount of their respective credits as depositors with the said bank. And the decree was accordingly. From this decree Robinson and Goddin applied to this court for an appeal; which was allowed.

N. P. Howard and Macfarland, for the appellants.

Neeson and Spilman, for the appellees.

JOYNES, J. The only question presented by this appeal is, whether the president and directors of the Farmers' Bank had authority to convey the assets of the bank by the deed of January 19, 1867, in trust for the benefit of the noteholders, in preference to depositors and other general creditors of the bank.

The plaintiff claims to be a creditor of the bank by virtue of a general deposit. It is well settled, and the principle has not been controverted in this case, that a general deposit of money in a bank creates the relation of debtor *and 512 creditor between the bank and the depositor. Though we call it a deposit, it is a loan, and not a bailment. Commercial

Bank v. Hughes, 17 Wend. R. 94; Marine Bank v. Fulton Bank, 2 Wall. U. S. R. 252; Pilling on Merc. Accounts 53; Dowes v. Phoenix Bank, 6 Hill's R. 297.

It is contended for the appellants, that it was competent for the bank, though it was insolvent and had suspended business in consequence of its insolvency, to give preferences among its creditors; that this right belonged to the bank under the law as it existed when the act of February 12, 1866, was passed, and that it was not taken away or impaired by that act. On the part of the appellee it is contended, that when a bank has become insolvent and suspended business in consequence of its insolvency, its assets become a trust fund to be applied to the payment of all its debts, for which there are no specific liens, ratably; and that the bank has no right to make an assignment giving preference to some of its creditors over others, so as to defeat this ratable distribution. And it is further contended, that if the bank had power, under the laws as they stood before the passage of the act of February 12, 1866, to make an assignment for the benefit of some of its creditors in preference to others, notwithstanding its insolvency and suspension, that right was taken away by the act of February 12, 1866.

In the view which I take of the case, it is not necessary to consider what would have been the rights and powers of the bank if the act of February 12, 1866, had not been passed. By the laws in force before the passage of that act, authority was reserved to the Legislature to alter, modify or repeal the charter of the Farmers' Bank at its pleasure. If, therefore, the bank had the power claimed for it, either under the general principles of law applicable to corporations, or by reason of the provisions 513 of its charter, *it was competent for the Legislature to restrict it, or to take it away altogether. No objection could be made to such an act on the ground that it takes away a vested right of the corporation, or impairs the obligation of the contract between the corporation and the State. The right of the State to alter or repeal the charter entered into the contract as an essential part of it, and the corporation could not make an exercise of that authority a ground of complaint as an invasion of its rights. *Anderson v. Commonwealth*, supra 295. The decision of this case must turn, therefore, upon the construction of the act of February 12, 1866. And by the express terms of the deed the preference which it proposes to give to the noteholders is made dependent upon the right of the bank, under the said act, to give such a preference.

The events of the late war reduced all the banks of circulation in the State to a condition of utter and hopeless insolvency. They suspended business from necessity, and there was no possibility of a resumption. It only remained to wind them up, and to distribute among their creditors such remnants of their assets as might be realized. In this condition of things, and to

accomplish this object effectually and upon equitable terms, the act of February 12, 1866, was passed. It is entitled "An act requiring the banks of this Commonwealth to go into liquidation. It proceeded, however, upon the assumption, that the banks were already in a course of liquidation, forced upon them by the calamities of the war, and its purpose was to provide regulations by which, as recited in the preamble, "a speedy settlement of the affairs of said banks should be made, in order to a legal and proper distribution of their assets amongst all persons entitled to share in such distribution."

The first section of the act provides that it shall be lawful for the president and directors of any bank of circulation, chartered by the General Assembly of Virginia, to "make a deed conveying all the assets of the bank to such persons as they may select, and providing that "the proceeds of said assets shall be distributed amongst all persons, corporations and associations entitled to share in such distribution according to the legal rights and priorities of such persons, corporations and associations at the time such deed shall be executed." This provision plainly contemplates that the deed shall recognize and respect existing priorities, which neither the bank nor the Legislature could destroy or impair; but it gave no authority to create new ones. The act did not undertake to ascertain the rights and priorities of different classes of creditors, or to lay down any rules upon that subject. It left them to be ascertained in each case according to the particular facts and the law applicable to them. It contemplated that, subject to such existing priorities, equality should be the rule of distribution.

The second section makes a provision, the object of which is to prevent any creditor from obtaining by suit more than his "just and ratable share in the distribution of the proceeds of the assets of the bank," and thus to preserve the equality contemplated by the first section. This section is in these words: "That whenever any creditor or creditors of any bank of circulation of this Commonwealth shall, by any suit or legal process whatsoever, seek to obtain a judgment, decree or order, which said judgment, decree or order when rendered or made would create a lien in favor of such creditor or creditors upon the assets of said bank, or upon any portion of such assets, and thereby entitle such creditor or creditors to receive more than his or their just and ratable share or shares in the distribution of all the assets of said bank, then and in that case, and in order to preserve the just rights of all creditors of said bank to a fair pro rata distribution of the proceeds of said assets, and for the
515 "purpose of effecting such distribution, it shall be the duty of the president and directors of said bank, and they are hereby required to make, or cause to be made, a deed of conveyance of the assets of said bank in such manner and form and for such purposes as are provided for in the

first section of this act." This provision in effect declares, that each creditor of the bank is entitled to his "ratable share" in "a fair pro rata distribution" of the assets of the bank, and plainly implies that such is to be the rule of distribution in case no deed shall be made. The deed is required to be made only when it shall become necessary to prevent a disturbance of this rule of distribution; the object of the deed is not to establish the rule, but to "preserve" it. This view is confirmed by the third section, which makes it the duty of the banks, or their legal representatives, "on the 1st day of April, 1866, and quarterly thereafter until final liquidation," to publish a statement of their condition, "and to make distribution of the assets on hand at the end of each quarter, according to the provisions of the first section of this act, so far as the same can be done consistently with the interests of all the creditors of said banks." This provision shows, that the rule of distribution was established by the first section, and that the same rule is to be observed in every quarterly distribution "until final liquidation."

I have already shown, that the establishment of a general rule of distribution, which could not be defeated or disregarded by the banks, was no invasion of their rights. And it was eminently just and proper. Among creditors having no legal priorities, equality was equity. The banks had ceased to exist for the purposes for which they were created. A resumption of their operations as banks was impossible. The stockholders had no longer any interest in them. It only remained to wind them up for the benefit of their creditors.

Under such circumstances, there was
516 "no reason of policy or justice why the banks should be allowed to make arbitrary preferences between those whose rights were equal. The Legislature, therefore, determined to treat their assets as a trust fund, to be distributed among the creditors generally in proportion to their respective debts, subject only to existing priorities, legal or equitable.

It only remains to enquire, whether the noteholders were entitled to priority over depositors or other general creditors. They had no lien, and therefore no priority at law. Nor is there any rule of equity upon which they could claim priority. It was so held by the Supreme court of Massachusetts in *Stockholders of Cochrane Bank v. Colt & al.*, 1 Gray's R. 382. In the matter of the *Franklin Bank*, 1 Paige's R. 249, general depositors claimed, upon more plausible grounds, that they were entitled to priority over the noteholders, but their claim was overruled by Chancellor Walworth. It was held, in both cases, that the noteholders of an insolvent bank stand upon the same footing as other general creditors.

I am of opinion, therefore, that the decree should be affirmed.

The other judges concurred in the opinion of Joynes, J.

Decree affirmed.

517 *Jones & Co. v. The City of Richmond.

April Term, 1868, Richmond.

Municipal Corporations—Destruction of Liquor by City Ordinance—Liability of City.—On the 2d of April, 1865, in anticipation of the evacuation of the city of Richmond by the Confederate army, the Council of the city ordered the destruction of all the liquor in the city, and undertook to pay for it. The Council, under the charter of the city, had authority to make the order and the pledge; and the city of Richmond is responsible for the value of the liquor destroyed under the order of the Council.

This was an action on the case in assumpsit in the Circuit Court of the city of Richmond, brought by William B. Jones and Richard L. Brown, merchants and partners trading under the name and style of W. B. Jones & Co., against the city of Richmond, to recover the value of a quantity of liquor destroyed by the order of the Council of the city on the morning of the 3d of April, 1865. The declaration contained two special counts, and the common counts in assumpsit. There was a demurrer to the special counts, which was sustained by the court; but as the demurrer was sustained on the ground that the facts did not constitute a cause of action against the city, they need not be further stated.

Upon the trial the plaintiffs introduced as evidence the following resolutions of the Council of the city, adopted on the 2d of April, 1865:

1. Resolved, That it is the imperative duty of this Council, in the case of the evacuation of this city by the government and army, to provide, as far as it can, for the immediate destruction of the stock of liquor in the city.

2. Resolved, That a committee of twenty-five citizens in each ward be appointed by the president to act on behalf of the city, and proceed at once to accomplish this object. That said committee destroy on the premises all the liquor they can find, giving receipts for the same to the holders.

3. Resolved, That the faith of the city be and it is hereby pledged for the payment of the value of all the liquor so destroyed to the holders of said receipts.

They further proved by a witness, that he was one of the committee appointed under the second resolution of the Council,

***Municipal Corporations—Destruction of Liquor by City Ordinance—Liability of City.**—The decision in the principal case was recognized as sound in *Dinwiddie County v. Stuart*, 28 Gratt. 526, 550, 579, and was accepted by the Supreme Court of the United States in *City of Richmond v. Smith*, 15 Wall. 438, 21 L. Ed. 201, as settling the local law upon the subject. But in *Wallace v. City of Richmond*, 94 Va. 204, 26 S. E. Rep. 586,—a case involving the same question as the principal case, *i. e.*, as to the council's power, under the law, to direct the destruction of the plaintiff's liquor and bind the city to pay him for it—the principal case was disapproved, and it was held that the order was *ultra vires* and that the city was not bound for the payment of the liquor destroyed.

and that, on the morning of the 3d of April, 1865, he caused to be destroyed under the said resolutions, the whiskey, brandy, rum and alcohol of the plaintiffs, which is mentioned in a receipt given by him at the time to the plaintiffs. This receipt was introduced in evidence, dated Richmond, April 3d, 1865: Received and destroyed for Mr. W. B. Jones, (specifying the quantity of the different kinds of liquor), for which the city, through its Council, agrees to pay its full value, this receipt being his voucher. The plaintiffs then introduced evidence as to the value of the liquor; when the attorney of the City moved the court to instruct the jury, that the plaintiffs are not entitled to recover against the defendant any damages for the destruction of said liquor, no matter what was the value thereof. This instruction the court gave; and the plaintiffs excepted.

There was a verdict and judgment for the defendant; and the plaintiffs obtained a writ of error from a judge of this court.

C. Robinson, Roberts and Nance & Williams, for the appellants.

519 *1st. This case does not come under the custom by which land may be used for defence against a foreign enemy, which is referred to in 8 E. 4, 23; 1 Bac. Abr. fo. 201, titles *Customes* pl. 45; 20 Vin. Abr. 476, title *Trespass* (B. a) pl. 4; 21 H. 7, 27, cited in 2 Bac. Abr. 285, title *Trespass* pl. 213; 20 Vin. Abr. 513, title *Trespass* pl. 24, 12 H. 8, fo. 2; 13 H. 8, fo. 15; 29 H. 8; *Maliverer v. Spike*, 1 Dyer R. 36b.; *Saltpeter* case, 12 Rep. 12, 13; *Mouse's* case, 12 Rep. 63; *Gedge v. Minne*, 2 Bulstr. 61. And even in such cases Vattel says, when standing corn or storehouses are destroyed to prevent their being of use to the enemy, such are to be made good to the owner, who should bear only his quota. Book 3, ch. 16, § 232.

2d. The constitution of the United States, Article 5 of the amendments, and of Virginia, Article 4, § 15, provide that private property shall not be taken for public use without just compensation. The restrictions put by these provisions upon legislation by the State may be seen by reference to 2 Kent's Com. 339; *Mayor, &c., of New York v. Lord*, 17 Wend. R. 289, 18 Id. 126; *Stone, &c., v. Mayor, &c., of New York*, 25 Wend. R. 157; *Taylor, &c., v. Inhabitants of Plymouth*, 8 Metc. R. 462; Code ch. 55, §§ 16, 17.

3d. The council of the city of Richmond had authority to pass the resolutions adopted on the 2d of April, 1865, and to come under the engagement contained in them. The 54th and 56th chapters of the Code are applicable to the corporation of Richmond and the Council of the city; and the powers of the corporation are still further enlarged by the charter of March 18th, 1861. By section twenty-nine of the charter, the Council has authority to pass all by-laws, rules and ordinances not repugnant to the constitution and laws of the State, which shall be necessary for the good order and government of such persons *as

shall from time to time reside or be within the limits of the city, &c.; or which they shall deem necessary for the peace, comfort, convenience, good order, good morals, health or safety of said city or of the people or property therein. It was for the Council, under the powers vested in it, to determine what was necessary for the peace, good order and safety of the city; and in the performance of their duty they directed the destruction of the liquor in the city, and undertook to pay for it.

4th. It made no difference that the property destroyed was liquor. *Wynehamer v. The People*, 13 New York R. (3 Kernan) 384; *Howell, &c., v. City of Buffalo*, 15 New York R. (1 Smith) 519.

Daniel, for the appellee.

The only question in this case is, whether the Council of the city had authority to destroy the liquor in the city at the time it was ordered. This authority must be derived, if it existed, from one of two sources. First—Overruling necessity; or, Second—The right of eminent domain. The distinction between these sources of power is explained in *American Print Works v. Lawrence*, 3 Zabr. R. 603-608. If the authority was derived from the first source, then the plaintiffs had no right to compensation; and the promise of the Council was without authority and without consideration.

There is certainly no inherent right of eminent domain in the corporation of the city of Richmond. All its powers are derivative, and are only such as are vested in it by statute; and in construing the statutes giving it powers, we are told that they must be construed strictly. *City of Richmond v. Daniel*, 14 Gratt. 388; *City of New London v. Brainard*, 22 Conn. R. 552; *State of New York v. Mayor and Aldermen of New York*, 3 Duer's R. 110; *City of Lafayette v. Cox*, 5 Indiana R. 38.

521 *There is no doubt that the Legislature may grant this power of eminent domain to corporations, and counties which are quasi corporations; and that this has been done in some cases in this State, as to take land for streets, for gas and water works, for roads and mills. But the fact that these powers have been granted demonstrates the necessity of the grant to the exercise of such powers.

It is not pretended that there is any express grant to the corporation of Richmond of the power to destroy the property of the citizen; but counsel attempt to derive it from some general words to be found in section twenty-nine of the charter of the city of March 18th, 1861. It is obvious, however that the language must be construed with reference to the other powers granted to the city; otherwise the expression of specific grants of power would have been useless; and it is obvious too, that the powers to be exercised under these general words is to be exercised by fixed and permanent by-laws, rules or ordinances and

not by some individual and instantaneous act. All the provisions of the section refer to legislation, not executive action.

RIVES, J. This cause rests upon a bill of exceptions to an instruction of the court denying the right of the plaintiffs to recover upon the evidence. Questions were made by demurrer to the first and second counts of the declaration; but in the argument here it seemed to be conceded, that the necessity of deciding them would be superseded by an adjudication of the principle defining the liability of the defendant in error. Hence, it will not be necessary to bestow any special notice upon the pleadings, but to restrict our examination to the propriety of this instruction. Its grounds are not expressed in the record; but the full and exhaustive argument we have had at this bar, discloses them with great clearness. It is contended on the part of

522 *the City, that the corporation is not liable on two grounds: first, because the destruction of these stores was the result of that urgent necessity which, on common law principles, deprives the sufferer of indemnity; and secondly, if not to be so regarded, it was an exercise of eminent domain, not pertaining to the corporation either by express or implied delegation of powers to that end, in its charter, or the general laws of the State.

The resolutions of the City Council for the destruction of these liquors were taken on the eve of its evacuation, in April, 1865, and were carried into effect just before the entry of the Federal forces. However, opinions may differ as to the extremity of this emergency; and the propriety of the measures thus taken to remove the most common, if not the most certain, cause of riot and military insubordination upon such an event, it must be conceded that this step was not inconsistent with a prudent forecast, a wise discretion, and a reasonable precaution. It may not now be possible to determine how far military discipline might have restrained the soldiery and populace under the ordinary license and excitements of such an occasion, from the plunder of these liquors, and the disorders usually created by it; the natural probability, however, that it might not have been prevented by all the resources of military discipline, should now be accepted as a sufficient justification of that discretion which was reasonably employed in removing such a prolific source of disorder and brutal license on an occasion so threatening to the safety of property and the good order of society. It was not for the Council, in its deliberations on the 2d of April, to foresee the order or events of a military hostile occupation, or to determine whether or not, by design or accident, the city might be exposed to the perils of rapine and disorder under such circumstances.

523 Hence, it must be admitted *that these legislative guardians of the city were well justified in the exercise of a discretion as to the destruction of stores so dangerous to the peace and safety of the

City; and that there is nothing in the facts of this cause to create the belief that their action in the premises was not the result of a sound discretion and a proper precaution.

But the question is raised whether these resolutions were within the scope of their corporate powers. This court has judicially recognized this corporation as a public municipality, as well as a private one, and clothed with delegated trusts of a governmental kind. The General Assembly has chosen to impart to it some of its own sovereign attributes over the people and property embraced by its charter. It is needless to enumerate these. It is sufficient for the purpose of this enquiry to state, that it possesses all the general corporate "powers and capacities appertaining to municipal corporations in this commonwealth," and that by the 29th section of its charter, the Council is specially empowered to "pass all by-laws, rules and regulations, which they shall deem necessary for the peace, comfort, convenience, good order, good morals, health or safety of said city, or of the people or property therein." It is hard to conceive of larger terms for the grant of sovereign, legislative powers, to the specified end than those thus employed in the charter; and they must be taken by necessary and unavoidable intentment to comprise the powers of eminent domain within these limits of prescribed jurisdiction. There were two modes open to the Council: first, to direct the destruction of these stores, leaving the question of the City's liability therefor to be afterwards litigated and determined; or secondly, assuming their liability, to contract for the values destroyed under their orders. Had they pursued the first mode, the corporation would have been liable in an action 524 of trespass *for the damages; but they thought proper to adopt the latter mode, made it a matter of contract, and approach their citizens, not as trespassers, but with the amicable proffer of a formal receipt and the plighted 'faith of the city' for the payment. In this, they seem to me to be well justified. They found themselves inhibited, by the terms of their charter, sect. 49, from "taking or using any private property for public purposes, without making to the owner or owners thereof just compensation for the same." I am well aware the exception is taken in adjudged cases, that such destruction is not within this language; but coupled with the inherent equity of such a course, this language was persuasive to the actual agreement for payment, and should be accepted as a probable and reasonable motive with the Council.

One of the primary and fundamental capacities of a corporation is, "to contract and to be contracted with." The City, through its Council and committees, approach the liquor dealers and possess themselves of their stores by virtue of a formal contract, set forth in the resolutions of the Council, to receipt and pay for them. The

least that could be said, if the City can escape this contract, would be, that the citizen was a sufferer by obedience to the public authority, and betrayed by his acquiescence in the formally proffered terms of the City. I am happy in the confidence, that no such consequence and injustice can result from the doctrines of law applicable to this case. The Council, or its successors, cannot esteem it a hardship to be required to keep their plighted faith to the holders of their receipts; and their failure to do so without suit, which, I confess, excites my surprise, is doubtless due to the doubts that have been raised by the able counsel for the defendant in error. I am, therefore, of opinion that the court below erred in its instruction to the jury, and in 525 *sustaining the demurrer to the first and second counts, which set out the special undertaking of the defendant.

The other judges concurred in the opinion of Rives, J.

Judgment reversed.

526 *Brent v. Washington's Adm'r.

April Term, 1868, Richmond.

1. *Wills—Construction of.—Case at Bar.*—Testator says: I give to my son H the sum of £1,000 Virginia currency, in trust to apply the interests and profits towards the support of my daughter A. to her sole and separate benefit, free from the debts, &c., of her husband, during her natural life; and after her decease, to divide the principal equally amongst her children and their representatives, according to the statute of distributions. Testator died in 1823; A died in 1861. **Held:**

1. *Same—Same—Same.*—The children of A took vested interests in the remainder on the death of the testator, subject to be divested on their dying in the lifetime of A.

2. *Same—Same—Same.*—On the death of a child of

**Wills—Construction of.*—In a *foot-note* to Corbin v. Mills, 19 Gratt. 438, the facts and decision in Tallafarro v. Day, 89 Va. 91, are given and it is said that the court based its decision partly on Corbin v. Mills. The other cases cited as authority for its holding are the principal case, Harrison v. Harrison, 3 Gratt. 1; Martin v. Kirby, 11 Gratt. 67; Rowlett v. Rowlett, 5 Leigh 20; Hansford v. Elliott, 9 Leigh 79.

In Gish v. Moomaw, 89 Va. 370, 15 S. E. Rep. 868, the court designated the decision in the principal case as the "key to Dickinson v. Hoomes," 1 Gratt. 308.

Vesting of Remainders.—In Corbin v. Mills, 19 Gratt. 472, the court said: "It is a familiar principle, that the law favors the vesting of estates, and where a legacy is given, which is not to be enjoyed in possession until some future period or event, it will, where no special intent to the contrary is manifested in the will, be held to be vested in interest immediately on the death of the testator, rather than contingent upon the state of things that may happen to exist at the period of payment or distribution. Catlett & ux. v. Marshall & als., 10 Leigh 79; Martin v. Kirby, 11 Gratt. 67; *Brent v. Washington's Adm'r*, 18 Gratt. 526; Doe v. Considine, 6 Wall. U. S. R. 458." See also, *foot-note* to Corbin v. Mills, 19 Gratt. 438.

A, in her lifetime, unmarried, the next of kin of the child took a vested interest in his or her share, which was absolute, and not subject to be divested by the death of such next of kin in the lifetime of A.

3. **Same-Same-Same.**—On the death of a child of A, in her lifetime, leaving a husband and child surviving her, the husband took the interest of his wife; and this though such child of A died before the act, Code ch. 123, § 10.
2. **Chancery Pleading—Misjoinder of Parties—Case at Bar.**—M is administrator of husband and wife, and it being doubtful whether the right to a fund is in the estate of husband or wife, he sues for it in equity in both characters. The bill is not demurrable for misjoinder of parties.
3. **Appellate Practice—Construction of Will—Reversal of Decree—Case at Bar.**—A defendant being in default for want of an answer, comes in and demurs to the bill; and upon the hearing upon the demurrer, the court overrules it, and proceeds to decree upon the case. The only question in the cause being upon the construction of a will, and the defendant not having asked leave to file an answer, the appellate court will not, for this cause, reverse a decree which is correct upon the merits.

527 *This was a bill filed in the Circuit Court of Fauquier county by Malcolm B. Washington, as the administrator of Temple M. Washington deceased, and also as administrator of Mary D. Washington, claiming a portion of a fund of \$1,000, bequeathed by George Fitzhugh. The will of George Fitzhugh bears date April 7th, 1818, and was admitted to probate April 29th, 1823. The case is fully stated by Judge Joynes in his opinion.

Brent, for the appellant.
Blackwell & Spilman for the appellee.

JOYNES, J. This case depends upon the construction of a clause in the will of George Fitzhugh, who died in or about the year 1823, which clause is in the following words: "I give to my son, Henry Fitzhugh, the sum of one thousand pounds, Virginia currency, in trust, that he shall apply the interest and profits thereof towards the support and maintenance of my daughter Ann Baylor, to her sole and separate benefit, free from the debts, contracts or control of her husband, during her natural life, and after her decease, to divide the principal equally amongst her children and their representatives, according to the statute of distributions; and I hereby authorize my said son, his executors or administrators, to invest the said sum of money in any government or bank stock, the profits and principal of which to be disposed of in like manner as the interest and principal of the said sum is hereby directed; and I do further empower my said son, with the consent of my said daughter, to vest the said sum of money or stock in land, which shall be settled and applied in the same manner as the said money or stock is directed."

At the death of the testator, Mrs. Baylor had five children, and does not appear
528 to have had any children *born after that time. She lived until 1861, and

survived all her children except Mrs. Brent, the wife of the appellant. First, her son Nathaniel died, unmarried. Then Mary D., who had intermarried with Temple M. Washington, died, having had two children, one of whom died before her, and leaving the other child and her husband surviving her. The other child died soon after, leaving the father surviving, who died in 1863. I infer that both children died unmarried and without issue. Fanny died next, unmarried, and, I infer, without issue. Then Eliza died, who had intermarried with Joseph Horner, and had children, leaving her husband and children surviving her, all of whom, with him, survived Mrs. Baylor.

The bill in this case is filed by Malcolm B. Washington, as administrator of Temple M. Washington, and also as administrator of Mary D. Washington. Brent and wife, and Joseph Horner, in his own right, and as administrator of his wife, together with other parties responsible for the fund, are made defendants. The defendants demurred to the bill. The court overruled the demurrer, and proceeding at once to render a decree, held, in effect, that each child of Mrs. Baylor took, at the death of the testator, a vested interest in remainder in one-fifth part of the trust fund, and that the plaintiff, as administrator of Temple M. Washington, was entitled to Mrs. Washington's share of the fund. An account of the fund and its distribution was directed, and by a subsequent decree the report was confirmed, which gave the share of Mrs. Horner to her husband.

The general rule is, that when property, real or personal, is given by will to one for life, and afterwards to his or her children, the children, if any, living at the death of the testator, take vested interests in remainder, which are liable to be divested pro tanto, so as to let in any other children that may be born during the life of
529 the *tenant for life. Upon the death of any of the children before the life tenant, their interests devolve upon their representatives; that is to say, in the case of land, upon the heirs or devisees; and in the case of personal property, upon the executors or administrators. And such undoubtedly would have been the construction in this case, if the words, "and their representatives according to the statute of distributions," had been omitted. There would then have been nothing from which an argument could be drawn in favor of regarding the interests of Mrs. Baylor's children as contingent, except that the gift to them is in the form of a direction to divide the fund among them after the death of Mrs. Baylor. But the distribution was obviously postponed for no other purpose than to give precedence to the life interest of Mrs. Baylor. The gift is in substance a gift to the children, subject to the interest of Mrs. Baylor; the title is conferred immediately, though the enjoyment in possession is postponed. When the postponement of distribution is thus made only

to give precedence to another interest, Jarman says that the legacy will be held to be vested, notwithstanding the gift is in the form of a direction to divide among the objects at the prescribed period. 1 Jarman on Wills, Ed. 1861, 798. This opinion of Jarman was approved in *Packham v. Gregory*, 4 Hare's R. 396; and is supported by the decisions of this court in *Rowlett v. Rowlett's ex'ors*, 5 Leigh 20; *Hansford v. Elliott*, 9 Leigh 79; and *Martin, adm'r, &c., v. Kirby, adm'r, &c.*, 11 Gratt. 67. See also *Smith v. Palmer*, 7 Hare's R. 225.

The primary sense of the word "representatives," when used in a bequest of personal property, is the same as that of "legal representatives" or "personal representatives." Each of them is equivalent to executors or administrators. 2 Wms. on Ex'ors, 966-970; 2 Redfield on Wills, 402-408.

If the words, "and their representatives," in *this case had stood alone, they would probably have been construed as words of limitation, intended only to describe the interest taken by the children, as in *Price v. Strange*, 6 Madd. R. 159, and *Taylor v. Beverly*, 1 Collier R. 108.

But this primary sense of the word "representatives" may be controlled, where an intention is clearly indicated to employ it in a different sense. In the books cited many cases are collected in which this has been done. Sometimes it has been held to mean next of kin according to the statute, and sometimes to mean descendants, according to the intention to be gathered from the whole will. In the present case, the sense in which this word is employed is explained by the addition of the words, "according to the statute of distributions." There is no room for construction. The words, according to their plain and necessary interpretation, describe those who are entitled to take the personal property of the children after their death, according to the statute of distributions; that is to say, the distributees. And the statute must be referred to, to ascertain the persons who are to take and their respective shares. *Houghton v. Kendall*, 7 Allen's R. 72, and cases cited. And the persons thus described take, under the gift, as purchasers. They are, in the events contemplated, direct objects of the gift. These words cannot be construed as words of limitation merely, for personal property, on the death of the owner, does not devolve upon the distributees, but upon the executor or administrator. And they cannot be construed as denoting children or descendants only. They describe all who represent the children according to the statute, whether descendants, or ancestors, or collateral kindred. There is nothing in the context to authorize us to restrict their meaning to any particular class of such representatives.

That the primary sense of the word "representatives" is thus controlled, and its meaning explained by the reference
531 *to the statute of distributions, seems obvious enough upon the interpretation of the language, and it is confirmed

by the opinion of Mr. Roper in 1 Roper on Legacies 130, 131, and by the cases of *Cotton v. Cotton*, 2 Beav. R. 70; *Booth v. Vicars*, 1 Collier R. 6; *Smith v. Palmer*, 7 Hare's R. 225; and *Wilson v. Pilkinton*, 11 Jurist 537; and also by the decision of this court in *Dickinson v. Hoomes*, 1 Gratt. 302.

It is obvious that these "representatives according to the statute" are not to take during the lifetime of the children of Mrs. Baylor, whom they are to represent. That would be impossible; for, in the nature of things, these children must be dead before they can have such representatives. The only construction which the words will admit of is, that the representatives are to take in the place and stead of the children, in case any of the children should die in the lifetime of Mrs. Baylor. The language must be construed as if it had been, "children who may be then living, and the representatives, according to the statute of distributions, of such of the children as may have previously died," or as if it had been, "children, or their representatives according to the statute of distributions," merely changing "and" into "or," which is often done when the intention plainly requires it. See *Dickinson v. Hoomes*. In *re Merrick's Trusts*; and *Martin v. Holgate*, cited hereafter. This substituted limitation in favor of the representatives of the children operates, in technical language, as a "conditional limitation," defeating the remainder limited to the children before its natural expiration. 2 Washburn Real Prop. 226; *Ib.* 251; *Smith on Executory Interests* 55. The limitation to the representatives is, of course, contingent until the death of the children, in whose place they take.

In *Girdlestone v. Doe*, 2 Sim. R. 225, the testator bequeathed £40 per annum
532 to Mary Tattershall for life, "and after her decease to James Holman, "or his heirs." It was held, that these words created a substitutional gift in favor of the next of kin of James Holman, in case he should die in the lifetime of Mary Tattershall. In *Jones v. Torin*, 6 Sim. R. 255, the bequest was in trust for A for life, and immediately on her decease for the children "or their descendants" of B and C in such proportions as A should by will or other written declaration during her lifetime direct. A died without making any appointment. It was held, that the "descendants" were mentioned only as substitutes for the children, and that the fund belonged to the children of B and C, to the exclusion of their issue. Other cases of the same sort might be cited from the English reports. So in *Dickinson v. Hoomes*, 1 Gratt. 302, where the testator gave an express estate in fee in real and personal property to each of his five sons, and then directed that if any or either of said five children should die without issue living at his death, all the estate real and personal of such child should be divided equally between the survivors "or their representatives according to the principles of the law of descents," it was held that, upon the

death of one of the children without issue, the property passed to the surviving children and the representatives of such as were dead, the latter taking as purchasers under the will the share which the parent would have taken if alive. In *Martin, adm'r, &c., v. Kirby, adm'r, &c.*, 11 Gratt. 67, the testator gave all his estate, real and personal, to his wife for and during her widowhood; and directed that at her death all his estate should be sold and equally divided between all his surviving children, "or their heirs." It was held, that the words "or their heirs" were intended to provide for the children or descendants of such of the testator's children as might die in the lifetime of the tenant for life. See also *Chew's Appeal*, 37 Penn. St. R. 23, and *Stevenson v. Evans*, 10 Ohio R. 533.

*N. S. 307, which are other instances of such a limitation. In all these cases the substitutional gifts were introduced by the word "or." But the same construction will be made, though "and" is used instead of "or," where the intention requires it. Thus in *Tucker v. Billing*, 2 Jurist N. S. 483, the testator bequeathed the residue of his property, after the death of his widow, to the brothers and sisters of her and himself, "and to their descendants," and the court held, that the persons entitled to the property were those brothers and sisters of the testator and his wife who were living at the death of the tenant for life, and the children of such of them as were then dead, who were entitled to take by way of substitution to their parents. I find the case of *Burrill v. Baskerville*, 11 Beav. R. 534, referred to as a case in which such a substitutional gift was likewise introduced by the word "and," but I have not been able to see the case itself.

In this class of cases the word "or," or the word "and" used in the sense of "or," introducing a substitutional gift, is tantamount to the words "in case of the death." 2 Jarman on Wills 710. The class of cases in which this latter form of expression occurs may be referred to, therefore, to illustrate the construction of such bequests. In *Harvey v. McLaughlin*, 1 Price's R. 264, the bequest was of certain sums of stock to a trustee in trust to pay the dividends to *Eleanor Todd* for life, with remainder, as to the capital, to be equally divided among the said *Eleanor Todd's* three children; and in case of the death of either of them, the share of such as might die was to go to and belong to the children or the child, if but one, of the persons so dying. One of the three children survived the testatrix, and died in the lifetime of the legatee for life, leaving children. The court established the title of the children of the deceased child under the executory limitation, holding that the intention was to substitute the children of *those dying in the lifetime of the legatee for life in place of their parents, and that the parents took vested interests at the death of the testatrix, subject to be divested in the event specified. See 1 Roper on Legacies 611-613,

where other cases of the same sort are cited. So in *Martin v. Kirby*, before mentioned, it was held, that the children of the testator took vested interests, (the words "surviving children" being construed to refer to children who survived the testator), though their interests were liable to be divested upon the death of any of the children, in the lifetime of the widow, leaving children or descendants. See also *Smith v. Palmer*, 7 Hare's R. 225.

In every such case it is true that the first legatee is not to take the property in possession unless he shall be alive at the period of distribution. But it does not, as the cases cited show, follow from this that the interest does not vest immediately. "It is not the uncertainty of ever taking effect in possession that makes a remainder contingent." * * "The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." *Fearne* 216. "It should be remembered that no degree of uncertainty as of the remainderman's ever enjoying the estate which is limited to him by way of remainder will render such remainder a contingent one, provided he has, by such limitation, a present absolute right to have the estate the instant the prior estate shall determine." 2 Washburne Real Prop. 227. And the construction is the same in this respect, in cases where there is a substitutional limitation, as in cases where there is none. The only difference is, that in the former the vesting is conditional, and liable to be defeated, while in the latter it is absolute and indefeasible.

535 *I conclude, therefore, that upon the death of the testator, each of the five children of *Mrs. Baylor* took a vested interest in remainder after her death, in one-fifth part of the trust fund, liable to be divested upon the death of such child in the lifetime of *Mrs. Baylor*. The next question is, whether the interest thus divested remained contingent until the death of *Mrs. Baylor*, and vested then in such persons as represented the deceased child at that time, according to the statute of distributions, or whether it vested, at the death of such child, in such persons as were then distributees, as their absolute property. I think the latter is the true construction, and it is in accordance with the authorities. The rule is thus laid down by *Redfield*: "Where a life estate is created, and after its expiration the estate is devolved upon J S, and in case of his decease before the termination of the life estate, it is provided the same shall go to his legal representatives, and J S dies during the life of the tenant for life, the estate being personal, it will go to the persons who will be entitled under the statute, as next of kin of J S, who take vested interests as of the death of J S." 2 *Redfield on Wills* 414. For this he cites *Smith v. Palmer*, 7 Hare's

R. 225; Gundry v. Pinninger, 14 Beav. R. 94, (which I find in 9 Eng. L. & Eq. R. 148), and Walker v. Marquis of Camden, 16 Sim. R. 329; and they fully sustain the doctrine as he states it. There are some remarks of the Master of the Rolls in Gundry v. Pinninger which have a pertinent application to this case: "I never accurately understood the meaning of the words 'the next of kin' to be ascertained at any period different from that at which the person himself dies; 'next of kin' are words having a distinct and legal meaning, which do not point to persons who are different persons at different times, but point to persons who must be ascertained at a future period, namely, on the death of the person to whom they are to be next of kin."

536 *And, therefore, if you say next of kin of a person at a period when he did not die, you really are using words with no sensible meaning or expression; but you ought to make them sensible by saying persons who would have been his next of kin if he had died at a period after that when he did die. This is giving a very peculiar and strong force to words which I do not think there is any rule of law to justify." So, in the present case, the words "their representatives according to the statute of distributions," naturally import those who did actually represent the deceased children at the time of their death, and not those who would have represented them if they had died at a different time, namely, immediately before the death of Mrs. Baylor. And it must be observed, that while the interests of the children are to be divested in case of their dying in the lifetime of Mrs. Baylor, no such provision is made in respect to the distributees.

Questions of an analogous character have frequently arisen in England within the last twenty years, where the substituted limitation was to "children," and, under different forms of disposition, have been the subject of much difference of opinion. The cases, up to a recent period, are cited, and the conflict between them exhibited in 2 Redfield on Wills, 374-376, note. In one of the most recent cases, decided in 1865, *Re Turner*, 5 Am. L. Reg. N. S. 235, holding the doctrine maintained by most of the judges, and finally established, the testator bequeathed £500 in trust for his daughter for life, and directed that if she should die without issue (which she did), the fund should be paid to his four sons, share and share alike; but in case any or either of his sons should be then dead, he directed that the share of him or them so being dead should be paid to his or their child or children, share and share alike. It was held by Vice Chancellor Kindersley, that only such children of the testator's

537 sons as survived *their parents could take, but that it was not necessary that such children should also survive the tenant for life. The same judge had shortly before made a like decision in *Lamphear v. Buck*, 5 Am. L. Reg. N. S. 224, where the subject is fully discussed. Vice Chan-

cellor Wood made a similar decision in the case of *Merrick's Trusts*, 1 Law Rep. Eq. 552. The substance of the decision on this point is thus stated in the syllabus: "Where there is a gift by will upon the death of A to B, and if B shall be then dead, to B's children, if B dies before A, it is not necessary that B's children should survive A in order to entitle them to a vested interest." In the course of his opinion, the Vice Chancellor said: "As regards the parent, the testator feels that if the parent lives to take the property, the children, through the parent, will have the benefit of it. If he dies, the testator wishes the children to have the direct benefit of the property; and supposing these children (as is often the case under these limitations), to attain an age when they marry and are launched in life, the testator has not expressed any opinion adverse to their having the benefit of the property (taking it by way of vested interest or remainder), which they would have derived directly through their parent, if their parent had lived to take it." In *Martin v. Holgate*, 1 Law Rep. H. L. 175, S. C. 44 Law Jour., Eq. 782, decided by the House of Lords in 1866, the testator gave his residuary estate to trustees in trust to his widow for life, and after her death for distribution among such of his five children as should be living at the time of her death, in equal shares; but if any of them should be then dead, leaving issue [construed to mean children], such issue to be entitled to their father's share. One of the nephews died in the life of the widow, leaving issue one daughter, who also died before the widow, and, therefore, before the period of distribution.

It was held that the condition [of 538 *surviving the widow] which was annexed to the contingent gift to the parents, was not to be extended by implication to the gift to the issue, and that the daughter of the deceased nephew dying before the period of distribution, took a vested immediate interest in the share which her father would have taken, if alive at that period, although the amount of it could not be ascertained until the arrival of that period.

The authorities which have been cited establish, that even if the interests of Mrs. Baylor's children could be regarded as contingent (which is not a question of any practical importance in the case), the interests of their distributees, under the substituted limitation, would be held to be vested and absolute on the death of the children, subject only to the life interest of Mrs. Baylor, and that this would be so, even if the substituted limitation had been to "children," which might imply that the objects were to answer that description at the period of distribution.

The question then arises, whether the interest of Mrs. Washington vested, on her death, in her husband or in her child. The same question arises in respect to the interest of Mrs. Horner. As the law was in 1835, when Mrs. Washington died, the hus-

band was not the distributee of the wife, according to the statute of distributions.

He took the personal property of the wife as her administrator, and kept it because relieved from the duty of making distribution like other administrators. Thus, he was the distributee, in effect, though not in form. The children were not distributees, either in effect or in form. We cannot give the words of the will effect, according to their literal meaning. If we hold the husband entitled, we give the property to the party who is substantially the distributee, though not so under the statute. If we give it to the children, we give it to those who could not take it from the mother, under the statute, or otherwise, and

539 construe the *words not in their literal sense, but as meaning those who would have represented the mother, under the statute, if she had not been a married woman.

I am of opinion, therefore, that the interests of Mrs. Washington and Mrs. Horner passed, on their death, to their respective husbands.

It may be objected that the construction which I put upon this will involves consequences inconsistent with the probable intention of the testator, as, for instance, that on the death of any of the children of Mrs. Baylor in the lifetime of their father, their shares might have passed to him; while the testator, by giving to Mrs. Baylor a separate estate, has shown an intention to exclude him altogether. Such possible disappointments of what may be supposed to have been the wish and expectation of the testator, may occur in every case of a vested interest in remainder, and are always urged as an argument against holding the interest to be vested. They were so urged in *Hansford v. Elliott*, by the dissenting judge. But this argument was not sufficient in that case, and is not sufficient in this case, to overrule the import of the language, and the rule which requires that a legacy should be held to be vested rather than contingent, when the language will allow it.

The decree of the District Court was, therefore, right upon the merits. It only remains to require whether the court erred in overruling the demurrer, or in proceeding to render a decree without giving a rule upon the defendant to answer the bill, as provided by chap. 171, sect. 32 of the code.

The plaintiff being entitled to sue in the character of administrator of Temple M. Washington, the only question upon the demurrer is, whether his joining as plaintiff in the further character of administrator of Mrs. Washington, affords ground

540 for sustaining the demurrer. He *was seeking, in both characters, the recovery of the same interest, and for the same beneficial party. There was no joinder of distinct or conflicting demands. The plaintiff sued in both characters, in consequence of the doubt which existed as to the true construction of the will. If another

person had been the administrator of Mrs. Washington, he might have joined as a defendant, and so the plaintiff might have made himself a defendant in his character as her administrator. I think, therefore, that his joining as a co-plaintiff in that character was no ground of demurrer. When a demurrer to a bill is overruled, the defendant is entitled to file his answer. But in this case the defendant did not ask leave to file an answer, and it is evident, from the nature of the case, and from the facts as they appear in the report of the commissioner, that he did not have any reason for doing so. In *Reynolds v. Bank of Virginia & als.*, 6 Gratt. 174, the court, upon overruling the demurrer, the defendant, as in this case, being already in default for want of an answer, and not asking leave to file an answer, proceeded at once to make a decree; and this court held that there was no error. The statute upon which that case arose was that of 1826 (Supp. R. Co. 130); but its provisions were substantially the same as those of sections 32 and 34 of chap. 171 of the Code. The case is, therefore, an authority upon the construction of these sections.

I am of opinion to affirm the decree.

RIVES, J., concurred in the opinion of Joynes, J.

MONCURE, P., dissented.

Decree affirmed.

541 *Rhett & Wife v. Mason's Ex'x & als.

January Term, 1868, Richmond.

1. Wills—Construction of—Case at Bar.*—Testator says: I devise all my estate, in possession, remainder, reversion or in expectancy, to my beloved wife B. C. M. for her maintenance and support, and for the maintenance and support of our children, during her life and widowhood. In the event of her marriage, she is to be restricted to her dower and distributary share as in case of intestacy. HELD: Upon the language of the clause, the widow is entitled absolutely during her widowhood to the whole profits of the estate: and there is no trust for the children. And this construction is sustained, in this case, by the other provisions of the will and the surrounding circumstances.

*Gift "to Wife and Children."—As to the effect of a gift "to wife and children" there has been some conflict in Virginia. In the late case of *Vaughan v. Vaughan*, 97 Va. 322, 33 S. E. Rep. 603, JUDGE RILEY, in a dictum, said that such word standing alone would undoubtedly convey the joint estate to the wife and children. In an article by Mr. John S. Barbour of the Culpeper Bar, 5 Va. Law Reg. 457, this dictum is criticised, the cases reviewed, and the conclusion reached that, however sound this statement may be in principle, it is out of harmony with the long line of authority in Virginia. But, in an editorial in 5 Va. Law Reg. 491, Mr. Lyle, in a criticism of Mr. Barbour's article, maintained that in no case has the court, by actual decision, construed a naked gift "to wife and children" or to a trustee "for the benefit of wife and children" as carrying the

2. **Same—Power of Appointment.**—A case in which a power of appointment authorizes the appointment of all or any part of the estate to any one or more or all of the children, or of the descendants of any child dying in the lifetime of the donee of the power.

3. **Same—Same.**—A life-tenant with power of appointment, and a provision for distribution of so much of the estate as she does not appoint, should keep a correct account of the principal of the estate and of appointments or advancements made by her under the will, and exhibit the same to any of the parties interested therein who may desire to see them.

Thomson F. Mason, of Alexandria, departed this life about the 21st of December, 1838, leaving a will which was duly admitted to probate in the Orphans' Court of the county of Alexandria; that county then being a part of the District of Columbia.

By the first clause of his will
542 *he directed all his just debts to be paid. The remainder of the will is as follows:

Secondly. I devise all my estate, real and personal, in possession, remainder, or reversion, or in expectancy, to my beloved wife, B. C. M., for her maintenance and support, and for the maintenance and support of our children during her life and widowhood. In the event of her marriage, she is to be restricted to her dower and distributary share, as in case of intestacy.

Thirdly. I authorize my wife, during her widowhood, by deed or will, to dispose of all or any part of my estate to our children, or any of them, at such times and in such proportions as she may think just and prudent; and if she marry or die without having exercised this power, then the estate remaining undisposed of shall be divided amongst my children by assigning to the males double the amount of the shares assigned to the females: Provided, that if my wife should die after having exercised her power of appointment in favor of one or more of our children, without having fully exercised it as to all my estate, the child or children so advanced shall, on the partition of my estate before directed, be

whole to the mother, with the possible exception of *Waller v. Catlett*, 83 Va. 200, 2 S. E. Rep. 280, and *Richardson v. Seever*, 84 Va. 250, 4 S. E. Rep. 712, and that in the former case the facts appear so meagerly in the opinion that it is impossible to determine what the real decision is. The editor then refers to, and quotes from, an annotation by JUDGE BURKS to *Nye v. Lovitt*, 2 Va. Law Reg. 39, 40, assuming up the real situation in Virginia. These two last mentioned editorials maintain that the decision in *Wild's Case*, 6 Cokes R. 228, is still law in Virginia: *i. e.* a gift "to wife and children," conveys against estate, if no manifest and certain intent appears in the will to the contrary.

Conveyance for Use of Wife and Child—Effect.—See *foot-note* to *Leake v. Benson*, 29 Gratt. 153, and cases there cited. See also, *McDevitt v. Frantz*, 85 Va. 753, 8 S. E. Rep. 642; *Young v. Easley*, 94 Va. 197, 26 S. E. Rep. 401; *Seamonds v. Hodge*, 36 W. Va. 308, 15 S. E. Rep. 158.

held accountable for and be charged with the advancement received. The power of appointment given to my wife shall be construed to extend to the descendants of any one of our children who may die before her; and in the division before directed, the descendants of any deceased child or children shall be considered as entitled to the same share the parent or parents, if living at the time of such division, would be entitled to.

Fourthly. I authorize my wife to sell, dispose of, and convey all or any part of my estate for the payment of my debts, or the advancement of the interests of my family; and to make such investments of the money or property she may receive as she may think most advisable; such investments, however, to be in all respects
543 subject to the *provisions hereinbefore contained for the disposal of my estate.

Fifth. I direct that no appraisement be made of my estate.

Sixth. I constitute my beloved wife, Betsey C. Mason, sole executrix of this my will, and guardian of my children, and direct that no security shall be required of her in either capacity.

For any aid or assistance which my wife may require in the management of my estate, I recommend her to my brother, Richard C. Mason, and my most excellent friends, Benjamin King and Bernard Hooe; and if she shall find occasion for legal advice or information, I recommend her to consult my friends, Robert J. Taylor and Richard H. Henderson.

In witness whereof, I have hereto subscribed my name and affixed my seal, this 14th day of December, 1838.

The testator left a widow and nine children living at his death; all of the children under the age of twenty-one years, and some of them quite young; five of the children were females, and four were males. Mrs. Mason went into possession of the estate, applying the proceeds to the support of herself and the children, and their education. Prior to the institution of this suit, four of the daughters had married, and upon their marriage, or soon after, they left their mother's family; two of the sons had died, infants and unmarried; and the other two sons had gone to Arkansas.

The estate consisted of a large real estate, some ninety slaves, thirty horses, agricultural stock, &c., and money and debts collected by the executrix, amounting to \$15,089.39. The executrix sold real estate to the amount of \$12,555; she paid debts to the amount of \$38,353.03; and she purchased real estate and slaves to the amount of \$21,600. To one of her daughters she
544 advanced, on her *marriage, fifteen slaves; to the female plaintiff she advanced eight slaves on her marriage, which occurred in October, 1847; and thirteen of the slaves having escaped to the North, she in 1849 advanced to her two sons a number of them, and they took them to Arkansas. She also advanced to her sons a tract of land in the county of Fairfax of

about eight hundred acres, they assuming the payment of a debt of \$8,000 which was charged upon it.

In February, 1860, Charles H. Rhett and Matilda his wife, who was one of the daughters of Thomson F. Mason, filed their bill in the Circuit Court of the county of Alexandria, against Mrs. Mason, as executrix of Thomson F. Mason and in her own right, and the other surviving children, in which, after stating the will, and the facts in relation to the family hereinbefore stated, and other facts which it is not necessary to detail, they say that, as they are informed, the executrix claims that the whole income of the estate, after expending so much thereof as she, in her discretion, may think fit to expend for her own support and of such of the children as may reside with her, is, upon a true and legal construction of the will, her individual and absolute property; whilst, on the other hand, the complainants allege that the will constitutes her a trustee, for the use and benefit of herself and the children; and no child, by ceasing to reside with her, ceases to have an interest in the trust subject.

The complainants further state that, as they understand her, she claims that the power of appointment conferred on her by the third clause of the will, invests her with authority, in her discretion, to bestow the whole estate upon any one or more of the children, to the exclusion of any number short of the whole. On the other hand, complainants insist that no such power legally results from the said will. They insist that the will is so obscure, uncertain and contradictory, that the true intent and meaning *cannot be ascertained; and by reason thereof, it is inoperative to dispose of the estate at least beyond the disposition made of it in the second clause), and leaves it to descend and be distributed as in a case of intestacy. But if capable of construction, they insist that whilst the executrix may, in the exercise of the power, discriminate, she is bound to appoint in favor of all, and must make a substantial appointment as distinguished from an illusory one, in favor of every one. They pray that the court will adjudge the rights of the parties touching all matters and things contained in the bill; will order all proper accounts; and grant the complainants all proper relief.

Mrs. Mason answered the bill; and it is from the schedules filed with her answer that the statement as to the property and debts of the estate hereinbefore given are made. It is unnecessary to give more of her answer than bears upon the questions decided by this court. She denies that the complainants have any fixed or vested interest in the rents and profits of the testator's estate; or that they are entitled to an alequot part thereof. She claims that by the will of her testator, an estate for life has been given to her; and for the motive expressed in the will, to wit, for her maintenance and that of the children. She is advised the proper construction of the will

is, that she, by its terms, takes the whole estate for her life, with a confidence reposed in her by the testator, that she would do her duty towards their common offspring.

That this was the intention of the testator, she insists, seems to be clearly indicated by the circumstances of the case. The testator left the defendant a widow about the age of thirty-seven years, with nine children, none of whom were adults, and some of whom were in tender infancy. He looked to this defendant for the devotion of her life to the service of their children. He gave to her all his estate for her life, and invested her with *whatsoever 546 power *he possessed over its disposition and management. There was to be no appraisement of the estate; no security for the performance of her duty; with power to sell and invest at discretion, and with unlimited power to appoint among their children. This plenary power of disposition and control, thus conferred by the will, this defendant humbly insists, is at war with the claims of the complainants for an accountability by her to them for rents and profits.

On the 26th of February, 1867, the cause came on to be heard, when the court being of opinion, and looking to the whole will, and weighing the powers given to the wife, and the motives naturally operating upon the mind of the testator, Thomson F. Mason, that his intention was to give such power as would enable the widow to look to the substantial interest and benefit of his whole family, and not to the arbitrary exclusion of any portion thereof; but that, at the same time, she may exercise a proper discretion as to the time when and proportions which she may advance to her children; and that if she shall die or marry without exercising this power, the estate must be divided among the children according to the proportions indicated in the will, decreed that the rights of the parties interested be adjusted and respected according to the provisions of said will, and the principles of the decree. The parties were decreed to pay their own costs; and liberty was reserved to the parties to resort to the court, should it become necessary, for such further relief in the premises as might be just and equitable.

From this decree the plaintiffs obtained an appeal to the District Court of Appeals at Fredericksburg, where it was affirmed; and they then obtained an appeal to this court.

Magruder, for the appellants, insisted:

1st. That the second clause of the 547 will gave the whole *estate to the widow for her life or widowhood, without any descending quality, and without any beneficial interest in herself beyond support and maintenance, in trust for the support of herself and the children; and that it limited the remainder to the children as a vested remainder, subject to the operation of the power of appointment, whatever that power might be. He referred to Cun-

ningham v. Moody, 1 Ves. R. 174, 177; Doe v. Martin, 4 T. R. 39, 65; Doe v. Dowell, 5 T. R. 518; 2 Lomax Dig. 211; Hill on Trustees, 68, 491, 492, marg.; Bull v. Vardy, 1 Ves. Jr. R. 271; 2 Sugd. on Powers 177; Cox v. Bassett, 3 Ves. R. 155, 164. And if this was correct, then clearly there was a trust for the children to the extent of their maintenance and support, whether they remained with their mother, or were foris-familiated. And though the will does not fix any definite sum to be paid to each child for maintenance and support; the value of the estate and the condition in life of the parties being known, a court of equity would have no difficulty in deciding what each should receive. Badham v. Mee, 1 Rus. & Mylne R. 631; Longmore v. Elcum, 2 Young & Col. N. R. 363; Woods v. Woods, 1 Mylne & Cr. R. 401; Crockett v. Crockett, 2 Phil. R. 553, decided by Lord Cottenham in 1847; Ex parte Harris, 8 Eng. L. & E. R. 537, decided in 1851; Pride v. Fooks, 2 Beav. R. 430; Cowman v. Harrison, 17 Eng. L. & E. R. 290, 293; Green v. Spicer, 1 Rus. & Mylne R. 395; Graves v. Dolphin, 1 Sim. R. 66; Snowden v. Dales, 6 Sim. R. 524. And these cases, he insisted, established that Mrs. Rhett had a vested right to maintenance and support from the time of her father's death, and that she is entitled to be paid all that she has failed to receive on that account, and to have an adequate provision made for her for the future. What that provision shall be, or what arrears she shall receive, must depend upon an account of the estate such as

548 was ordered to be *taken in Longman v. Elcum, supra. That the trust is not too vague to be ascertained as to its extent by a court of chancery is clearly established by the case of Thorpe v. Owens, 2 Hare's R. 607, and the cases there cited.

2d. That the power of appointment under the third clause of the will was restricted by the provision of the second clause. That the exercise of this power could not interfere with the previous trust for the maintenance and support of the children. And the decree of the Circuit Court is erroneous in not imposing this limit upon the power of appointment, and requiring that the widow shall always retain in her hands a sufficient amount of the estate to afford what the court may consider a fair and just support and maintenance for those children in whose favor no appointment shall be made.

He insisted further, from the wording of the will, that it was the obvious intention of the testator that his children should have his estate; and that none of them should be excluded from a share in it. That the intention of the donor of the power is the great principle that governs in the construction of powers. And in furthering the objects in view, the courts will vary the form of executing the power, and as the case may require, either enlarge a limited power, or cut down a general power to a particular purpose. 4 Kent's Com. 345, marg.; Sugd. on Powers, 452, 453.

In conclusion, he referred to the case of Randolph Harrison's will, 2 Gratt. 1, as a leading case upon the construction of this will.

George W. Brent, for the appellees.

There are two questions involved in this case. 1st. Whether any child has a fixed and vested interest in the income of the estate, during the widowhood and life of Mrs. Mason, for maintenance and support under the provisions *of the second clause of the will of her deceased husband?

2d. Whether, by virtue of the power of appointment conferred on Mrs. Mason by the third clause of the will, she has an absolute discretion to appoint in favor of one or more children to the exclusion of the others?

The second question propounded has been settled by numerous adjudications. Sugden, in his work on Powers, says: "On the other hand, powers to appoint 'to such of my children as my wife shall think fit,' 'to one or more of my children, as my wife shall think fit,' 'to be at my wife's disposal, provided it be to any of my children,' 'amongst all or such of my children,' 'to and amongst such of my relatives as shall be living at the time of my decease, in such parts, shares and proportions,' have been properly held to enable the donees to appoint exclusively to any of the subjects." Sugd. on Powers, ch. 7, § 5, p. 562, Marg., 15 Law. Libr. 297. See also, Cowles v. Brown, 4 Call 477.

It would seem clear in the present case, from the estate, the authority, and the discretion vested in Mrs. Mason, that the testator intended to confer on the devisee a plenary discretion in the distribution of his estate among their children.

2d. Upon the first question the counsel referred to and stated the facts and principles of the following cases: Webb v. Woods, 13 Eng. L. & E. R. 63; Crockett v. Crockett, 2 Phil. Ch. R. 553, decided by Lord Cottenham in 1848; Bowden v. Laing, 14 Sim. R. 113, decided by Sir L. Shadwell in 1844; Thorpe v. Owens, 2 Hare's R. 607, decided by Sir James Wigram in 1843. This last case, he said, was in its circumstances much like the present; and the Vice Chancellor held that the widow took the property absolutely for her life. The counsel also *referred to Wallace & wife v. Dold, 3 Leigh 258, and Stinson, &c. v. Day, &c., 1 Rob. R. 435.

The present case furnishes additional circumstances to support a conclusion similar to that arrived at in Thorpe v. Owens. A husband makes a will expecting to leave a widow in the meridian of life, with a large family of children, none of whom are adults, and some of whom are in tender infancy. His will is a proposition to her: Devote your life to our common children, and I will invest you with whatever estate and whatever authority I have. You shall have every expression of my trust and confidence, besides the unlimited control of the estate for the benefit of yourself and our

children. No supervision shall be exercised over you by the courts; there shall be no appraisement, or inventory, or bond, for the performance of your duty. You may sell and invest; you may advance your children as you may think fit. I place no restriction upon you, if you will accept this office.

A case somewhat similar has arisen in our own courts. *Steele v. Levisay, &c.*, 11 Gratt. 454.

It is respectfully submitted that the testator, by his will, placed Mrs. Mason in loco parentis to the children, with full power and authority to sell and convey the property, and distribute the same or the proceeds of sale among the children, when and in such proportions as she may deem just and reasonable.

MONCURE, P. This case involves the construction of the will of the late Judge Thomson F. Mason, of Alexandria. He died on the 21st of December, 1838, and his will bears date on the 14th day of that month. He left a large estate, real and personal, which was somewhat involved in debt, and a large family, consisting of a wife about thirty-seven years of age, 551 and nine children, of whom five *were daughters and four were sons, all of whom were infants, and some of whom were of very tender years. He had great confidence in the discretion, good management and affection of his wife, as his will plainly shows, and his confidence was not misplaced, as abundantly appears from the record. Making his will under these circumstances and with these surroundings, we would naturally expect him to give her an ample portion of his estate, at least during her life or widowhood, and to invest her with extensive power and discretion in appropriating the remainder of the estate to the benefit of their children. When we come to read the will, this natural expectation will not be disappointed.

By the first clause, he subjects his estate to the payment of his debts. The rest of the will, down to the concluding clause, "In witness whereof," &c., being all of it material to the decision of the questions involved in this case, is as follows:

"Secondly. I devise all my estate, real and personal, in possession, remainder or reversion, or in expectancy, to my beloved wife, B. C. M., for her maintenance and support, and for the maintenance and support of our children during her life and widowhood; in the event of her marriage, she is to be restricted to her dower and distributary share, as in case of intestacy.

"Thirdly. I authorize my wife, during her widowhood, by deed or will, to dispose of all or any part of my estate, to our children or to any of them, at such times and in such proportions as she may think just and prudent; and if she marry or die without having exercised this power, then the estate remaining undisposed of shall be divided amongst my children, by assigning to the males double the amount of the shares

assigned to the females: Provided, that if my wife should die after having exercised her powers of appointment in favor of 552 one or more of our children, *without having fully exercised it as to all my estate, the child or children so advanced shall, on the partition of my estate before directed, be held accountable for, and be charged with, the advancement received. The power of appointment given to my wife shall be construed to extend to the descendants of any of our children who may die before her; and in the division before directed, the descendants of any deceased child or children shall be considered as entitled to the same share the parent or parents, if living at the time of such division, would be entitled to.

"Fourthly. I authorize my wife to sell, dispose of and convey all or any part of my estate for the payment of my debts or the advancement of the interests of my family, and to make such investments of the money or property she may receive as she may think most advisable; such investments, however, to be in all respects subject to the provisions hereinbefore contained for the disposal of my estate.

"Fifth. I direct that no appraisement be made of my estate.

"Sixth. I constitute my beloved wife, Betsey C. Mason, sole executrix of this my will and guardian of my children, and direct that no security shall be required of her in either capacity.

"For any aid or assistance which my wife may require in the management of my estate, I recommend her to my brother, Richard C. Mason, and my most excellent friends, Benjamin King and Bernard Hooe; and if she shall find occasion for legal advice or information, I recommend her to consult my friends, Robert J. Taylor and Richard H. Henderson."

The first question involved in this case arises under the second clause of the will. The widow, who never married after the death of her husband, applied the income and profits of the estate, so far as was 553 necessary, not only to *the maintenance and support of herself, but also to the maintenance and support of all her children, so long as they remained with her and in her family respectively, without any charge for the same, and without any complaint whatever on the part of any of them. The female appellant, after her father's death and until her marriage, a period of about nine years, lived with her mother, and was maintained and supported by her as aforesaid, and for some time after the marriage both of the appellants lived with the said mother, and were maintained and supported in the same way, and without any charge therefor. But the appellants having long since left the family and become foris-familiated, as it is called, claim to be entitled to receive a portion of the income and profits of the estate for their maintenance and support since they left the family, and during the life or widowhood of her mother. In other words,

they claim that the second clause of the will creates a trust for the maintenance and support of the widow and children of the testator during her life or widowhood, which trust they, the appellants, are entitled to enforce for their benefit in a court of equity. While, on the other hand, the widow claims that the said clause creates not trust which can be enforced in equity, but gives her the estate during her life or widowhood to do with as she pleases, though the nature of the gift, as expressed by the testator, was the maintenance and support, not only of herself, but also of their children. The question, therefore, is, which of these two conflicting constructions is the true one? Does the second clause of the will create a trust for the maintenance and support of the children as well as the widow, which the appellants are entitled to have enforced in equity for their benefit, or does it give an interest only to the widow, referring to the subject of maintenance and support merely as a motive for the gift?

I am of opinion that the latter is 554 the true construction. *An intention to give the whole estate to the wife during her life or widowhood, to do with the income and profits as she pleases, confiding in her that she would do what might be proper in regard to the maintenance and support of her children as well as herself, but not giving them any interest in the subject which they could enforce against her, is a reasonable intention, and such a one as might well have been entertained by the testator. There is no presumption, therefore, arising from considerations of hardship or injustice to the children, that such an intention did not exist. And whether it did or not, must be ascertained by reading the will in the light of surrounding circumstances.

In the first place, let us examine the second clause by itself, without reference to the context and the surrounding circumstances. "I devise all my estate &c. to my beloved wife." Here is an express devise, in the broadest possible terms, to his beloved wife only. The clause then immediately goes on to express the purpose and motive of the devise; "for her maintenance and support, and for the maintenance and support of our children." He thus says to his children: "I have not forgotten you, or left you unprovided for. I have not given you any present interest in my estate, because I know not what will be the extent of your several wants; but I have left it all to your mother, to afford her ample means of supplying your wants, which her affection for you will prompt her to do, and which I confide in her doing." But the gift of the whole estate to her is limited "during her life or widowhood." He knew that he could safely confide in her doing what was right in regard to their children so long as she might remain his widow, but apprehended that she might not have it in her power to do so if she married again. He knew that if he gave his estate to his wife during her life, and she should

marry again, it would then become 555 *vested in her husband, and thus be placed beyond her power. Therefore, he limits the devise to her widowhood, and the clause concludes: "In the event of her marriage, she is to be restricted to her dower and distributary share, as in case of intestacy." Now here, it seems to me, is incontestible evidence that the testator intended to give his wife the entire income and profits of his estate, to do with as she pleased during her widowhood, although he believed that whatever surplus might remain after providing for her own maintenance and support would, as far as might be necessary or proper, be applied to the maintenance and support of their children. If he intended, as the appellants contend, to give the estate to his wife during her life or widowhood in trust for the maintenance and support of herself and their children, then in what proportion is the income of the trust subject to be apportioned among the beneficiaries? It may be said, that they are all to be maintained and supported, and as unequal sums may be required for the maintenance and support of each, according to their several ages and necessities, the income would not be apportionable equally, but according to what was necessary for the maintenance and support of the parties respectively. This might be the case while the children were young, or remained together in the same family, although the apportionment, even to that extent, would be difficult and liable to objection and complaint. But after the children grew up and separated from the family, supposing the trust still to continue as contended for, there would seem to be no good reason for applying any other rule of apportionment to the case than that of equality. The trust, supposing it to be a trust, being precisely for the same purpose, "the maintenance and support" of all the parties, wife and children, the share of each when they all became adult and separately settled in life, if not before, would be the same. Indeed, the counsel for 556 the *appellants, while claiming for the female appellant full maintenance and support out of the estate during the life or widowhood of her mother, insists that, according to the true construction of the will, her mother is entitled to no more than her maintenance and support out of the estate, however large may be its annual income. According to that view, the surplus of the income, whatever it might be, if any, over and above the amount necessary to maintain and support the wife and children, would accumulate for the ultimate benefit of the children. Then, upon the construction contended for by the appellants, the wife would get during her life or widowhood only a share of the income of the estate, and if it were an equal share with each of her children, as there were nine children living at the testator's death, he must have intended, according to that construction, to give her only one-tenth of the income of his estate during her life or

widowhood, instead of one-third of the real estate and slaves during her life, and one-third of his other personal estate absolutely, to which she was entitled by law. But surely he did not intend to do this, as is conclusively shown by the very terms of the clause in question. He certainly intended to give her more by his will than the law would have given her, for he says: "In the event of her marriage, she is to be restricted to her dower and distributary share, as in case of intestacy." What, then, must he have intended to give her by his will? Clearly the whole income of his estate during her life or widowhood. How could he have intended to give her less? And if less, how much? Did he intend to leave his nine children, all of them infants, and some of them of very tender years, unprovided for during that period? Certainly not. He knew that they needed care, support and education, and he was not an unnatural father. But he thought the best mode of providing for them during

557 that period was, to *entrust them to their mother, and give her the whole income of his estate "for her maintenance and support, and for the maintenance and support" of their children. He could not foresee what or how much each one of them would need, and he did not wish to limit or restrict his wife in the disposition of the subject according to her will and pleasure and her sense of propriety; but only indicated in his will the motive of the gift, and what was expected of the donee in regard to their children. It is difficult, if not impossible, to believe that he could have intended to make his wife accountable to his children for shares of the income of the estate during her widowhood, and even to entitle them, after having been maintained, supported and educated out of it during their infancy, and grown up, left the maternal roof and settled separately in life, to require a settlement of an account of the income and payment to them of distributive shares of it. He could not have intended to expose her in her declining years to so much trouble and annoyance. Having been called away by death at a comparatively early age, and leaving behind him a wife and nine young children, he thought he could do no better than to leave his wife in his place, in regard to his estate and the maintenance and support of herself and children, during her life or widowhood. His conclusion in this respect was not unreasonable. But however unreasonable it may have been, if it was his intention, as I think it clearly was, it must be carried into effect. As was said by Judge Brooke, in his dissenting opinion in *Harrisons v. Harrison's adm'r*, 2 Gratt. 16, which is as remarkable for its good sense as for its brevity: "If a testator has complete dominion over his property, and can throw it into the sea if he so will, I can see no reason why he may not give it absolutely to his wife. That the testator so intended in this case, I think there can be no doubt, if language can express ideas. That he

558 did not intend *she should give it to a stranger, I admit. The answer to that suggestion is, that he did not believe she would give it to any but their children. Such was his confidence in her affection for them, that he intended to place her in the situation he himself occupied as to his property and children: to give her the control of both. The will is very short, and I think too plain for criticism. It may be an imprudent will; but we cannot make wills, but construe them according to the language in which they are expressed. *Cujus est dare ejus est disponere.*"

The appellant's counsel relies upon the fourth clause of the will as tending to show that the testator intended, by the second clause, to create a trust for the benefit of his wife and children. And he argues, that the fourth clause authorizes his wife to sell any part of his estate for the maintenance and support of his family. So that, according to his view, not only the income of the estate under the second clause, but the estate itself under the fourth clause, is charged with the maintenance and support of the wife and children during her life or widowhood. Now I do not so read and understand the will. The fourth clause, in my view, was merely intended to authorize the wife to sell any part of the estate for the payment of the testator's debts or the advancement of the interests of his family. But it was not intended that the proceeds of sale might be consumed in the use of the family. On the contrary, the clause, after giving authority to make the sale, proceeds to direct an investment of the proceeds, thus: "And to make such investments of the money or property she may receive as she may think most advisable, such investments, however, to be in all respects subject to the provisions hereinbefore contained for the disposal of my estate."

I have thus far been considering the second clause by itself, referring only incidentally to other parts of the will.

559 *and I think it sufficiently indicates that it was not intended to create a trust for the benefit of the children, but only to make a provision for the wife during her widowhood, and to declare the motive which induced such a provision. It will be found that the rest of the will fully confirms this construction. By the third clause the testator gives to his wife extraordinary power and discretion in regard to his estate and his children, thus showing his unbounded confidence in her, so long at least as she might remain his widow. "I authorize my wife during her widowhood, by deed or will, to dispose of all or any part of my estate to our children, or to any of them, at such times and in such proportions as she may think just and prudent." Can it be supposed that he would have given her his extraordinary and uncontrolled power and discretion in regard to the disposition of the capital of his estate, if he intended to impose any limit on her power and discretion in disposing of the income

of his estate given to her during her widowhood? The same may be said of the power and discretion given her by the fourth clause of the will, already noticed—the power to sell the whole or any part of the estate, and invest the proceeds as she may think most advisable.

The unbounded confidence of the testator in his wife is further shown by the fifth clause of his will, which directs that no appraisal be made of his estate; and by the sixth, which constitutes her sole executrix of his will and guardian of his children, and directs that no security shall be required of her in either capacity. For any aid or assistance she might require in the management of his estate, he recommends her to his brother Richard C. Mason, and his most excellent friends Benjamin King and Bernard Hooe, and if she should find occasion for legal advice or information, he recommends her to consult his friends Robert J. Taylor and Richard H. Henderson.

560 *Thus stands the matter, looking to the second clause of the will and the context. Now if we look also at the surrounding circumstances, our construction will be still further confirmed. Those circumstances, or most of them, have already been incidentally referred to. They are, the extent and nature of the testator's estate; the age of his wife; the confidence he reposed in her; and her worthiness of it in every respect; the number and ages of his children—nine in number—all of them infants, some of them of very tender years, and five of them daughters. He looked to her, as she says in her answer, "for the devotion of her life to the service of their children." Under these circumstances he made his will, and reading it by the light which they afford, can there be a remaining doubt in regard to its meaning? I certainly have none.

Being thus satisfied as to what was the true intention of the testator expressed in the second clause of his will, I am relieved from the necessity of reviewing the many cases which were cited in the argument, as they all concur in affirming or conceding this cardinal rule of construction, that the intention of the testator as expressed in his will, if it be lawful, must prevail; and that to ascertain that intention, if it be at all doubtful, we may look to the whole will, and the surrounding circumstances under which it was executed. If a case could be produced precisely, or substantially like the present in all respects, it would have more or less weight in the decision of this case, and might even amount to a binding authority. But as it is extremely rare to find two cases alike in all respects, little or no aid can be derived by a court in construing a will from prior decisions construing other wills. It is not enough that the same words in substance, or even literally, have been construed in other cases. It often happens that the same identical words require very different constructions in different cases, according to the context

561 and *the peculiar circumstances of each case. All the cases which have a material bearing on the subject now under consideration—I mean the English cases—including, I believe, all that were cited in the argument of this case, are collected and commented upon in the last London edition, published in 1861, of Mr. Jarman's invaluable work on Wills, vol. 1, pp. 356-374. Of all the cases which I have seen, the one which seems to throw most light on this, and to set forth most clearly the principle which I think applies to this case and must govern its decision, is the case of *Thorpe v. Owen*, decided by that great Judge, Vice-Chancellor Wigram, and reported in 2 Hare, 24 Eng. Ch. R. 608. The case was twice argued before him, and he delivered two opinions in it; the second after long and anxious consideration, and with a view of putting an end to the controversy. In calling for a second argument, he said: "My object is that my decision may be satisfactory to the parties, and that, so far as possible, they may be relieved from the necessity and expense of discussing this question elsewhere;" that is, in an appellate court. His decision seems to have been satisfactory to the parties, as no appeal appears to have been taken from it. And I have seen no case in which it has been questioned, while I have seen many in which it has been referred to and relied upon. The counsel on both sides in this case cited and relied upon it, though, of course, for different purposes; and neither of them doubted its soundness. The words of the will in that case were: "I desire everything to remain in its present position during the lifetime of my wife for her use and benefit; and after her decease I devise," &c. "I give the above devise to my wife, that she may support herself and her children according to her discretion, and for that purpose." It was held that the widow took an absolute interest for life in the real and personal estate. Now I consider this decision important in the

562 present case, *not because of any substantial agreement in the words of the will in the two cases, for, as I have already said, that is a circumstance in itself not very material; but because of the importance of the principles and distinctions laid down by the Vice-Chancellor, and of the pertinency of many of his remarks to this case. "The cases," he said, "should be considered under two heads: first, those in which the court has read the will as giving an absolute interest to the legatees, and as expressing also the testator's motive for the gift; and secondly, those cases in which the court has read the will as declaring a trust upon the fund, or part of the fund, in the hands of the legatee. A legacy to A, the better to enable him to pay his debts, expresses the motive for the testator's bounty, but certainly creates no trust which the creditors of A could enforce in this court; and again, a legacy to A, the better to enable him to maintain, or educate and provide for his family, must, in the ab-

tract, be subject to a like construction: it is a legacy to the individual, with the motive only pointed out. This is very clearly, and, in my opinion, very correctly laid down by the Vice-Chancellor in the late case of *Benson v. Whittam*, (5 Sim. R. 22); and the cases of *Andrews v. Partington*, (2 Cox 223), *Brown v. Casamajor*, (4 Ves. Jr. R. 498), and *Hammond v. Neame*, (1 Swanst. R. 35), illustrate the same principle. At the same time, a legacy to a parent upon trust, to be by him applied, or in trust, for the maintenance and education of his children, will certainly give the children a right, in a court of equity, to enforce their natural claims against the parent in respect of the fund on which the trust is declared." "It is, I am aware, difficult to reconcile all the decisions or cases of this nature; but although those decisions may not appear reconcilable with each other, I am satisfied that the learned judges by whom they have been pronounced did not mean to disregard the distinction

563 *I have noticed, or in any way to break in upon it. The difference has arisen in the different modes of applying admitted principles. In *Raikes v. Ward*, (1 Hare R. 445), and *Crockett v. Crockett*, (Id. 451), I thought, and still think, a trust was declared, as well as a motive expressed; and I am satisfied that neither Lord *Cottenham*, in *Woods v. Woods*, (1 Myl. & Cr. R. 401), nor Lord *Langdale*, in *Wetherell v. Wilson*, (1 Keen R. 80), intended to negative the distinction to which I have adverted." The foregoing and other observations were made by the Vice-Chancellor in the first opinion delivered by him. In the second, he made the following: "I am satisfied that, however long this case may be under consideration, there would still be some doubt upon it with reference to the authorities. I cannot, however, doubt the principle laid down by the Vice-Chancellor in *Benson v. Whittam*, (5 Sim. R. 22); it is plain to common sense that the law must be as it is there explained. If you give property to persons to accomplish an object, increasing their funds so that they might be the better able to do it—that is, in point of fact, a gift to them, and there is no trust which others can enforce. And I think those cases of *Bushnell v. Parsons*, (Prec. Chan. 218), *Hammond v. Neame*, (1 Swanst. R. 35), *Bunell v. Bunell*, (Amb. R. 660), *Andrews v. Partington*, (2 Cox 223), and others, are all cases in support of the same proposition, and recognizing the principle with great clearness. A great number of these cases might be cited, but I will not go through them; the principle cannot be at all doubted, although Judges may differ as to the mode of applying it. I think it equally clear, if property be given to a parent upon trust to maintain herself and her children, that although she takes a beneficial interest, and though to some extent there is an uncertainty as to the quantum she is bound to apply, it is impossible for me to hold that the cases do not

564 *decide that the court will find the

means of measuring the extent of the children's interest. The only question here is, under which of the two principles I am to say that this case falls. At the same time I agree with the argument, that if the expression that the gift is to support the children, extends to the support of the children throughout the whole of their lives, in the various situations that may arise, the impossibility, I may almost say, of measuring the gift to each child by any rule to be laid down by a court of justice, is—in a case where there is no trust excluding the mother from taking whatever she is not obliged to part with—a strong argument against holding that the expressions which refer to the children were meant to create a trust binding on her." "I considered this case very much in private before I called for the second argument, and the conclusion to which I have come is, that the words of this will import a gift to the mother for life, and that afterwards the personal estate is to go to the testator's children, and the real estate to his heirs at law. The testator adds to the gift an explanation, which appears to me merely to express what actuated his mind in the gift. He trusts to the affection of the mother towards her children, and says: 'I have given to her this large provision, in order that she may be able to support her children during her life.' The gift is to her, and the support is to be administered according to her discretion." "I confess I have the less regret in coming to this conclusion, because, so far as respects the maintenance of the children during their minority, there appears to be no practical reason for deciding the case one way rather than the other; all such children having, in fact, been maintained by the widow. With regard to the other children, the difficulty of applying the fund in many cases which may arise, or be suggested, is such that I can hardly see any way of effecting it. The

best legal conclusion, I think, is this: 565 The *testator has given the property to his wife absolutely, during her life. In order that the children may not suppose that they had been overlooked during that time, the testator tells them his reason for giving the property to the mother. I think, therefore, that the construction of the will is, that the widow takes the property absolutely for her life."

Having quoted thus freely from the opinions of the Vice-Chancellor in the case just referred to, I will not prolong this opinion by reviewing other cases in detail, as I deem it wholly unnecessary to do so. The Vice-Chancellor said, as we have seen, that "the cases should be considered under two heads: first, those in which the court had read the will as giving an absolute interest to the legatees, and as expressing also the testator's motive for the gift; and secondly, those in which the court has read the will as declaring a trust upon the fund, or part of the fund, in the hands of the legatee." Now I consider this case as plainly falling under the first head, and if it does, then

there is an end of the question. Whether it does or not, depends upon the intention of the testator expressed by the words of his will read in the light of surrounding circumstances, all of which I have considered.

The cases arising under the second head, that is, where a trust is declared, and which, in 1 Jarm. on Wills, supra, p. 368, are sub-divided into two heads: first, those in which the purpose is so peremptorily expressed as to constitute a perfect trust; and secondly, those in which the will leaves entirely in the discretion of the primary donee the quantum of benefit to be communicated to the other persons, provided that such discretion is honestly exercised, have no bearing upon the case in my view of it, and I therefore will not notice them. Many of the cases referred to in the argument fall under this head.

Besides the English cases referred 566 to, some of our own *decisions were cited and relied on by the counsel on both sides, viz., the case of *Harrisons v. Harrison's adm'x*, 2 Gratt. 1, on the side of the appellant, and the cases of *Wallace & wife v. Dold's ex'ors*, &c., 3 Leigh 258, and *Stinson, ex'or, &c. v. Day & wife*, 1 Rob. R. 435, on the side of the appellees. But it is unnecessary to notice these cases any further, as they are not in conflict with the foregoing opinion, and two of them at least strongly confirm it.

The only other question involved in this case arises under the third clause of the will; and that is, as to the interest of the children in the capital of the estate, and the nature and extent of the wife's power of appointment over it.

And first, as to the wife's power of appointment over it. The words of the third clause are: "I authorize my wife during her widowhood, by deed or will, to dispose of all or any part of my estate to our children, or to any of them, at such times and in such proportions as she may think just and prudent; and if she marry or die without having exercised this power, then the estate remaining undisposed of shall be divided amongst my children, by assigning to the males double the amount of the shares assigned to the females: Provided, that if my wife should die after having exercised her power of appointment in favor of one or more of our children, without having fully exercised it as to all my estate, the child or children so advanced shall, on the partition of my estate before directed, be held accountable for, and be charged with, the advancement received. The power of appointment given to my wife shall be construed to extend to the descendants of any of our children who may die before her, and in the division before directed, the descendants of any deceased child or children shall be considered as entitled to the same share the parent or parents, if living at the time of such division, would be entitled to."

567 *I think there is no uncertainty or obscurity as to the intention of the

testator in this clause, but that it is as plainly expressed as language can well do it, notwithstanding the very ingenious argument made upon the subject by the learned counsel for the appellant. I think that the power of appointment given by the testator to his wife during her widowhood is subject only to this limitation as to the objects in whose favor it may be made; that it must be made in favor of one or more of the children of the testator, or of the descendants of any of them who may die before her, and that it extends over his whole estate and every part of it. She may appoint all or any part of the estate to all or any number of such children and descendants, "at such time and in such proportions as she may think just and prudent;" for so the will expressly declares. She may, therefore, if she shall think it "just and prudent" to do so, appoint all the estate to any number of such children and descendants, less than the whole, and even to any one of them. I think the words, "as she may think just and prudent," refer to the whole preceding part of the same sentence for their antecedent, and not to the immediately preceding words, "at such times and in such proportions," only. This was certainly very great power and wide discretion to give to the wife; but the testator had a right to give it, and I think plainly did so. If this be true, there is then an end of this matter, without any inquiry as to the reason for his doing so and the prudence of the act. That would have been an important inquiry if there had been any room for doubt as to his meaning. He no doubt believed that he could safely entrust his wife and the mother of his children with this power and discretion, and that she would exercise them faithfully and wisely. He declared in his will how he wished his estate divided in default of such appointment by his wife in whole or in part, but he did not know

568 *what might afterwards arise to make a different mode of division more just and prudent, and therefore he did not make that mode peremptory, but made it subject to the exercise of the power of appointment given to his wife as she might think to be just and prudent under all the circumstances. He did not intend to do injustice to any of his children. He did not intend to exclude any of them from a participation in his bounty. They were all equally near and dear to him, and so they were to their mother. He did not believe it possible that she would do injustice to any of them. At all events, he was willing to trust her, and preferred to run the risk of her possibly doing such injustice rather than prescribe a peremptory mode of division in the then state of his family. He could not know what changes would take place in their condition during the life of his wife, who has already survived him about thirty years. Some of his children might be so fortunate, in the course of events, as not to need any part of his estate, while others,

less fortunate, might stand greatly in need of it; which seems actually to be the case. Men may well differ in opinion as to the prudence of conferring such a power under the circumstances, but certainly the doing so, if unreasonable at all, is not so unreasonable as to require us, if anything could require us, to wrest the words of the will from what we consider their plain and natural meaning. The doctrine of illusory appointments does not apply to this case, but only to a case in which the appointment is to be made among persons of a certain class, so as to entitle each one of the class to a substantial portion of the subject.

And now as to the interest of the children in the capital of the estate. On this question I think there can be no doubt or difficulty. The estate is given to the wife during her life or widowhood, with remainder to the children, to be divided among them by assigning to the males
569 *double the amount of the shares assigned to the females, considering the descendants of any deceased child or children as entitled to the same share the parent or parents, if living at the time of such division, would be entitled to; but such remainder is subject to be divested by the exercise of the power of appointment given to the wife to the extent to which such power may be so exercised. In the event of only a partial exercise of the power, leaving a portion of the estate unappointed and subject to division, the parties who may have received advancements under such exercise of the power will not be entitled to participate in the division without accounting for their advancements respectively as of their value at the times they were received, in the manner in which advancements are accounted for under the statute of descents and distributions. (Code of 1860, ch. 123, § 15, p. 580.) But such parties respectively may elect not to participate in such division; but to retain and hold their advancements in full of their shares of the estate.

I have now, I believe, considered and disposed of all the questions arising in this case, and am of opinion that the decree of the Circuit Court should be reversed, and a decree entered declaring the true construction of the will to be as before mentioned. I think the widow and executrix is bound to keep a correct account of the estate of her testator, and of all appointments or advancements made by her under the will, and to exhibit the same to any of the parties who may be interested therein and desire to see them. It does not appear that she has been guilty of any default in this respect, nor that she has in any way mismanaged the estate or abused the power conferred upon her. On the contrary, she seems to have honestly and laboriously endeavored to manage the estate to the best advantage, and make the most of it for the benefit of her children. It may be

570 well, however, since this *suit has been brought, to reserve liberty to the parties, or any of them, to apply from

time to time to the court hereafter by motion or petition in the cause, for a decree for the settlement of such an account, and for any other relief to which they may then show themselves entitled in the premises. I think the costs of the suit in the Circuit Court, both of the plaintiffs and defendants, should be paid out of the testator's estate, but that the appellees should recover their costs in this court, as they are the parties substantially prevailing.

The other judges concurred in the opinion of Moncure, P.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the testator, Thomson F. Mason, by the second clause of his will, gave his estate to his wife absolutely during her life or widowhood, and not in trust, "for her maintenance and support, and for the maintenance and support" of their children; and that those words, in regard to maintenance and support, were merely used by him to indicate the motive of the gift; so that she is not bound to account to anybody for the income of the estate during her life or widowhood, or any part of it.

The court is further of opinion, that the power of appointment given by the testator to his wife during her widowhood by the third clause of his will, is subject only to this limitation, as to the objects in whose favor it may be made; that it must be made in favor of one or more of the children of the testator, or of the descendants of any of them who may die before her, and that it extends over his whole estate and every part of it. She may appoint all or any part

571 of the estate, to all or any number of such *children and descendants, "at such times and in such proportions as she may think just and prudent;" for so the will expressly declares. She may therefore, if she shall think it "just and prudent" to do so, appoint all the estate to any number of such children and descendants less than the whole, and even to any one of them. The words, "as she may think just and prudent," refer to the whole preceding part of the same sentence for their antecedent, and not to the immediately preceding words, "at such times and in such proportions," only. The doctrine of illusory appointments does not apply to this case, but only to a case in which the appointment is to be made among persons of a certain class, so as to entitle each one of the class to a substantial portion of the subject.

The court is further of opinion, that by the third clause of the will, the remainder of the estate, not disposed of by the second clause, is given to the children of the testator, to be divided among them by assigning to the males double the amount of the shares assigned to the females, considering the descendants of any deceased child or children as entitled to the same share the parent or parents, if living at the time of such division, would be entitled to; but

such remainder is subject to be divested by the exercise of the power of appointment given to the wife, to the extent to which such power may be so exercised. In the event of only a partial exercise of the power, leaving a portion of the estate unappointed and subject to division, the parties who may have received advancements under such exercise of the power, will not be entitled to participate in the division, without accounting for their advancements respectively as of their value at the time they were received, in the manner in which advancements are accounted for under the statute of descents and distributions. (Code of 1860, ch. 123, § 15, p. 580.) But such parties respectively may elect

572 not to participate in such *division, but to retain and hold their advancements in full of their shares of the estate.

The court is further of opinion, that the widow and executrix is bound to keep a correct account of the estate of the testator, (but not of the income or profits to which she is entitled as aforesaid,) and of all appointments or advancements made by her under the will, and to exhibit the same to any of the parties who may be interested therein and desire to see them. And though it does not appear that she has been guilty of any default in this respect, nor that she has in any way mismanaged the estate or abused the power conferred upon her, but, on the contrary, that she has faithfully endeavored to manage the estate to the best advantage, and make the most of it for the benefit of her children; yet it seems to be proper, since this suit has been brought, to reserve in the decree to be made therein, liberty to the parties, or any of them, to apply from time to time to the court hereafter, by motion or petition in the cause, for an order or decree for the settlement of such an account, and for any other relief to which they may then show themselves entitled in the premises.

The court is further of opinion, that the costs of both parties, plaintiffs and defendants, in the court below, ought to be paid out of the estate of the testator, as the suit was occasioned by a doubt arising as to the true construction of the will, in the solution of which doubt they all were interested.

The court is therefore of opinion, that the said decrees of the said District and Circuit Courts are both erroneous. And it is decreed and ordered that the same be reversed and annulled, and that the appellants do pay unto the appellees as the parties substantially prevailing, their costs by them about their defence in this behalf in this court and the said District court ex-

573 pended. And this court proceeding *to pronounce such decree as the said Circuit court ought to have pronounced, it is declared that the right of the parties, and the true construction of the second and third clauses of the said will, are as above set forth; and it is further decreed and ordered, that the costs of both parties, plaintiffs and defendants, in the said Circuit

court, be paid out of the estate of the said testator in the hands of his said executrix. And liberty is reserved to the parties, or any of them, to apply from time to time to the said court hereafter, by motion or petition in this cause, for the settlement of an account and further relief, as hereinbefore mentioned. Which is ordered to be certified to the said District court, the clerk of which is ordered forthwith to certify this decree to the said Circuit court.

Decree reversed in favor of the appellee.

574 *Hoxton & als. v. Griffith & als.

April Term, 1868, Richmond.

Wills — Construction of.—Testator says: All my landed estate in Westmoreland to be equally divided between my nephew E and the children of H, namely: L, S, W, M and W. E and H were the nephew and niece of the testatrix, to whom she was equally attached. H was dead when the will was made. By another clause, she gives other property to be divided between E and the surviving children of H; and she says: Should any of the children of H die without heirs, the property left them shall be divided among the survivors. **HOLD:** E took one moiety and the children of H the other moiety of the Westmoreland land.

In the year 1865, Sally W. Griffith, of the city of Alexandria, departed this life, having made her will, which was duly admitted to probate in the County Court of Alexandria. The will bears date on the 17th of June, 1858, and after giving certain property to the children of Eliza L. and Dr. W. W. Hoxton, including all her real estate in Alexandria, and dividing her slaves between her nephew E. Colville Griffith and the children of Eliza L. Hoxton, naming them, she says:

"All my landed estate in the county of Westmoreland, in the State of Virginia, to be equally divided between my nephew E. Colville Griffith, and the children of Dr. W. W. Hoxton and Eliza L. Hoxton, namely: Llewellyn G. Hoxton, Sally G. Hoxton, William Hoxton, Mary S. Hoxton and Winslow S. Hoxton. Should the claim I have on the government for the property destroyed off Nahomey be recovered, I wish it to be equally divided between E.

575 *Colville Griffith and the surviving children of Eliza and Dr. W. W. Hoxton; and if any other property to which I am justly entitled should at any time be recovered, I wish it divided in the same manner. Should any of the children of Dr. and Eliza Hoxton die without heirs, the property left them shall be divided

*Senger v. Senger, 81 Va. 698, 706, and Walker v. Webster, 95 Va. 881, 28 S. E. Rep. 570, cited the principal case as authorizing the general rule that where a bequest is made to several persons in general terms, indicating that they are to take equally as tenants in common, each individual will, of course, take the same share; in other words, the legatees will take *per capita*.

among the survivors. If I should survive my dear E. C. Griffith, it is my will that the property left him in this will should be divided between his three children, Frederick, Eleanor and David."

In September, 1866, Frederick, Eleanor and David Griffith, the children of E. Colville Griffith, instituted a suit in equity in the Circuit Court of Alexandria against Llewellyn G. Hoxton and the other surviving children of Eliza L. Hoxton; and in their bill, after setting out the will of Miss Sally W. Griffith, and that E. Colville Griffith had died in the lifetime of the testatrix, they say that the testatrix was a maiden lady, and virtually adopted and raised her nephew E. Colville Griffith, and her niece Eliza L. Griffith, who married Dr. Wm. W. Hoxton, both of whom were long since dead; that she stood in the light of a parent to her said nephew and niece; and it is believed and charged, entertained a like affection for them both. That having in her lifetime given to E. C. Griffith real estate in the county of Westmoreland, valued at \$3,000, the testatrix, with a view to place her nephew and niece on a footing of equality in the disposition of her estate, by her will gave to the children of the latter her real estate in the city of Alexandria as an offset to the land given to her nephew in Westmoreland. That to carry out said principle of equality the testatrix, by her will, devised to E. Colville Griffith and the children of Mrs. Hoxton all her landed estate in the county of Westmoreland. They insist, that this land is given one moiety to E. C. Griffith, and the other moiety to the children of Mrs.

Hoxton; and they ask for a construction of the will *and a partition of the land between the parties according to their respective rights therein.

It appears that one of the children of Mrs. Hoxton had died after the death of the testatrix; the others answered the bill. They admit that the testatrix was an unmarried lady; but deny that E. Colville Griffith was adopted by her, though in his tender years he resided in and formed part of her family. They say, that E. C. Griffith and Eliza L. Hoxton lived with her during their minority, and were regarded by her with like affection. And they insist, that under the will of Miss Griffith, E. Colville Griffith, if he had survived her, would have been entitled to one-sixth of the Westmoreland farm, and the five children of Dr. Hoxton named in the will to five-sixths; and the plaintiffs, under the last clause of the will, take his share, and no more.

The cause came on to be heard upon the bill, the answers and the exhibit, when the court held that, by the will, E. Colville Griffith and the five children of Mrs. Hoxton each took one-sixth of the land in Westmoreland county; and that E. C. Griffith, having died before the testatrix, his three children took the one-sixth which had been given to him. And commissioners were appointed to make partition of the land accordingly. From this decree the

plaintiffs obtained an appeal to the District Court of Appeals at Fredericksburg, where the decree was reversed; and then the Hoxtons obtained an appeal to this court.

G. W. Brent, for the appellants.

F. L. Smith and Mayo, for the appellees.

JOYNES, J. The only question in this case relates to the construction of the following clause in the will of Sally W. Griffith: "All my landed estate in the county of Westmoreland, in the State of

Virginia, to be equally divided
577 *between my nephew E. Colville Griffith, and the children of Dr. W. W. Hoxton and Eliza L. Hoxton, namely: Llewellyn G. Hoxton, Sally G. Hoxton, William Hoxton, Mary S. Hoxton and Winslow S. Hoxton." Mrs. Hoxton was the sister of E. Colville Griffith, and both she and her husband were dead at the date of the will. E. Colville Griffith died after the date of the will, and before the death of the testatrix; and by the last clause of the will, which made provision for that event, the property given to E. Colville Griffith passed to his children, Frederick, Eleanor and David, who filed the bill in this case. The bill claimed, that the land in Westmoreland was to be divided per stirpes, the plaintiffs taking one moiety, and the children of Mrs. Hoxton, who were made defendants, taking the other moiety. The defendants contended, that the land was to be divided among the original parties per capita, the plaintiffs, among them, taking one-sixth part, and each of the five children of Mrs. Hoxton taking one-sixth part. The Circuit Court held, that the division should be made per capita, as contended by the defendants. The District Court reversed the decree of the Circuit Court, and held, that the division should be made per stirpes, as contended by the plaintiffs.

Where a bequest is made to several persons, in general terms indicating that they are to take equally as tenants in common, each individual will of course take the same share; in other words, the legatees will take per capita. The same rule applies where a bequest is to one who is living, and to the children of another who is dead, whatever may be the relations of the parties to each other, or however the statute of distributions might operate upon those relations in case of intestacy. Thus, where property is given "to my brother A, and to the children of my brother B," A takes a share only equal to that of each of the children of B. So where the gift is

578 to A's and B's *children, or to the children of A and the children of B., the children take as individuals, per capita. The substance of this rule of construction is, that, in the absence of explanation, the children in such a case are presumed to be referred to as individuals, and not as a class, and that the relations existing between the parties, and the operation which the statute would have upon those relations in case of intestacy, are not sufficient to

control this presumption. The general rule is well established, and has been fully recognized by the decisions of this court. *Brewer & ux. v. Opie*, 1 Call 212; *Crow v. Crow*, 1 Leigh 74; *McMasters v. McMasters' ex'ors*, 10 Gratt. 275.

But this rule is not inflexible, and it will yield to the cardinal rule of construction which requires that effect shall be given to the intention of the testator, to be collected from the whole will. If, therefore, an intention can be collected from the will that the children of the deceased parent are to take as a class, that intention will prevail. The general rule above referred to rests, indeed, upon a very slender foundation, and Jarman says that it "will yield to a very faint glimpse of a contrary intention in the context." 2 Jarman on Wills, Ed. 1861, 1862. "Thus," he adds, "the mere fact that the annual income, until the distribution of the capital, is applicable per stirpes, has been held to constitute a sufficient ground for presuming that a like principle was to govern the gift of the capital."

The foregoing remark of Jarman is illustrated and confirmed by cases in this country. In *Hamlett v. Hamlett's ex'or*, 12 Leigh 350, the testator gave the residue of his estate to be "equally divided among James Hamlett, Mary Jeffress, Patsy Wilson, Nancy Jeffress, Narcissa Jeffress, [all of whom were children of the testator,] the children of my son George Hamlett and Lucy his wife, the children of my daughter Elizabeth Arnett, the children of my son Bedford Hamlet, deceased, and the 579 children of my daughter Obedience."

The court held, that the property must be divided per stirpes, each family of grandchildren taking one-ninth part. In *Gilliam v. Underwood*, 3 Jones Eq. R. 100, the testator gave the residue of his estate to be "equally between my daughter Lucy, my son John's children, and my son Berry Underwood." The court held, that John's children took as a class one-third part of the residue, because in another part of the will they had a legacy given to them as a class. The court acted on a like ground in *Lockhart v. Lockhart*, 3 Jones Eq. R. 205. In *Alden v. Beall*, 11 Gill & John. R. 123, the testator gave the residue of his estate as follows: "The residue of my estate, real and personal, to be equally divided between the children of my sister Ann Latimer, and their heirs forever, and the children of my sister Penelope Beall, and their heirs forever." The court held, on the construction of this clause alone, without aid from the context, that the residue should be divided equally between the two families. In *Lackland's heirs v. Downing's ex'or*, 11 B. Mon. R. 32, the testator gave the residue of his estate in the following terms: "All the residue" "I desire may be equally divided after my death between my brother John Downing, my two sisters, Elizabeth Cannon and Nancy Gibson, and the children of sister Nelly Lackland, to them and their

children forever, it being my desire that the portions allotted to my brother John and my two sisters and the children of my deceased sister shall be made as nearly equal as possible, both in kind and amount." The court held, on the construction of this clause alone, that the residue was to be divided per stirpes; the children of Nelly Lackland taking together, as a class, one-fourth part. In *Fissel's Appeal*, 27 Pennsylv. R. 55, the testatrix directed her real and personal estate to be "equally divided between the children of my brother John, deceased, the children or heirs of my 580 sister Rosanna, *deceased, and the children or heirs of my sister Juliana, deceased, and my brother John, or his heirs or legal representatives." It was held, that the children referred to took per stirpes, and not per capita.

E. Colville Griffith and Mrs. Hoxton were related to the testatrix in the same degree. They had both lived with her during their minority, and, as alleged in the bill and admitted in the answer, "they were regarded by her with like affection." We naturally expect, therefore, to find that, in the disposition of her property, she has sought to effect equality between these equal objects of her affection, bestowing upon the children of Mrs. Hoxton what was intended for her. And I think that the will contains satisfactory evidence that, in the clause on which this case depends, the children of Mrs. Hoxton, though enumerated as individuals, were designed to take as a class, representing their mother.

The will provides, in the clause next to the last, that "should any of the children of Doctor and Eliza Hoxton die without heirs, the property left them shall be divided among the survivors." The next and last clause provides, that if the testatrix shall survive E. Colville Griffith, "the property left him shall be divided between his three children, Frederick, Eleanor and David." These clauses indicate clearly the purpose of the testatrix to distinguish the objects of her bounty into two classes—the children of her deceased niece being one class, and her nephew (or, in case of his death, his children,) being the other. Under the latter clause, on the death of E. Colville Griffith in the lifetime of the testatrix, his children, who are substituted in his place, are not to take equally with the Hoxtons, who stand in equal degree with them, but they are to divide among themselves the share of their father. They are treated as a class representing their father, and

taking among them what was intended for him, if he had *lived to take it. It is reasonable to presume that she intended to treat both families alike, and that she regarded the Hoxtons likewise as a class, taking what their mother would have taken if alive. All ambiguous expressions should be construed in conformity with this presumption.

By the former of the two clauses just quoted, the testatrix provides, in general

terms, for the death of any of the Hoxtons "without heirs." This provision seems to have had reference to the death of any of the members of this family in the lifetime of the testatrix, as the next provision has reference expressly to the death of E. Colville Griffith in her lifetime. If so, the effect of it is, that by the death of any of the Hoxtons in the lifetime of the testatrix, the share of E. Colville Griffith would not be increased; he would still take his share, whatever it was, and the surviving Hoxtons would take what was intended for that family. If equality between her nephew, on the one hand, and the family of her niece on the other, was the purpose of the testatrix, this provision was a natural and reasonable one, and preserved this equality. If individual equality between E. Colville Griffith and the several children of Mrs. Hoxton was the object, then this provision was unreasonable and unjust. It violated the rule of equality among the individuals, in case of the death of any of the Hoxtons, by giving the share of the deceased to the surviving Hoxtons, in exclusion of E. Colville Griffith.

Another clause of the will provides, that if a claim of the testatrix on the government for certain property destroyed should be recovered, it should be equally divided between E. Colville Griffith and the "surviving children" of Mrs. Hoxton. In the next preceding clause, the "children" of Mrs. Hoxton are spoken of in general terms, and are enumerated by name. The word "surviving" seems to have had reference to the time at which the claim should be recovered. If so, the provision is
582 consistent with the *rule of equality, if equality between classes or families was intended. If equality among individuals was intended, this provision is capricious and unjust, because it makes the share of E. Colville Griffith depend upon the number of the Hoxtons who may be surviving when the claim is recovered.

I am of opinion to affirm the decree of the District Court.

The other judges concurred in the opinion of Joynes, J.

Decree of the District Court affirmed.

583 *Wade & als. v. The City of Richmond.

Thomas & als. v. The Same.

April Term, 1868, Richmond.

1. *Statute—Extending Boundaries of Richmond City—Constitutional.*—The act, Sess. Acts 1866-67, p. 635, extending the boundaries of the city of Richmond, is not unconstitutional in any of its provisions.

*In Dinwiddie County v. Stuart, 28 Gratt. 549, the principal case and Harrison v. Holland, 3 Gratt. 247, are cited as authority for the proposition that not even an excision of a part of its territory and incorporation of a part of its inhabitants with another county or municipality destroys the identity of a county.

2. *Same—Same—Effect on Inhabitants of Annexed Territory.*—The act operates upon the municipal relations of the inhabitants of the territory annexed to the city, but in political elections they are still to vote as part of the county of Henrico.

3. *Same—Same—Jurisdiction of Courts as to Justice of Statute.*—The General Assembly having the authority to extend the boundaries of the city, the justice or expediency of it is not a question of which the courts can take jurisdiction.

4. *Same—Same—Constitutional.*—That the tax-payers of the county may have the burthen of taxation increased, or the creditors may have their security lessened by the reduction of the value of the subjects of taxation, or that the inhabitants in the annexed district may be subjected to heavier taxation, does not affect the constitutionality of the act.

The first of these cases is a bill for an injunction by William E. Wade and others, in which they allege that they are citizens, tax-payers, property-holders, and voters in the county of Henrico, beyond the proposed boundary of the city of Richmond; and that they are also creditors of the county. That the General Assembly, by an act passed on the 13th of February, 1867, entitled an act to extend and define the boundaries of the city of Richmond,
584 *propose to take from the county of Henrico and add to the city of Richmond a large portion of the territory, and about half the population and taxable wealth of the county of Henrico. That as tax-payers, property-holders and creditors of the county, they will be greatly injured by this act, by the increase of taxation which they will be required to pay, and the diminution of their security as creditors of the county.

They insist that the boundaries of the county of Henrico and the city of Richmond are fixed in the constitution of the State, and cannot be changed by law; and that the act of the 13th of February, 1867, is an assumption of power unauthorized by the constitution of the State, in derogation of the rights of the people, and therefore null and void. And they pray for an injunction to restrain the city of Richmond, its officers and agents, from carrying into effect the said act of Assembly, and that the act may be declared unconstitutional and void.

The second case is a bill by George W. Thomas and others residing in that part of the county proposed to be included within the city of Richmond, in which they allege that they will be subjected to heavier taxation in the city than they would be in the county. They insist that the act is unconstitutional and void, on the grounds stated in the first bill; and they pray for a similar injunction and relief.

The Circuit Court of the city of Rich-

*See principal case cited and approved in Slack v. Jacob, 8 W. Va. 639; Board of Education v. Board of Education, 30 W. Va. 434, 4 S. E. Rep. 640.

See generally, monographic note on "Municipal Corporations" appended to Danville v. Pace, 35 Gratt. 1.

mond overruled the motions for injunctions in the cases; and the plaintiffs thereupon applied to this court for appeals, which were allowed.

In this court it was agreed by the counsel in the causes, that the act took from the county of Henrico and added to the city of Richmond about fifteen hundred acres of territory, that had been already laid off, built up, and densely populated as suburbs of the city, and took within
585 *these limits a population of about fourteen thousand; and there was cut off from the city about one acre.

S. McRae, for the appellants.

The act of the General Assembly, passed the 13th day of February, 1867, entitled an act to extend and define the boundaries of the city of Richmond, the effect of which is to excise and annex a large part of the territory and population of Henrico to the city of Richmond, it is submitted, is unconstitutional.

1st. The constitutions of 1851 and 1864 specifically recognize and establish certain counties and cities as distinct constitutional divisions, and distribute and apportion representation to each. Art. 4, sect. 2. They are divisions fixed in the constitution as firmly as the House of Delegates or Senate. When the city of Richmond and county of Henrico were fixed by name as distinct constitutional divisions, their territory and boundaries as then existing, were also fixed. Name, territory and boundary are essential to the existence of a city or county. The name implies territory and boundary, and being fixed in and by the constitution, are permanent and unchangeable.

The constitution of 1851, 4th art., 2d sec., provides that the city of Richmond shall elect three delegates, and the county of Henrico shall elect one delegate. Here the boundary between Henrico and the city of Richmond is fixed; their territory separated, and separate and independent elections by separate and independent constituencies ordained. The same article, third section, provides that the city of Richmond shall be another district (Senatorial), and that the counties of Henrico and Hanover shall form another district (Senatorial), recognizing and establishing distinct communities, distinct political rights (elective and representative), and separate and distinct territory, on which these rights are to be enjoyed.

586 *Art. 6, sect. 2, makes Henrico a part of the sixth circuit (judicial), and the city of Richmond the seventh circuit (judicial). Here again we have the recognition of the city of Richmond and the county of Henrico as distinct territorial divisions.

Neither of these articles of the constitution can be operative unless Henrico and Richmond comprise separate and independent territories, inhabited by separate and independent populations. The 27th section

of the same article provides that each county shall be laid off into districts, as nearly equal as may be in territory and population. Under this section, the entire territory of Henrico is required to be laid off; but Richmond is not laid off as a part of this territory, because the city of Richmond and the county of Henrico are territorially separate and distinct. All land within the boundaries of Henrico must be part of its territory, and is required to be included in the county districts. All not included must be without its territorial limits. In this section, which relates specifically to territory, we have a clear warrant for the position that the county of Henrico and city of Richmond are territorially separate and distinct. What the constitution has separated, the law cannot unite. In the language of the Massachusetts judges, 6 Cush. p. 580, on the subject of change of boundaries, "the counties were made senatorial districts; the effect of which was to make the counties, with their then actual limits, permanent senatorial districts. That which is made permanent by the constitution cannot be changed by law." Henrico and the city of Richmond, by their then actual limits, having been made separate constitutional divisions for the election of delegates, and separate permanent senatorial districts, and separate individual districts and separate municipal districts, by parity of reasoning, their boundaries cannot be changed by law.

587 *Public corporations created and existing only by law, may be changed, and, if purely public, even destroyed by law. Thus all the counties, cities and towns of the State, not specifically mentioned, nor having a share of separate representation, in and by the constitution, may have their boundaries changed. They are subject to the law, being but creatures of the law. They have no place in the constitution; they have no political status; they exist only on the statute book; their organization is purely municipal. Their boundaries, as well as their names, are unknown to the constitution. They obliterate no boundary, and create no new one, for the county within which they may exist. Their vote is that of the constitutional county within which they may be. Thus the vote of Lynchburg is the vote of Campbell; the vote of Manchester is the vote of Chesterfield; the vote of Tucker is the vote of Randolph. Certain counties and the cities of Richmond, Norfolk and Petersburg, named in the constitution, and to which separate representation is apportioned, are not only constitutional counties and cities, but they are a part of the structure of the constitution itself; all other counties, cities and towns are public corporations, or quasi corporations, unknown to the constitution, creatures of the law only, and of course changeable by law.

Under the first constitution of Virginia, the counties were not named, and there was no apportionment. No county had a status in that instrument, fixing it in its structure,

distinguishing it from other counties, and imparting to it peculiar political and other rights. Name, territory and boundary were all the endowments of law, and could therefore be changed by law. Giving to each county two representatives fulfilled that constitution on the subject of representation, although the name and boundaries of each county in the State had been changed.

Loudoun and Warwick had equal shares 588 of representation, not as *Loudoun and Warwick, (for these names were unknown to the constitution), but as counties which the law could name, enlarge and diminish, at pleasure. But Loudoun and Warwick now have each a name, territory and boundary fixed in the constitution, which the law cannot change, because the constitution is paramount to the law. Thus, in some of the other States of the Union, where counties, cities and towns were mere civil divisions—the creatures of the law, and no part of the constitution—their boundaries were changed by law; but when by amendment they were fixed in the constitution by name, it was held their boundaries could no longer be changed by law. 30 Barb. pp. 365, 366; 2 Gray, p. 104; 6 Cush. 578.

However it may be held as to the separation of Richmond and Henrico by an absolute boundary fixed in the constitution, it will not be denied that they are separated politically, judicially and municipally, under the 3d, 4th and 6th articles of the constitution, as has already been shown; and the unconditional transfer of the territory, population and property of the county of Henrico to the city of Richmond, is a violation of the rights secured by these articles of the constitution. The mandates of the constitution must be fulfilled by Richmond and Henrico as existing at the adoption of the constitution; that is to say, with their territory and boundary as then existing.

The 3d article of the constitution authorizes every male citizen who has resided in the State two years, and in the county, city or town where he offers to vote twelve months, to vote. This is the most sacred of rights, of which the citizen cannot be deprived but by his consent, or by some voluntary act of his own. The voters in the annexed territory cannot vote in Richmond, because they have not resided there twelve months; they cannot vote in Henrico, because they no longer reside in that county. Thus a right conferred by the constitution, to be enjoyed at any 589 *and every instant of time, is destroyed by an act of Assembly. That an act of Assembly impairing, suspending, or destroying the right of voting, is unconstitutional, is admitted by all. 6 Cush. 578; 2 Gray 103, 105; 30 Barb. 365, 366.

The 4th article of the constitution provides that Henrico shall elect one delegate. Henrico, deprived of much of her territory and one-half of her population, is deprived of one-half of her elective and representative intelligence and strength. Henrico

and Hanover form a senatorial district. In this case Henrico is not only deprived of one-half of its elective and representative intelligence and strength, but its relation to Hanover as an elective and representative body is injuriously changed. The 6th article of the constitution makes Henrico a part of the sixth judicial circuit, and provides for the election of a judge by the voters therein. The same consequences ensue here as in the election of delegate and senator.

The 27th section, same article, provides that each county shall be laid off into districts as nearly equal as may be in territory and population, and that in each district there shall be elected by the voters thereof four justices of the peace, who shall reside in their respective districts, and hold their offices for the term of four years.

The 30th section, same article, provides that the voters of each county shall elect a Clerk of the County Court, Surveyor, Commonwealth's Attorney, Sheriff, &c., for certain terms. The 31st section provides that these officers, except the Attorneys, shall reside in the counties or districts for which they were respectively elected. Now if the county districts cannot embrace any part of the territory of the city of Richmond, the city of Richmond cannot embrace any part of the county districts of Henrico. Under these sections of the constitution, Richmond and Henrico are distinct and separate municipalities, as to territory, 590 *population, and elective representative rights. The annexed territory and population must constitutionally be either in Richmond or Henrico. If in Henrico, they cannot be comprised within the boundaries of the city of Richmond. The act of Assembly in question assumes to excise and annex to the city of Richmond at least fifteen hundred acres of land and fourteen thousand people, including a portion of all the magisterial districts, nearly one-half of the magistrates, the clerk, deputy clerk, and other county officers, in violation, it is submitted, of the 27th, 30th and 31st sections of the 6th article of the constitution.

2d. Representation is distributed and apportioned, by the 4th article of the constitution, amongst certain counties and cities by name. To the city of Richmond, the counties of Augusta and Rockingham each, three delegates are apportioned. To another class of counties, two delegates each are apportioned; to another class, one delegate each is apportioned; to another class, forming districts by the union of two or more counties, one delegate is apportioned. Apportionment was made to each county by its limits, as existing at the adoption of the constitution. The General Assembly is directed to re-apportion at certain periods; and has no other authority on the subject of apportionment. It has no power to dispropportion at any time. An act of Assembly apportioning representation, or re-apportioning it, at a time other than a decennial period, would be clearly uncon-

stitutional; an act of Assembly disproportioning representation, all will admit, would be unconstitutional; an act which, if done directly, is unconstitutional, is equally so if accomplished by indirection. *Kinney v. The City of Syracuse*, 30 Barb. R. 349. The annexation of any part of the territory and population of Henrico, much more the annexation of fifteen hundred acres of land and fourteen thousand people, disproportion⁵⁹¹ the existing apportionment, and alters the basis of the present apportionment, and of future re-apportionment. This could not be done directly by act of Assembly declaring such purpose and object, and cannot be done indirectly by change of boundaries. 30 Barb. R. 349. The apportionment made by the constitution establishes a proportionate representation. This proportion is destroyed by diminishing the constituency, while the representative or representatives remain as before; or by diminishing or enlarging the basis while the representation is unaltered. Re-apportionment is designed to correct the departure from a proportionate representation which time or accident may have produced. Excision and annexation, by change of boundaries, disproportion what the constitution has proportioned.

The power in question might be exercised so as to change the whole map of the State, and systematically disproportion the basis of representation. To Bath and Highland, together, is apportioned one delegate; to Augusta, three delegates. Annex three-fourths of the territory and population of Augusta to Bath, and Bath becomes the large and populous county, possessing three-fourths of the elements on which the representation of Augusta is based, and yet, with Highland, continues to have but one representative; Augusta, with three-fourths of her territory, population and property excinded, retains her three delegates. The case of Bath and Augusta is the case of every contiguous large and small county in the State, and the case of Richmond and every contiguous county. If the power is possessed at all, there is no limitation in the constitution on its exercise. Then any part, or the whole, of Henrico, may be excinded and annexed. In that case, are her delegates excinded and annexed? and if not, how can the territory, population and taxable wealth which they represent be annexed? If a part⁵⁹² of the county can *be excinded and annexed, what part will of right remain? A fourth, a half, an acre, or one man? Where does the constitution draw the line? In a similar case, Judge Bacon says: If twelve hundred acres of land and two hundred and fifty persons can be cut off from the city of Syracuse, and annexed to the city of Dewitt, why may not one-half or any other portion of the city be annexed? In constitutional questions, the inquiry is not what will probably be done, but what it is possible to do under the assumed power. 16 Gratt. 489; 30 Penn. R. 27. The act of Assembly, by its extended

boundary, annexes a small part of the city of Richmond to the county of Henrico. If the power exists, crowded streets, populous squares with spacious buildings; public and private, may be excinded from Richmond and annexed to Henrico. What becomes of her chartered boundary? Before 1849, the boundaries of counties in Massachusetts were changeable by law; an amendment of the constitution made these counties permanent senatorial districts. The judges then say: "The boundaries of the senatorial districts having been made permanent by the constitution, cannot be changed by law. Our constitutional counties and cities are not only made senatorial districts, and parts of districts, but they are made districts or divisions by the constitution for the election of delegates, senators, judges and county officers, and separate territorial divisions for municipal purposes. These being constitutional provisions, are necessarily permanent, and cannot be changed by law. Art. 3, § 1; Art. 4, §§ 2, 3, 5; Art. 6, §§ 2, 6, 27, 30, 31, Con. 1851; 30 Barb. R. 365, 366; 6 Cush. R. 575, 578, 580; 2 Gray's R. 104. The same judges say that where the boundaries of counties can constitutionally be changed, the law must provide that the annexed voters must vote in the county from which they were excinded; and if this cannot be done, or is not⁵⁹³ provided for by the Legislature, *the law will be null and void. The excinded voters of Henrico are not provided for in the act of Assembly in question; and the provision above indicated would violate the 3d article, 1st section of the constitution. The citizen must vote where he resides. If he resides in Richmond, he cannot vote in Henrico. Under the ruling of the above cases, the boundaries of Henrico cannot be changed. The counties and cities of the constitution are a part of its structure; they are the basis of the legislative department, and necessary to the existence of the General Assembly. They are the instruments through which the most valued constitutional rights of the people are exercised and secured.

The power to form new counties, recognized in the 34th section of the 3d article of the constitution, and the power to create new towns and cities, heretofore stated as legislative powers, may be thought to imply the power to change the boundaries of the counties and cities named in the constitution. No such result follows. The creation of a new county, or city, or town, has not the slightest effect on the boundary of the constitutional county or city from which they may be formed. The new county, city or town is a component part of the constitutional county within which they may be situated; their existence and boundaries are statutory, not fixed in and by the constitution, as the counties and cities named in the constitution are. A town or city incorporated within the boundary of Henrico would be a part of the county, its existence and boundary unknown to the constitution, and having no

effect on the boundary of Henrico as existing at the adoption of the constitution. All the cities and towns, not entitled to separate representation, vote as competent parts of the counties within which they are situated; and the new counties vote as competent parts of the counties from which they are formed. See acts of Assembly 1855, 1856, *p. 914. In a word, their creation and existence are consistent with the apportionment of representation, and the structure and mandates of the constitution. The excision of territory and population from Henrico, and annexation to Richmond, produces consequences altogether different. The effect is to increase the territory and population of Richmond, and to diminish the territory and population of Henrico, thereby disarranging the apportionment made by the 4th article of the constitution.

This difficulty cannot be obviated by leaving the voters, for political purposes, in the county of Henrico. When the law went into operation, the annexed territory instantly became a part of the city of Richmond, and the voters therein residents of the city; and by virtue of such residence, and the 3d article of the constitution, voters of the city. The voter must not only vote in the county or city in which he resides, but must also vote in the ward in which he resides. The voter must reside either in Richmond or Henrico; if in Henrico, then he is not amenable to the municipal jurisdiction of Richmond; if in Richmond, then he must vote in Richmond, and nowhere else. Art. 3, §§ 1, 2, constitution. Our acts of Assembly, annexing portions of counties to others, incorporates the excised population and territory with the counties to which they are annexed, and thus merges territory and population for all purposes; and herein is a marked difference in our acts of Assembly between annexation of territory and the formation of new counties. In the case of the new county, town or city, there is no merger and no effect on the boundary of the county as fixed in the constitution at the adoption of that instrument. This was well understood by the Legislature, as shown by the acts of Assembly referred to.

But an act of Assembly annexing a portion of the territory and population of Henrico to the city of Richmond, and merging the same in the city for all purposes, 595 violates *the apportionment of representation and other provisions of the 4th article of the constitution. Such an act of Assembly, requiring the voters in the annexed territory to vote in the county of Henrico after annexation to the city of Richmond, would be in conflict with the 3d article 1st and 2d sections of the constitution, which requires the voter to vote in the county or city in which he may reside at the time of offering to vote.

And if such last mentioned act were otherwise constitutional, according to the authorities heretofore cited, the failure to insert in the act of Assembly a provision

to secure to the excised people their constitutional rights, will make the act unconstitutional. Silence is as unconstitutional as an open invasion of the constitution. *Kinney v. City of Syracuse*, 30 Barb. R. 349. In all three of these aspects, the act of Assembly in question is unconstitutional.

The proceedings of the convention in relation to the concluding clause of the 34th section of the 4th article of the constitution furnish the fullest evidence that the manner of voting required by that clause does not apply to voters residing on annexed territory. That clause requires the voters of any new county, "in all general elections," to vote as a part of the constitutional county from which it is formed. It was proposed to apply the same requirement to the annexation of part of one county to another, and negatived, showing conclusively that the effect of annexation, if constitutional, is to merge the annexed territory and voters, municipally and politically, in the city of Richmond. We have already shown that such merger is in conflict with the 4th article 2d section of the constitution. (See Legislative Report of Convention, pp. 2, 4.) And the conclusion seems inevitable, that the absence of this requirement in relation to voters, on annexed territory, results from the absence of legislative power to annex.

596 *If the power of annexation existed, the reasons for such requirement as to voting, and for limitations on the exercise of such power, applies with more force to the annexation of territory than to the formation of new counties. The absence of such wholesome provisions argues the absence of the power. The act of Assembly in question, extending the boundary of the city of Richmond, is necessarily an act of annexation. Richmond and Henrico are distinct municipalities, separated in the constitution by their boundaries as existing at the adoption of the constitution. They have coterminous boundaries. The extension of the boundary of Richmond over any part of the county of Henrico excises such part of Henrico, and annexes it to the city of Richmond, with the inhabitants thereon, as effectually as if the word annex had been used.

Previous acts of Assembly, annexing parts of one county to another, effected their object by extending the boundary of one county over another. Acts '55-6, p. 97, several cases. In all such cases the territory and inhabitants excised, with the political rights of the latter, have been considered as merged in the county to which they have been annexed. The act of Assembly in question bears on its face such object and purpose. If a merger of the annexed territory and inhabitants, municipally and politically, had not been intended, (with previous acts of Assembly before it on this subject,) the Legislature would have felt itself constrained to guard its own act against such an inevitable effect. This they have not done. It is against reason

and authority to imply any such purpose. 30 Barb. R. 349.

It is contrary to the recognized rule for the construction of written constitutions and statutes to expound a law in opposition to its plain meaning, in order to obviate its unconstitutionality. Judge Shaw says:

"The act within itself should make provision for all the changes which it
597 *seeks to effect in the rights and conditions of the inhabitants; otherwise, the act is unconstitutional." Judge Bacon similiter, supra, 30 Barb. R. 349. The implied prohibitions of the constitution, forbidding the change of the boundaries of the constitutional counties and cities, and certain limitations being imposed on the formation of new counties, power is given in the 34th section, 4th article of the constitution, under certain conditions, to divide a county. Under these limitations and conditions, no new county can be formed from Henrico, nor can it be divided. Can it be excised at the pleasure of the General Assembly, and annexed to Richmond? Excision is a mode of division which may lead to the destruction of a county; this is not the division intended in the constitution. It would be inconsistent in the constitution to give a qualified and conditional power to divide a county, and leave in the same instrument a power to excise and divide without qualification or condition. But the county of Henrico, by the foregoing clause and the necessary implication arising under it, is protected from any division of her territory. And the spirit and purpose of this clause protect from excision and annexation, which is the most enlarged use of the power of division.

The county of Campbell is entitled to two representatives. The 4th article, 2d section, last clause, provides that the General Assembly shall have power, upon application of a majority of the voters of the county of Campbell, to provide that instead of the two delegates to be elected by the said county, the town of Lynchburg shall elect one delegate, and the residue of the county of Campbell shall elect one delegate. The Legislature, then, had no power to make this arrangement without specific authority, although under this arrangement the county of Campbell still possessed her two representatives (Lynchburg being a component part of the county of Campbell),

598 *and such arrangement not affecting in the slightest degree the distribution and apportionment of representation between the counties and cities named in the constitution. If the county of Henrico contained a town numbering about half of her population, the Legislature would have no authority to transfer half of the representation, or one delegate, (Henrico not having two delegates), to such town; much less could the town and inhabitants be transferred to the city of Richmond, which possesses its apportioned share of representation. Nor could such town, or any part of the county, be transferred municipally

to Richmond, leaving the inhabitants of the annexed territory to exercise their political rights in Henrico. As before said, residence follows the municipality. After annexation, the voter resides in Richmond, and must vote there, or nowhere else. The case of Campbell shows that the vote of Henrico cannot be severed. It is fair to infer that the voters cannot be severed—some voting in Henrico and some in Richmond—a county and city having separate representation. This case also shows that the implied prohibition of the constitution restrains the Legislature in a case affecting the rights of a county in a much less degree than the case at bar affects the rights of Henrico. It also shows that when the voters of a county are authorized by the constitution to be separated, the voters of the entire county should be consulted. Neither the voters of Henrico nor Richmond have ever been consulted in the form of a vote, but Henrico has constantly protested against this change of boundary.

Taxes are the food of counties, as a necessary part of the government. The destruction or diminution of the resources of taxation destroys, or tends to destroy, the county or city within which they may be situated. Every citizen, as liable to pay his share of the public tax, State and county, is

interested in every act and question
599 which *diminishes the resources of taxation, or in any manner affects his interests as a tax-payer. 30 Penn. R. 24, 35. Every citizen is interested in his fellow-citizen, as under obligation to share the burthen of taxation. Vattel, B. 1, ch. 20. The excision from Henrico of fifteen hundred acres of land and fourteen thousand people, with all their taxable wealth, seriously affects the tax-payers who remain in Henrico. The tax-payers in the annexed territory are injuriously affected by forcible removal into a foreign jurisdiction, and the imposition of heavier taxes than those imposed in Henrico. These consequences can never be justly and constitutionally produced, unless by voluntary removal. Voluntary residence and removal are attributes of personal liberty, and secured by the first article of the Bill of Rights. If annexation in any way is constitutional, provision must certainly be made by the law enacting it, for the protection of these rights. If otherwise constitutional, the law should make provision to secure the rights of the county to all public property included within the annexed territory.

This act of Assembly impairs the security of every county creditor's debt; and therefore violates that provision of the constitution of the State and the United States which forbids the impairing the obligation of contracts. 30 Penn. R. 36. That this is a judicial question, reason and authority declare. 30 Penn. R. 24; Kinney v. City of Syracuse, supra; Crenshaw v. Slate River Co., 6 Rand. 645.

The people and property-holders in the annexed territory cannot be held responsible for the city debt existing at the time of

annexation, they not incurring such obligation by voluntary removal; yet the law makes them so.

Daniel, for the appellee.

The boundaries of the city of Richmond were fixed by a committee before the year 1805; and these boundaries had continued unchanged until 1867, when the act which is the subject of consideration in these cases, was passed. In the meantime, a large population had grown up around the city, enjoying its benefits without its burthens; and the General Assembly looking at the condition of things as it existed, deemed it just and expedient to extend the boundaries of the city, so as to include that population; and the question now before this court is the constitutionality of this law.

The first thing to be done in order to ascertain whether this act is unconstitutional, is to look at its provisions. It will be found in the sessions acts of 1866-67, p. 635. The first and second sections merely extend the limits of the city; the third section exempts the persons and property within the district added to the city from liability for the then existing city debt for five years; and the fourth section provides that the taxes levied upon persons and property within this district shall for three years be applied to the improvement, protection and police of the district so annexed; the fifth and sixth sections only refer to the collection of unpaid dues, and the county levy of the year; and the seventh section provides for the representation of the inhabitants of this district in the Council of the city. In all the act there is not a word about voting, or the political relations of this annexed district; but the act simply extends over it the corporate franchises of the city; and this is a power exercised ab urbe condita unchallenged until now.

A subject like this purely political, affecting the General Assembly itself, which has been acted on under all constitutions, and through every period of our history, both as a colony and a State, has obtained something like judicial construction. Even in ordinary cases the courts will be slow to pronounce an act of the legislative department of the government unconstitutional. *Fletcher v. Peck*, 6 Cranch's R. 87. And how much more cautious will they be in such a case as this, which involves the constitution of a co-ordinate department of the government; if, indeed, it may not be considered as beyond the jurisdiction of judicial tribunals.

It is only necessary to examine this act to see that it does not attempt to disturb any political relations. As to voters and voting, it is perfectly silent; and it has effected no change in this respect, unless it is a legal constitutional sequitur from what it does. What then is the complaint? It is said it was against the consent of the people of Henrico, and the district annexed. Does the validity of a law depend upon the consent of the people of a county, or of a

small part of a county? If it does, then what law in the statute book is valid? How many of the acts found there were passed by a unanimous vote?

But it is said that it violates certain mandates of the constitution; that when the city of Richmond and the county of Henrico were put into the constitution, they were fixed beyond the power of change, either as to names or boundaries. If the counsel for the appellants is correct, there is no power that can alter, by a hair's breadth, the line which divides the city and the county, though it may be the wish of everybody that the change should be made. And yet it has been the practice of the Legislature, from the year in which the colony became a State, and even before that day, to make these changes. And this restriction upon a power which has been at all times recognized, and at all times acted upon, is to be effected not by any express prohibition, not even by any provision of the constitution having reference to the subject, but is to be implied from provisions relating to entirely different subjects, and having entirely different objects in view. Such a conclusion is at war with every sound principle of construction; and is expressly condemned by the Court of Appeals in the case of the County Levy, 5 Call 139.

The counsel for the appellants insists that a strict rule of construction is to be applied to the constitution, both to its grants and its prohibitions. Apply the rule, and it will scarcely effect his object. The State constitutions are not grants of power, but restrictions upon power. The State governments have all the political power not taken from them by the constitution of the State, or of the United States. The constitution of the United States does not affect this question; and it certainly is a sound rule that to restrict a power which has existed and has been acted on from the foundation of the government, the intention to do so must be clearly expressed.

The constitution does put a restriction on the power to divide counties. To the extent of that restriction the power is now taken away; but within it the power exists, and has been frequently exercised; not by virtue of a grant of the power, but because of its previous existence. Now the power to change county lines, and to establish cities and towns, and extend their limits, has always existed, and the constitution puts no restriction upon that power. If it was intended to take away this power from the General Assembly, or to restrict it, would it not have been done expressly, as was done in relation to the formation of counties.

But it is said that the cities and counties to which representation has been given by the constitution, constitutes them an essential part of the fabric of government; and they must remain in all respects of name and boundary as they then existed; and this, it is said, distinguishes the present constitution from its predecessors.

It is only necessary to look at a map of

the State to be satisfied that representation was not based upon territory. It is only necessary to examine the census of 603 1850, to be *satisfied that it was not based upon population; and it is only necessary to examine the returns in the Auditor's office, to be convinced that it was not based upon taxation. And it is most obvious that the representation was distributed among the cities and counties, because we had always been accustomed to it, and it was most convenient to be done in that way; and it was distributed not with reference to any precise boundaries of the cities or counties, or to their population or taxation, but with the purpose to give a fair representation to the different sections of the State.

If there is any ground for the assumption, that under the constitution of 1851 and 1864 the boundaries of the counties are unchangeable, it equally applies to all the previous constitutions. The first provided generally for county representation, and gave to West Augusta two delegates. When that constitution was adopted, the boundaries of West Augusta were as certainly defined as were those of Henrico in 1851 or 1864; and yet forty counties or more were carved out of West Augusta, on each occasion changing its boundaries; and still it was West Augusta, until it became simply Augusta. By the constitution of 1831, the State was divided into four districts, and the representation apportioned among these districts; and these distributed among the counties and cities of the districts respectively—to each county a certain number of delegates. And although there was a provision for representation when a new county was formed, nothing is said about changing the boundary lines of counties; and yet there were numerous instances of such changes between 1831 and 1851. And since the adoption of the constitution of 1851, there have been some six or eight instances of the kind; nobody ever doubting the power, or supposing that such changes violated the mandates of the constitution.

604 *This idea of the sanctity of county boundaries seems to be based upon the notion that a county loses its identity by the change of its boundaries. But a county is no such rickety bantling. The State of Virginia, as a political entity, of April 17th, 1861, was the State of Virginia of the 4th of July, 1776; though she had, in the meantime, given the northwest to the Union, and had established her daughter Kentucky as an independent State. North Carolina is North Carolina still, though she no longer embraces Tennessee within her borders; and Alabama and Mississippi have not been brought into existence at the expense of the political being of their mother Georgia; Maine is Maine still, though she lost a part of her territory under the Ashburton treaty. And so it is with counties. Kanawha, as a political entity, is Kanawha still, though a dozen counties have been taken off from her; and certainly Tazewell, and Giles, and Randolph, and Preston, and

Monroe, and Craig have none of them lost their being because some change has been made in their boundary lines. This question has been strikingly illustrated in the case of *The Harrison Justices v. Holland*, 3 Gratt. 247. The General Assembly passed an act requiring the owners of mill dams on Simpson's creek, in the county of Harrison, to put sluices in their dams, for the benefit of navigation; and providing that, when the work was done, the county court of Harrison should lay a levy and pay the expenses incurred by the different owners of the dams. Before the work was completed, two counties had been taken off from Harrison. And yet the court held that the county of Harrison was still the county of Harrison, and must lay the levy and pay the expenses.

The counsel for the appellants has great apprehensions of the abuse of this power; and argues, from the possibility of its abuse, against its existence. The same argument may apply to all other 605 powers. The power of taxation *may be greatly abused; the taxation by license has been most grossly abused, as may be seen by turning to the tax laws of 1852, and of subsequent date; and yet nobody has ventured to question their constitutionality. The reply to all such arguments is, that free institutions are based upon the axiom of the capacity of man for self-government; and that rests upon his intelligence and virtue. If these are not sufficient to direct the government aright, and to restrain it from the perpetration of wrong, then the whole system is a failure, and we must resort to a master to protect us from ourselves.

As to the cases which have been cited by the counsel for the appellants, from Massachusetts and New York, an examination of them will show that they are based upon the peculiar provisions of the constitutions of these States, and are wholly inapplicable in Virginia. And if this were not so, then they are utterly inconsistent with the principles which have been recognized and acted on in Virginia during the whole period of our political existence. But even these cases are authority, if authority were wanting, for every thing that has been done by the act now under consideration; and fully justify the addition of the territory and people of the annexed district to the city of Richmond for all municipal purposes. And I will add, in conclusion, what I should have said before, that the mandates of the constitution, on which the counsel for the appellants relies, all of them, have reference to the political and judicial departments of the government, and can in no wise apply to restrain the legislative control over the counties and cities in their municipal concerns.

RIVES, J. These cases present for consideration, in two aspects, the constitutionality of the act of Assembly, passed 13th February, 1867, extending the limits of the city of Richmond. In the first, the

606 plaintiffs in error, as residents, *voters, tax-payers and property-holders in the county of Henrico, and creditors of the same, complain that this act violates their constitutional rights in these several capacities by the withdrawal of population and the resources of taxation from the county, the disturbance of their rights of representation, the augmentation of their county levies, and the diminution of county receipts. In the second, the plaintiffs in error are within the annexed territory, and as such object to the competency of the Assembly, by this act, to disturb their electoral privileges and relations, and to subject them to the increased burdens of the city government.

It is agreed by the counsel here, that the effect of this act is to annex to the city about fifteen hundred acres of territory that had been already laid off, built up and densely populated as suburbs of the city, and to take within these new limits a population of about fourteen thousand. The new boundary also cuts off from the city and adds to the county about one acre. There was no vote taken at any time in these separate communities upon the question of annexation; so that, from all that appears in this case, it may be assumed as done in invitoe. These, therefore, are the principal and material results of this act of Assembly, and the facts of this case.

The act, the constitutionality of which is questioned in these cases, was passed February 13, 1867, and is entitled "an act to extend and define the boundaries of the city of Richmond." Sess. Acts 1866-7, p. 635. The first and second sections prescribe the new boundaries of the city, as extended, without any mention of the parts of Henrico thereby annexed to the city, or of the small part excised from the city and added to the county. For such facts, as already stated, we have the authority only of the agreed statement of the counsel here. The third section exempts the inhabitants of the annexed territory for the period 607 of five years from liability for the anterior city debt, or its interest; the fourth appropriates the taxes of such inhabitants, for three years, to the improvement, protection and police of their district; the fifth empowers the sheriff and other collectors of the county of Henrico to collect public dues or officers' fees unpaid at the commencement of the act; the sixth provides for the collection by the authorities of Henrico county, within the annexed territory, of the county levy for the year 1867, and exempts the persons and property therein from city taxes for that year; the seventh directs the City Council to provide for the representation in that body of the inhabitants thus added to the city; finally, the eighth section, which is the commencing clause of the act, gives it effect from the 1st July, 1867. This is literally the whole of the act.

The questions growing out of it, now presented for our consideration, may be resolved into three classes: first, those

affecting the political state of the inhabitants of the county transferred to the city; secondly, the allegations of permanency and unchangeableness of the counties and cities named in the constitution; and thirdly, those relating to the power of the Assembly, by any process of annexation, to render the citizen liable to other and greater taxes than those incident to the local administration under which, it is assumed, he was permanently placed by the constitution. Great latitude has been allowed to the discussion of these questions; the counsel for the plaintiff in error has been twice heard at great length; and his views pressed with an earnestness that attested the strength of his convictions. We are also told that the same arguments were addressed to both branches of the General Assembly; so that this act was not passed without controversy, nor without the fullest consideration of its merits. The magnitude of the interests involved, the nature of the rights affected, and the natural excite-

608 ment *of interested speculations on the subject, have imposed upon us the duties of careful deliberation and patient investigation. If we do not experience the difficulties and doubts that have been expressed upon this subject, it does not arise from inattention to the arguments adduced, or the authorities cited. We have given to these full consideration. We do not propose to review them at length, or in detail; but a concise statement of the results at which we have arrived, and our reasons therefor, will suffice to show that they have not been pretermitted in our examination of these cases.

1. Our first enquiry is into the effect of this act upon the right of voting and of representation pertaining under the constitution to the inhabitants of the annexed territory. It has been seen that the act is wholly silent upon this subject. If, therefore, their rights and duties in this respect are at all disturbed, it is due to this silence, and not to any enactment of the law. But can such an effect legitimately ensue from such a cause? We find opposed to it, the practice of the General Assembly—see note to Code of 1860, p. 39, where instances are given, in the formation of new counties under the constitution of 1851, of acts failing to prescribe how the people should vote; and where, as a consequence thereof, they were left to vote with the counties from which they were taken. If it be conceded, as perhaps it ought to be, that voting and representation are rights territorially ordained and adjusted by the constitution, and as such, cannot be altered by the Assembly, it would be a violent presumption to infer from the silence of the act, that it designed to interfere with these rights. The reasonable inference is directly contrary. They were left where the constitution placed them; there was no necessity to indicate by law, upon such an event, where the people were to vote, or how they were to be represented. The constitution was 609 the only *rule upon that head; and

however or wherever the boundaries of the city might be extended, the citizens of Henrico on the one hand, and of Richmond on the other, were to vote and to be represented as the constitution appointed. Instead of making, as we are plainly required to do, all reasonable presumptions and fair inferences to sustain the constitutionality of a law, we should disregard the obvious import of the act, and the respect we owe a co-ordinate branch of the government, by attributing to this silence an implied direction, in derogation of the constitution, to vote and be represented along with the new communities thus created. A decent respect for the Assembly, that passed this act upon full advisement, forbids us to suppose that they thereby intended to incorporate with the city and county respectively the added inhabitants, for the purposes of voting and representation, as well as municipal government. The latter was the object of the law; the former, apart from it and beyond it. What reason can be given that the political status of these citizens should not remain the same after as before the act? True, their municipal government was changed; citizens of Henrico ceased to be such, and became citizens of Richmond to that end alone, and vice versa; but constitutional limits still remained for the exercise of constitutional rights, and the enjoyment of constitutional privileges. If it could be said that this act did anything to obstruct these rights, or in any way render them impracticable, the case would be different; but inasmuch as these people can, without difficulty or uncertainty, vote and be represented as the constitution ordains, it is fair to say that their rights in this respect are not disturbed by this act, but, as in other cases, remain the same. I cannot believe that this act would have been assailed in this particular, if it were not for the authority of adjudged cases in Massachusetts and New York, that are earnestly
610 claimed to be decisive upon *this point. Accustomed, as we are, to pay great respect to the decisions of courts of sister States, we of course incur the obligation of making proper discriminations, and avoiding the too common danger of a wrong application of the rulings. Keeping in view this obvious duty, let us first examine the case of Warren and others v. The Mayor and Aldermen of Charlestown, 2 Gray's R. 84. In this case, the act for the annexation of Charlestown to Boston was held to be unconstitutional, because it undertook to erect the territory of Charlestown until the next decennial census, into a representative district, which is neither a town nor a city, and contains no adequate provisions to secure to the inhabitants of Charlestown their rights to elect representatives and senators in the general court and representatives in Congress. This act, while it merged the city of Charlestown into the city of Boston, purported to reserve the electoral rights of the former, as if the law had not been passed; but this reservation

was alleged to be futile, because no provision was or could be made under the constitution to give it validity. Chief Justice Shaw, in his opinion, p. 99, stated the principal ground on which the constitutionality of the act was assailed, to be "that the main scope and object of the act is to annex the city of Charlestown, with its territory, property and inhabitants, to the city of Boston; and to annul the charter of the city of Charlestown; whereas Boston and Charlestown are now separate municipal corporations, constitute several representative districts for the election of separate representatives to the general court, belong to distinct counties, constitute parts of distinct representative districts for the choice of representatives in the Congress of the United States, and yet no adequate provision is made, in the act in question, for the exercise and security of the political and constitutional rights of the citizens of Charlestown, after
611 the merger, which, by *the act, is to take effect immediately on the issue and publication of the certificate of the Secretary of the Commonwealth that the act has been accepted." This objection was sustained, and for reasons peculiar to Massachusetts, and inapplicable to us. They were predicated of the peculiar provisions of the Massachusetts constitution upon the subject of representation. Representation was declared to be a corporate right attached to the town as a corporation, and not to any inhabitants or territory, and can only be exercised in a corporate capacity. 7 Mass. R. 526; 15 Mass. R. 537; and 3 Pick. R. 519. To this corporate right of representation was annexed the corporate privilege of determining whether the town will send any, and how many representatives. Under the constitution, the representative must be an inhabitant of the town for which he is chosen; the voter must vote in the town within which he resides; the town may be fined for neglect to send representatives, &c., &c. All these requirements of the constitution, it will be seen, were distinctly contravened by the annihilation of the city of Charlestown, and its merger in the city of Boston. The inhabitants of the city of Boston could not decide for the extinct city of Charlestown, how many representatives the latter should send to the general court; nor be fined for neglect of the latter to send any; nor could it be held that a resident of Boston was a voter in Charlestown, or eligible as a representative therefor. It seems to me, therefore, to have been properly ruled in this case, that while the rights of voting and representation were nominally reserved as they formerly stood, they were in truth abrogated, or, at least, incapable of being enforced according to the constitution. The opinion of the Judges, 6 Cush. R. 578, was distinctly approved, whereby it was declared competent by the Legislature to change the boundaries of towns for
612 general municipal *purposes, provided the territory thus set off from one

town to another, or the different portions of territory of which any new town was composed, should, by proper provisions in the act, until the next decennial census and apportionment of representatives, be and remain a part of the town from which they were respectively taken, for the purpose of electing representatives.

A further objection to the constitutionality of the act arose from its failure to provide any means by which the inhabitants of Charlestown, after the annexation, could participate at all in the election of representatives to Congress. Charlestown was in District No. 7, and the city of Boston divided, with six wards in one district, and six in another. The difficulty attributable to this failure or silence of the law is thus stated by Chief Justice Shaw, p. 105: "After the annexation, the inhabitants of the territory, now Charlestown, although it might still be considered as part of District No. 7, would have no right and no power to vote in that district, because the town of Charlestown, as an organized body, with its officers, would no longer exist to call meetings and receive and certify votes; and no authority is conferred on the mayor and aldermen of Boston, or any other officer, to perform these duties. They could not vote with Boston, because Boston, as a municipal corporation, does not form a representative district, and its twelve wards are distributed and appropriated in other districts. No provision is made for the uniting of the two Charlestown wards with any corporation or organized body for electing members of Congress; the inhabitants, therefore, for the time being, and for an indefinite term of time, would in this respect be wholly disfranchised. It is no answer to say, that this is a defect which may be amended by the Legislature; it would depend wholly on the will of a future Legislature whether to
613 *amend it or not, whereas the act within itself should make provisions for all the changes which it effects in the rights and condition of the inhabitants."

The case of *Kinney v. City of Syracuse*, 30 Barb. R. 349, is, in like manner, founded on a special provision of the constitution of New York, declaring that the Assembly districts, when once fixed and determined by the Board of Supervisors, shall remain unaltered until the next decennial enumeration. In consequence thereof, it was held, that the annexation of a part of the city of Syracuse to the adjoining town of Dewitt, whereby two Assembly districts were altered without any provision being made in respect to the political status of the inhabitants of the excised and annexed territory, or defining their rights in reference to the Assembly districts, or the manner in which they should participate in the election of representatives from the several districts, was unconstitutional and void. Judge Bacon, in delivering the opinion of the court, admitted that the power to create towns or to change their boundaries is legislative in its character, and, irrespective

of any provision which would control or circumscribe it, must rest in the discretion of the Legislature as to the time and manner of its exercise; but held that this power was, in this instance, restricted by the precise constitutional provision already quoted.

I have thus stated at some length the grounds and principles of these decisions, that it might be apparent how inapplicable they are to the case at bar. The cases are wholly dissimilar. The Massachusetts case, which was the leading one, rests on the practical inadequacy of the provisions made by the law for the fulfilment of the constitutional rights nominally saved by it, and its total failure to secure the means or appoint the mode of electing representatives to Congress in the districts thus confounded; and the New York case on
614 an express prohibition of the "constitution. But no such difficulties, obstructions or prohibitions exist here. It cannot be said, that the voters of Henrico are prevented by this act of annexation from participating in the same elections, and having the same rights of representation as appertained to them before. The silence of the act is as potential to leave them in possession of these rights as a special and express enactment that it was not thereby designed to change the constitutional arrangements for voting, representation and courts. Had such an express enactment been made in this statute, no exception, I presume, would have been made to its constitutionality on this score; but, I confidently submit, its silence is of equivalent import and force, because the inference is irresistible, that these rights, not being amenable to legislation, were left to exist under the constitution as they did, more especially as under our polity no new provisions of law were required to meet and adjust these changes of boundaries and municipalities. But does not the history of the times furnish an explanation and excuse for the silence of the act in this respect? The State had not as yet been recognized by the authorities of the United States since the overthrow of the Confederacy, to which it had attached itself. A general expectation existed of the necessity of a speedy change of its constitution; and before the passage of this act, the agitation commenced in Congress, which resulted in the passage of the act of Congress of March 2, 1867, 'to provide for the more efficient government of the rebel States.' This act proceeded upon the recital that "no legal governments" existed in these States, Virginia included, and as a means of "preserving peace and good order in said States until loyal and republican State governments can be legally established," erected them into military districts, and subordinated the existing governments to military authority. The fifth section of this
615 act *contemplated the formation of new constitutions for these States, and ordained the mode and conditions of framing and ratifying them. The Gov-

error of this State immediately communicated this act to the Assembly, which, after the expiration of its constitutional term, had just been recalled, and urged them to provide for the call of a convention in conformity therewith. A bill to this end passed the Senate, but its further progress was arrested by the act of Congress of the 23d March, 1867, which, by establishing all the agencies necessary to the call of this convention under the superintendence and management of the military commanders, wholly superseded the functions of such a bill. From this contemporaneous history, it is reasonable to infer that the General Assembly then regarded the existing government of the State as provisional and temporary, and did not recognize (as it otherwise might have done under a greater prospect of permanency) the necessity or propriety of making express provision for the short period preceding a new organization of the State. The absence, therefore, of these provisions is sufficiently accounted for by the remarkable circumstances under which the Assembly was legislating; and it seems to me to militate against the deference we are accustomed to pay to our law-makers, to construe such an omission, under such circumstances, into a violation of their constitutional obligations. I conclude, therefore, that this first and most serious constitutional objection is not tenable.

II. We are next to consider, whether the counties and cities of the Commonwealth, as is strenuously contended, are such component and structural parts of the body politic as to be incapable of alteration for municipal purposes by the General Assembly? This remarkable attribute of permanency is predicated chiefly, if not solely, of the fact that they are named in the constitution, and thereby so *incorporated, as it is urged, in its fabric as to be incapable of legislative change in name or boundaries. The statement of this pretension would seem to be sufficient to mark its extravagance, if not to carry with it its own refutation. The counsel who advanced it was confronted by his own authorities (cited, however, for a different purpose), from 6 Cush. 575, 578; 2 Gray 84, and 30 Barb. 349. These cases conceded an inherent legislative power to change, for municipal purposes, the boundaries of towns, either by the erection of new ones out of parts of others, or by setting off to one portions of another; but the main point of them consisted in this, namely, that such changes could not be made so as to affect the constitutional rights of suffrage and representation by rendering their observance or enforcement impracticable. The principle is freely admitted by counsel for the appellants, that the plenary grant of legislative power embraces this control over the division and limits of counties, unless, indeed, the mention of them in the constitution so made them parts thereof as to make their continued and unchangeable existence vitally necessary to its integrity.

Let us, therefore, examine the constitution to see how and for what purpose the counties and cities are named therein, and what foundation exists for the proposition that they are integral parts of the governmental fabric, and therefore as permanent and unchangeable as the constitution itself. In the fourth article, the legislative power of the Commonwealth is vested in a General Assembly, consisting of a Senate and House of Delegates. There is no limitation upon this grant; and it will be important to another part of our inquiry to remember that it is ample enough to carry with it such legislative control over persons and property, for the purposes of general and local government, as is asserted and exercised by the sovereignty of a State. The

third section of this article simply declares, that the *House of Delegates shall be elected biennially by the voters of the cities of Norfolk and Richmond, and the several counties on the fourth Thursday in May. The phrase, "distributed and apportioned," employed in the correlative passage of the constitution of 1851 is omitted here; but I presume there is no significance in this, for the representatives are not the less clearly "distributed and apportioned" thereby among the said cities and counties. The fourth section arranges the counties and cities into classes: first, those to elect three delegates; secondly, those to elect two delegates; thirdly, those to elect one delegate; and fourthly, those to compose election districts, and as such to elect one delegate. Again, these counties and cities appear in the fifth section as arranged in thirty-four districts for the election of senators, wherein the county of Henrico, with Louisa and Hanover, forms the sixth district, and the city of Richmond the tenth. The sixth section directs in the year 1870, and in every tenth year thereafter, a re-apportionment of representation among the cities and counties, from "an enumeration of the inhabitants of the State." In article six, respecting the judiciary department, the cities and counties are again enumerated and arranged into judicial circuits and districts.

These are the only instances in which the counties and cities are enumerated in the constitution; and the enquiry recurs, whether this enumeration can have the magical effect of exempting them from all legislative change. To determine this, we must settle in our minds the purpose for which these existing territorial divisions were referred to, and the sense in which they were employed by the constitution. Unlike the towns of Massachusetts, our counties possess no corporate right of representation; their well known bounds and population afforded to the framers of the constitution the readiest, if not the only, mode of *designating the apportionment of representation in the two Houses of Assembly, and appointing the jurisdiction of circuit and district courts. Nor was it a representation of territory;

but rather of the persons and property comprised in these local departments. If this were not manifest from the republican theory of representation, it would be inferable from requiring future apportionments to proceed from "an enumeration of the inhabitants." It is presumed that the framers of the constitution, having before them the census returns of the various counties and cities, could not, without the greatest inconvenience and a resort to a future cumbrous machinery, ignore these divisions, and fail to adopt them as the basis for the construction of the legislative and judicial departments. That they did so, resulted, in my view, from convenience and the fitness of things, rather than from the imputed design to fix these divisions unalterably in the framework of the government. While representatives were nominally appointed for these counties and cities, it was merely meant thereby to indicate that the people residing within these defined boundaries should severally choose such representatives; and their rights in this respect would be as certain and as defined, no matter what changes might be made by law in their names, shapes or boundaries. It is the city of Richmond and the county of Henrico, as they existed at the formation of the constitution, that must be looked to in the ascertainment of these electoral rights; and no matter how their names or limits may be altered, such changes cannot be allowed to interfere with constitutional rights which are fixed by and referred to these divisions as they were designated in the constitution, and just as easily and conveniently settled as if no such changes had occurred in their names or limits.

It is conceded by the ingenious counsel who has pressed upon us these subtle refinements upon the letter of the
619 *constitution, that towns might be erected within the existing boundaries of counties, because such boundaries would not thereby be altered or affected; and as a consequence thereof, I presume he would not question the competency of the Assembly to create, out of the population and territory of Henrico, wherever it thought proper, a new town, and provide for it a municipal government. Hence, if these suburbs, so far as they were included within the county of Henrico, had been incorporated as an independent municipality, these constitutional cavils would not apply; nevertheless, the same public evils, the same social mischiefs, the same individual grievances, would ensue. But now that the Assembly has concluded, and as it seems to me with great good judgment, that by extending over these settlements the corporate authority of the city of Richmond, the needed organization of these suburban communities might be had at less cost and inconvenience, and more conformably to the obvious proprieties of the situation, it would not comport, in my view, with that broad and liberal spirit of enquiry which should control judicial interpretations of

the constitution, to decry the latter measure as unconstitutional, and sustain the former as constitutional. It would be, in my opinion, to attribute to county lines and divisions a constitutional fixity, which, however ingeniously advocated, they do not in fact possess by prescription, reason, authority or precedent.

The practice of the Assembly, under the constitution of 1851, in the change of county lines and the formation of new counties, (to numerous instances of which we have been referred in the argument,) taken in connection with the constitutional restriction upon the formation of new counties, strikingly corroborates the views I have presented against this broad and novel challenge of the legislative power, under the constitution, to change, in any
620 *particular, even in name, what the counsel is pleased to term constitutional counties and cities, because of their names appearing in that instrument.

As to county districts or city wards, and the election of local officers therein, the former are subject to changes by the General Assembly, under the 26th clause of the 4th article, under the head of "County Courts;" so that there is no difficulty nor inconvenience in the re-adjustment or transfer of them, and in the matter of new regulations for municipal government, and local elections in pursuance of law.

III. The third and last enquiry is into the alleged grievances of the plaintiffs in error, resulting from the withdrawal of population, territory and taxable wealth from the county of Henrico, and the subjection of the annexed inhabitants to liabilities for the city debt and the city taxes, which they would have escaped without this act of annexation. The resources of the county are greatly depleted by this measure, so that its remaining citizens and creditors may well object to the loss of the accustomed contributions; and the abstracted citizens may revolt at the prospect of city burthens. But provided the General Assembly has the right thus to change and shift these municipalities, as I have endeavored to show, these consequences, however grievous, are addressed to the legislative will and discretion, and cannot legitimately undergo judicial supervision, or challenge judicial redress. Some violation of the constitution, State or Federal, must lurk in these results, in order to place the measure without the category of those that may be characterized as the abuse rather than the transgression of power. Accordingly, it is urged that this measure is violative of the obligation of contracts, and, in the form of public contributions, takes, without consent, private property for public purposes, without
621 *just compensation. It is also contended that it is by means of a voluntary removal only, as contra-distinguished from a legislative act, that a citizen previously without the city, can be brought within its authority and subjected to its charges. But it should be remembered that

the expediency, if not the necessity, of this incorporation has grown out of the voluntary acts of this suburban population in making these thick settlements, and projecting them upon the prolongation of the streets, so as to make them conform to the plan of the city. It is not doubted, however, that these exterior settlements were, in no small measure, dictated by the expectation of escaping city taxes, at the same time that the facilities of doing business, the chances of lucrative employment, and other advantages in the city, were secured to the inhabitants by their position on its outskirts. Yet, they must be presumed to know, that their establishment of an actual town might eventually expose them to the liability of being put under a municipal charter, at the pleasure of the General Assembly. No one has ever yet doubted the supreme authority of that body to grant charters to towns. It is an attribute of that sovereignty which, in its unrestricted functions of taxation and legislation, regulates the affairs of the people, and carries on their government, local and general, under the constitution; and whatever irregularities may arise from the grant of such charters, they are to be taken as the incidents of this governmental will, and rest in the discretion of the Assembly, without appeal to the courts or other arbiter. The necessity or propriety of granting such charters implies the power to defray local expenditures out of local contributions to be levied by the corporation, although such local impositions are in addition to the State taxes. It would not do to throw the local charges of such incorporated

622 communities upon the general *treasury of the whole people; therefore, the provision that the taxation of the State shall be "equal and uniform throughout the Commonwealth," absolutely requires that these local charges should fall exclusively upon the local communities; and the compensation and justification for it must be sought in the chartered privileges, and the uncontrollable discretion of the Assembly. Had it pleased the Assembly to grant an independent charter to this exterior town, it is admitted by the appellants' counsel that no constitutional exceptions could have been taken to the measure, although the grievances now complained of would doubtless have been aggravated by such a separate corporate existence. How, then, shall the extension of the charter of the interior town over the exterior one, which, in the progress of time and the pursuit of private interests, had grown up on its borders, be deemed unconstitutional, while all the city privileges of police, gas, water, &c., were obtainable at far less cost and inconvenience? It seems to me, therefore, that if any wrong has been done to the appellants by this extension of the city limits, it has not been owing to any violation of the constitution, but to the lack of discretion and precaution on the part of the Assembly, upon which we have neither the right nor the disposition to sit in judgment, nor the materials,

in this case, to form or express an opinion.

I am indebted to the remarkable familiarity of my brother Joynes with adjudged cases in this country, as well as abroad, for a reference to a most apposite case, before the Court of Appeals of Kentucky. It is the case of *Cheaney v. Hooser*, 9 B. Monr. R. 330, which brought up for consideration all these and other constitutional exceptions to the extension of the limits of the town of Hopkinsville. The opinion of the court was delivered by Chief Justice

623 Marshall, of that State, and is so elaborate, *exhaustive and conclusive, that I may be well permitted to close my investigations by a reference to that authority, and the luminous reasoning of the court.

The decrees of the court below are, therefore, affirmed.

The other judges concurred in the opinion of Rives, J.

Decrees affirmed.

624 *Corbett v. Nutt, Trustee.

April Term, 1868, Richmond.

1. Will—Secondary Evidence of—Admissible.*—Plaintiff in unlawful detainer proves he deposited the original will of his testatrix with the clerk of the Circuit Court of Richmond, in 1864. He also proves that the witness had enquired for said paper of the said clerk, at his office in the city of Richmond, in whose custody the said original paper had been left; that said clerk, at his request, made search for said paper, and reported it had been lost out of his possession, and destroyed at the time of the fire in April, 1865. In the absence of all suspicion of fair dealing, this testimony is sufficient to let in a copy of the will, of the accuracy of which copy there is no question.

2. Same—Same—Same—Case at Bar.—Upon proof that the will had been regularly admitted to probate in the Circuit Court of Richmond, such proof of the loss and destruction of the record will authorize the admission of an official copy of the record, certified by the clerk. And this official copy having been admitted to probate in the Orphans' Court of the District of Columbia, an official copy from that office is admissible.

*Secondary Evidence—When Admissible.—In *Colley v. Sheppard*, 81 Gratt. 821, the court said: "In practice, when there is no ground of suspicion that the paper is intentionally suppressed, nor any discernable motive for deception, the courts are extremely liberal in regard to secondary evidence. The rule must be so applied as to promote the ends of justice and guard against fraud and imposition. If the circumstances justify a well-grounded belief that the original paper is kept back by design, no secondary evidence ought to be admitted; but where no such suspicion attaches, and the paper is of that description that no doubt can arise as to the proof of its contents, there can be no danger in admitting secondary evidence. This is the rule laid down in Cowen & Hill's notes to 4 Phillips on Evidence, 1238, and approved by this court in *Corbett v. Nutt*, 18 Gratt. 624."

3. **Secondary Evidence—Admission of Two Copies of Same Paper—Effect.**—Where the copy of a paper has been properly introduced in evidence, the admission of another copy of the same paper, if improper, cannot possibly do injury to the other party; and is, therefore, no cause for reversing the judgment.

4. **Taxes—Land Sold for—Redemption of.**—A married woman, whose land has been sold for taxes under the act of Congress June 7, 1862, may in person redeem the same within two years, upon taking the oath prescribed by the act; or a person appointed her trustee in another State, and professing to act as such, may redeem for her.

625 *5. **Devises—Land within Enemy's Lines—Valid.**—

Mrs. H was a resident of the county of Alexandria at the time of the breaking out of the late civil war; and after its breaking out voluntarily went into the Confederate lines, and resided therein until her death in 1863. By her will, she devised certain land in the county of Alexandria to N in trust for Y and F, which lands were at all times in the military lines and within the jurisdiction of the United States. The devise is valid; and after the war, N may maintain an action to recover the land; although N also went into the Confederate lines, and held office under the Confederate government at the time of the death of Mrs. H.

6. **Trustees—Removal from Office—Case at Bar.**—

Though N was removed from his office of trustee by the decree of the District Court of Columbia at the suit of Y and F, and M was appointed in his place; that decree was inoperative to remove him from his office as to lands in Virginia; and N may maintain an action to recover them.

7. **Unlawful Detainer—To Settle Legal Title.**—A proceeding of unlawful detainer may be maintained against a party in unlawful possession of land, where such unlawful possession has not continued for more than three years, though the legal title to the land is the only question involved in the cause.

8. **Recovery of Redeemed Land—What Need Not Be Shown.**—Where land sold under the acts of Congress of June 7th, 1862, and February 3d, 1863, has been redeemed, after the commissioners have paid the money into the treasury, the owner is entitled to recover it without showing that the certificate of redemption has been forwarded to the Secretary of the Treasury, and that the purchaser has been paid his purchase money by draft drawn on the treasury of the United States.

In September, 1866, William D. Nutt, trustee, instituted a proceeding of unlawful detainer in the Circuit Court of Alexandria county, against V. P. Corbett, to recover a tract of sixty acres of land lying in that county. And in November, 1866, Corbett filed his petition, in which he stated that the object of the suit was to recover a tract of land situate in the county of Alexandria, which was purchased by him on the 29th of February, 1864, at a sale of land for unpaid taxes, under and by virtue of an act of

626 Congress entitled "an act for the collection of direct *taxes in insurrectionary districts within the United States, and for other purposes;" and he asked that the cause might be removed for trial to the Circuit Court of the United

States, under the authority of the fifth section of the act of Congress approved March 3d, 1863, entitled "an act relating to habeas corpus, and regulating judicial proceedings in certain cases." But the court overruled the motion; and issue was then made up on the plea of not guilty.

On the trial of the cause it was agreed—that Louisa Hunter died in April, 1863, seized in fee and possession of the land in controversy; and the plaintiff introduced the evidence of Joseph H. Bradley, a lawyer in the city of Washington, who stated that in the year 1852 or '53 he wrote a will for Mrs. Hunter, by which she disposed of her whole estate, real and personal; and by that will she appointed the plaintiff, William D. Nutt, executor and trustee of her whole estate, he believed. This will was executed by Mrs. Hunter in his office, and was duly attested by Philip R. Fendall, Edward B. Steele and himself. That about four years afterwards she executed a codicil to her will, which was also prepared by himself, and was attested by David Saunders, Benjamin Young and himself. And by this codicil she either again nominated or recognized Nutt as her executor and trustee. These papers were taken away by Mrs. Hunter, and were the only testamentary papers he had ever prepared or witnessed for her.

The plaintiff Nutt gave his evidence, and proved that he knew Mrs. Hunter; that she died in Charlottesville, in Virginia; that some years prior to the war she delivered to him a paper purporting to be her last will and testament, and a codicil thereto; that he himself made a copy of said paper; that the original paper was in the handwriting of Joseph H. Bradley, and 627 that said copy was in *the following words and figures—setting out the will and codicil at length. He further proved that he deposited the said original paper with the clerk of the Circuit Court of the city of Richmond, in 1864. He also introduced a witness, who proved that he had enquired for said paper of the said clerk, at his office in the city of Richmond, in whose custody the said original paper had been left; that said clerk, at his request, made search for said paper, and reported that it had been lost out of his possession, and destroyed at the time of the fire in Richmond in April, 1865: and the said plaintiff then offered to read to the jury, as evidence of the contents of said original paper, the said copy which he had before given in with his testimony. He had previously proved that he knew the signatures of Mr. Fendall and Mr. Bradley, two of the attesting witnesses to the said original paper, to be genuine, but did not know the others; and that all the attesting witnesses were beyond the limits of the State of Virginia.

The plaintiff further offered to prove by himself, that he had had the said paper probated as the last will and codicil of Louisa Hunter, in the said Circuit Court of the city of Richmond, in November, 1864; and that the same was then duly proved and

admitted to record in said court; promising to follow said last offer with proof respecting the loss and destruction of the record of probate, corresponding to the proof already offered respecting the loss and destruction of the said original paper.

The only copy of the said original paper which is in the record, is a copy from the office of Register of Wills of Washington county, District of Columbia. From the paper and the certificates annexed, it appeared that on the first of November, 1864, the will and codicil of Mrs. Hunter were admitted to probate in the Circuit Court of the city of Richmond, upon proof of three witnesses that the signatures of Fendall and Bradley were in their handwriting, 628 *and by two witnesses that the signature of Saunders was in his handwriting.

The record of the proceedings in the Circuit Court of Richmond having been regularly certified by the clerk of that court, were presented to the Orphans' Court of the county of Washington, D. C., and on the 20th of June, 1865, that court made an order that—An authenticated copy of the will of Louisa Hunter, deceased, from the clerk of the Circuit Court of the city of Richmond, in the State of Virginia, was this day filed for probate and record in this court; and it appearing that the said will had been duly admitted to probate and record by a court of competent jurisdiction in the State of Virginia, and the requisite stamps, &c., it is thereupon ordered that the said paper be, and the same is hereby admitted to probate and record as a legally authenticated copy of the will of Louisa Hunter, deceased.

The paper bears date the 6th of August, 1852; and by it Mrs. Hunter devises and bequeaths to the plaintiff Nutt a considerable estate in the city of Washington, upon the trusts therein mentioned, which are principally in favor of Marian, the wife of William Young, and Emily Featherstonhaugh. The codicil, which bears date December 4th, 1856, devises to the same trustee, two pieces of land situate in the county of Alexandria, purchased by Mrs. Hunter since the date of her will, in trust, the one of them for Mrs. Young, and the other for Mrs. Featherstonhaugh.

The defendant objected to the admission of this evidence: because no legal ground had been laid for the admission of secondary evidence; because it was inadmissible to establish the record of the probate in this form; because it required the evidence of two witnesses to prove the contents of such will; because if said will were lost or destroyed, it could only be established in the manner prescribed by the Code for 629 proving lost records, or *established in a court of chancery. But the court overruled the objection, and admitted the evidence; and the defendant excepted.

The witness Nutt further proved that before the late war Mrs. Hunter lived in the county of Alexandria; that some months after the occupation of Alexandria by the

United States forces, she left home and went within the Confederate lines, where she remained until her death. That about the breaking out of the war Nutt held an office under the United States, which he resigned in February, 1861; and in September, 1861, he went into the Confederate lines, and held office under the Confederate government, which he retained at the time of the death of Mrs. Hunter. The plaintiff then offered to read the record of the Alexandria county court, which bears date on the 5th of February, 1866, and states that an authenticated copy of the last will and testament and codicil of Louisa Hunter, deceased, was presented to the court by Marian Young, by John D. McPherson, her next friend; and it appearing to the court that said will has been proved before the Circuit Court of the city of Richmond, (as stated in the record of that court), and admitted to record in said Circuit Court, the said authenticated copy is ordered to be recorded in this court as a will of realty.

The authenticated copy thus admitted to record in the County Court of Alexandria was a copy from the records of the Orphans' Court of Washington county, in the District of Columbia, with the certificates of the clerks of the Circuit Court of Richmond and the Orphans' Court of Washington, of the action of said courts upon the paper as hereinbefore stated.

To the reading of this evidence the defendant objected, because the original will had already been probated in the Circuit Court of the city of Richmond, and a certified copy of said record of probate 630 should be introduced; and, *because the probate of the copy of a will in a court of foreign jurisdiction could not be probated in the county of Alexandria. But the court overruled the objection, and allowed said record to be read; and the defendant again excepted.

The defendant, to maintain the issue on his part, proved that the land in suit was duly assessed with taxes due the United States under the act of Congress of June 7th, 1862, entitled an act for the collection of direct taxes in insurrectionary districts, and for other purposes; that it was sold for the non-payment of said taxes; that the defendant was the purchaser, and received the commissioners' certificate, and took possession of the land in controversy under the title so acquired. The certificate was introduced as evidence, and states that the sale was made on the 29th of February, 1864, and is in all respects in due form.

The defendant also introduced in evidence the record of a suit in equity in the Supreme Court of the District of Columbia, instituted in July, 1865, by the cestuis que trust under the will of Mrs. Hunter, against William D. Nutt, in which the bill, after setting out the will of Mrs. Hunter, and its admission to probate in the Orphans' Court of the District of Columbia, says that she left a large estate, real and personal, in the District of Columbia, of which it is impossible to obtain a settlement without a

trustee; and they are informed that the defendant declines to qualify as trustee, or to accept the trusts reposed in him. And they call upon him to answer, and pray that a new trustee may be appointed; and for general relief.

Nutt answered, admitting the facts stated in the bill; says that he is the person mentioned in said will as trustee, and that he has declined to accept the trusts reposed in him. And the court thereupon made a decree, by which John D. McPherson was appointed trustee in the place
631 *and stead of the defendant William D. Nutt, with the powers and duties vested in Nutt as trustee by the will of Mrs. Hunter. And McPherson was required to execute a bond in the penalty of \$10,000, with condition for the faithful performance of the trusts; which he did on the 22d of July, 1865.

The plaintiff then proved the land in controversy, on which said tax was levied, was susceptible of convenient partition, so that the sale of a very small part thereof would have satisfied said tax. And he further offered to read the certificate of redemption, admitted to be genuine. To the reading of this certificate, the defendant objected, because said redemption in favor of McPherson was illegal, and did not sustain the plaintiff's claim. But the court overruled the objection, and allowed the certificate to be read; and the defendant excepted.

The certificate bears date the 10th day of February, 1866, and is signed by the tax commissioners. It recites, the sale to the defendant Corbett on the 29th of February, 1864, of the land in controversy, for the sum of \$1,516, which sum had been paid into their hands on the 10th of March, 1864; and had been duly forwarded, with a duplicate certificate of sale, to the treasury department; and it then proceeds:

This is to certify that John D. McPherson, trustee for Marian Young and Emily Featherstonhaugh, owners of said property, and married at the time of said sale, and under the same disability at the present time, having taken an oath to support the constitution of the United States, and Marian Young and Emily Featherstonhaugh having sworn that they had not taken part with the insurgents in the present (or late) rebellion, or in any way given them aid and comfort, and satisfied us that said oath was true; and the said John D. McPherson having paid, &c., the receipt whereof in full
632 is hereby acknowledged and confessed, *has redeemed the lot, tract or parcel of land from forfeiture and sale; and the said lot, tract or parcel of land is hereby henceforth discharged from all lien, charge or claim by reason of said tax, penalty, interest and cost of every kind and nature.

And the foregoing being all the evidence, the defendant prayed the court to instruct the jury as follows:

1st. If the jury shall believe from the evidence, that William D. Nutt, the plain-

tiff who sues as trustee, held a position under the government of the United States, and resigned said office, went voluntarily within the lines of the Confederate States, and accepted office under the Confederate government, and held said office at the time of the death of the said testatrix; and that said Louisa Hunter was a resident of the county of Alexandria at the time of the breaking out of the civil war; and after its breaking out, went voluntarily into the Confederate lines, and resided therein up to the time of her death; and that the premises in the summons described were at all times in the military lines and under the jurisdiction of the United States, then that the said devise to the plaintiff was inoperative to pass or transfer any title to him; and he cannot therefore recover in this action.

2d. If the jury shall believe from the evidence, that William D. Nutt was removed from his office as trustee by a decree of the Supreme Court of the District of Columbia, in the suit of Featherstonhaugh and others against the said Nutt; and that on the motion of the said complainants, John D. McPherson was substituted in his stead, then the plaintiff has no right to recover in this action.

3d. That on the foregoing facts, established in this cause, the plaintiff has no right to recover in this form of action.

4th. That to enable the plaintiff to
633 recover in this *action, he must show that the certificate of redemption was forwarded to the Secretary of the Treasury, and the defendant re-paid his purchase money by draft drawn on the treasury of the United States.

The court refused to give these instructions; and the defendant again excepted. All the foregoing exceptions are embraced in one bill.

The jury found a verdict for the plaintiff; and thereupon the defendant moved the court to set aside the verdict and grant him a new trial; but the court overruled the motion, and rendered judgment on the verdict for the plaintiff. The defendant again excepted, and in his exception referred to the evidence as stated in the first bill. And he obtained a writ of error to the District Court of Appeals at Fredericksburg. That court, however, affirmed the judgment; and the defendant then obtained a writ of error to this court.

G. W. Brent, for the appellant.
Beach, for the appellee.

JOYNES, J. The first ground of error assigned in the petition is, that the court allowed the plaintiff to give secondary evidence of the will and codicil of Louisa Hunter, deceased, under which he claimed the land in controversy, when no sufficient ground had been laid for the introduction of such evidence.

The proof was, that the original paper containing the will and codicil of Mrs. Hunter was deposited, in 1864, with the clerk of the Circuit Court of the city of Rich-

mond; that the witness had inquired of said clerk at his office for said original paper; that said clerk, at the request of the witness, made search for the said paper, and reported that it had been lost out of his possession, and destroyed at the time

634 of the fire in Richmond in April, *1865. The plaintiff then offered to prove, that in November, 1864, he had the said original paper admitted to probate in the Circuit Court of Richmond as the will and codicil of Louisa Hunter, deceased; and that it was duly proved and admitted to record; promising to follow this up with proof respecting the loss and destruction of the record of probate corresponding to that already offered respecting the loss and destruction of the original paper. The defendant objected to all the evidence thus offered; but the objection was overruled, and the evidence admitted.

There is some confusion and want of certainty in the record in respect to the secondary evidence introduced. The copy first offered in evidence was one made several years before Mrs. Hunter's death by the plaintiff, from the original will and codicil placed in his hands by her. No objection appears to have been made to this evidence at the time it was offered. Then follows, in the bill of exceptions, a duly certified record from the Orphans' Court of the county of Washington, D. C., of the probate in that court of a duly authenticated copy of the record of the original probate in the Circuit Court of the city of Richmond. It is no where stated that this record, or the copy of the will contained in it, was offered in evidence. I presume this was an oversight in preparing the bill of exceptions. When the plaintiff had introduced the evidence already stated, respecting the inquiry at the office of the clerk of the Circuit Court of Richmond for the original will, the record says, that he "then offered to read to the jury, as evidence of the contents of the said original paper, the said copy hereinbefore inserted." This seems to have referred to the copy made by the plaintiff from the original will, and which appears to have been already introduced and read to the jury. There does not appear, therefore, to have been any specific objection to the admission of the record of the Or-

635 phans' Court of *Washington. But there was a general objection to the admission of any secondary evidence, and if the objection was well founded, the secondary evidence previously introduced should have been excluded, though admitted without objection at the time.

It is objected, that the loss of the original paper and of the record of probate could properly have been proved only by the clerk himself, and that the evidence of what the clerk stated to the witness was only hearsay, and therefore inadmissible.

In Cowen & Hill's notes to Phillip's Evid. vol. 4, p. 1223, the following passages occur in reference to the admission of secondary evidence. I omit the citations of cases:

"The rigor of the old common law rule has

been relaxed in this respect, and the non production of instruments is now excused for reasons more general and less specific, upon grounds more broad and liberal, than was [were] formerly admitted. In general, the party should give all the evidence reasonably in his power to prove the loss. He is not bound, however, to furnish the strongest possible assurance of the fact. If any suspicion hangs over the instrument, or that it is designedly withheld, a rigid enquiry should be made into the reasons of its non production. But when there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original. In practice, where there is no ground of suspicion that the paper is intentionally suppressed, nor any discernible motive for deception, the courts are extremely liberal in regard to secondary evidence. The rule must be so applied as to promote the ends of justice and guard against fraud and imposition. If the circumstances justify a well-grounded belief that the original paper is kept back by design, no secondary evidence ought to be admitted; but where no such suspicion attaches, and the paper is

of that description that no doubt can 636 arise as to *the proof of its contents, there can be no danger in admitting secondary evidence. Ordinary diligence in ordinary cases is enough. Where the proof of loss adduced establishes the fact with reasonable certainty, nothing more is required. Evidence which induces a fair presumption of loss is enough. No other than circumstantial evidence of loss can generally be expected; it will, therefore, usually suffice that the paper has been sought for, where it might be supposed likely to be found, or was usually kept, and that the search was fruitless." The same general doctrine is laid down in other cases of subsequent date to those cited by Cowen & Hill, of which I will cite only two. In *United States v. Sutter*, 21 How. U. S. R. 170, the Supreme Court holds this language: "We agree that the rule of law which requires the best evidence within the power or control of the party to be produced, should not be relaxed, and that the court should be satisfied that the better evidence has not been wilfully destroyed nor voluntarily withheld. But the rule on the subject does not exact that the loss or destruction of the documents of evidence should be proved beyond all possibility of a mistake. It only demands that a moral certainty should exist that the court has had every opportunity for examining and deciding the cause upon the evidence within the power or ability of the litigants." In *Brigham & al. v. Coburn*, 10 Gray's R. 329, the plaintiffs claimed as assignees of one Baas, an insolvent debtor. The original deed of assignment was not produced, and to authorize the introduction of secondary evidence, the affidavit of one of the plaintiffs was filed, which stated that he had made diligent search for the deed of assignment, and could not find it, and that it was not, to his knowledge, recorded in the registry of deeds. The court held that

secondary evidence of the deed was properly admitted. The court said: "We cannot perceive that the affidavit, from the statement of its contents in the
637 *exceptions, did not raise a reasonable and legal presumption of the loss of the deed, according to the established rules of evidence. The question what is due enquiry for a deed or other document, in order to admit secondary evidence of it, must be decided upon the particular circumstances of the case in which that question arises." *Miller v. Miller*, 1 *Hodges R.* 187; 2 *Phil. Ev. (N. Y. ed. 1849)* 229, 230. "In ordinary cases," says Mr. Baron Alderson, "you do not make search as for stolen goods. The court must be reasonably satisfied that due diligence has been used; it is not necessary to negative every possibility—it is enough to negative every reasonable probability, of anything being kept back." *McGahey v. Alston*, 2 *Mees. & Melab. R.* 206.

Upon the evidence in this case, it is impossible to entertain a suspicion that anything has been suppressed or withheld, or that the copies which were given in evidence are not true copies of the original will and codicil. Enquiry was made of the clerk, at his office, for the original will and codicil, and also for the record of the probate. It is fair to presume that these enquiries were made for the purpose of obtaining a copy in the regular and usual way. And certainly nothing could be more satisfactory to the mind, if legally admissible, than the record of the Orphans' Court of Washington. The papers admitted to record in that court were duly authenticated by the clerk of the Circuit Court of Richmond, where they were admitted to probate, as copies from the records of his court. The Register of Wills certifies, in due form, a copy of the papers thus authenticated by the clerk of the Circuit Court. The copy sent from Richmond is filed in the Orphans' Court, and cannot, therefore, be obtained. An authenticated copy of it is the next best thing, and carries as full conviction to the mind of its authenticity, as would a copy

from the clerk of the Circuit Court of
638 Richmond. *The court will not, therefore, according to the authorities which have been cited, require that the loss or destruction of the original papers, and of the probate of them, shall be "proved beyond all possibility of mistake;" it is only necessary that the evidence in relation to the loss should produce "a moral certainty that the court has had every opportunity for examining and deciding the cause, upon the best evidence within the power or control of the litigants." This "moral certainty" is produced in his case by the evidence as to the application to the clerk of the Circuit Court of Richmond. It was his official duty to preserve the original papers and the record of their probate, and to furnish copies when applied for. The evidence is not merely that the clerk declared that the paper and record had been lost or destroyed at the time of the great

fire; but at the request of the witness he made search for them, and reported, then and there, as the result to the search, that they had been lost. The search seems to have been made in the presence of the witness. At any rate, it was made, and the result reported, and the declaration of the clerk accompanies, and formed part of, an official act. We must presume, in the absence of any evidence to raise a suspicion of the contrary, that a declaration thus made was true. It was not only the duty of the clerk, but his interest also, to find the paper and record, and to furnish a copy, if they were in existence. The testimony of the clerk as to the particulars of his search, and as to the facts connected with the fire, would have gone a step further to exclude the possibility of a mistake, and might properly have been insisted on, if there had been room to suspect that anything had been "kept back" by design, or that the copies actually produced were not genuine. In the case cited from 10 *Gray's R.* 329, the affidavit of the other plaintiff would in like manner, have gone a step further to exclude the possibility of
639 *mistake as to the loss of the deed;

but there being no ground of suspicion, the court did not require it. In *Waller v. School District*, 22 *Conn. R.* 326, the court said: "The only ground of complaint is, that the plaintiff's son was not called to testify as to the loss. His testimony would have rendered the evidence more satisfactory, and ought to have been required, had there been any reason to believe there was any collusion between him and the defendants. But nothing of that kind appears."

I conclude, therefore, that a sufficient ground was laid in this case for the introduction of secondary evidence. The plaintiff was under no obligation to avail himself of the provisions of the act of February 21, 1866, to establish the lost record. The provisions of that act are only cumulative. *Smith v. Carter*, 3 *Rand.* 167; *Newcomb v. Drummond*, 4 *Leigh* 57.

The next ground of error assigned, is the admission of the record of the county court of Alexandria of a probate of a copy of the bill certified from the Orphans' Court of Washington. The ground of the objection is, that the county court had no jurisdiction to admit the copy to probate, because the original will had already been admitted to probate in Richmond, and that the case is not embraced by the provision of ch. 123, section 26, of the Code; and that as the defect of jurisdiction appears on the face of the proceedings of the county court, its act was void and not voidable merely.

But conceding this to be so, I think that the admission of this evidence affords no ground for reversing the judgment. If, according to the doctrine in England, there are no degrees in secondary evidence, then this evidence was admissible on the same ground as the other secondary evidence. But even if that is not so, it is obvious that the admission of this evidence could do the defendant no injury. The

record of the Orphans' Court of
640 Washington *was already before the jury, which was the best secondary evidence attainable, and the record of the county court only brought this record of the Orphans' Court before the jury a second time. The same views apply to the objection made to the admission of the copy of the original will made by the plaintiff, under the assumption made by the defendant that two witnesses were necessary to authenticate that copy.

The next ground of error assigned is, the admission in evidence of the certificate of redemption. The objection is, that the land was redeemed by McPherson, who was a stranger to the land, and had no right to redeem it under the act of Congress. Before this certificate of redemption was offered by the plaintiff, the defendant had introduced the record of a suit in chancery in the Supreme Court of the District of Columbia, instituted for the purpose of appointing another trustee under the will of Mrs. Hunter, in the place and stead of the plaintiff, and in which the court made a decree appointing McPherson as trustee. It is conceded, in the petition, that the court of the District of Columbia had no authority to remove the plaintiff from his trust in respect to the land in Virginia, or to constitute McPherson trustee in respect to said land.

The seventh section of the act of Congress, passed June 7, 1862, as amended by the act of February 3, 1863, provides that when land has been sold by the Commissioners, "the owner of said lots of ground, or any loyal person of the United States, having any valid lien on, or interest in the land, may, at any time within sixty days after said sale, appear before the said Board of Tax Commissioners, in his or her own proper person, and, if a citizen, upon taking an oath to support the Constitution of the United States, and paying the amount of said tax and penalty," &c. * * "may redeem said lots of land from said sale, and any purchaser under the same having

641 *paid moneys, treasury notes, or other certificates of indebtedness of the United States, shall, upon such redemption being made, be entitled to have the same, with the interest accruing after said sale, returned to him by the said Commissioners, upon surrendering up the certificate of sale. And provided further, that if the owner of said lots of ground shall be a minor, a non-resident alien, a loyal citizen beyond seas, a person of unsound mind, or under a legal disability, the guardian, trustee, or other person having charge of the person or estate of such person, may redeem the same at any time within two years after the sale thereof, and in the manner above provided, and with like effect."

This provision distinguishes those who are entitled to redeem into two classes, one of which is required to redeem within sixty days after the sale, and the other of which is allowed to redeem within two years. The owner, of either class, must appear

before the Commissioners in proper person, and, if a citizen, must take an oath to support the Constitution of the United States. The first class embraces persons who are resident and sui juris, and whom Congress designed to hold to a strict responsibility for their acts and defaults, and as to whom it restricted the privilege of redemption within narrow limits. The other class embraces persons under disability, non-resident aliens and loyal citizens beyond seas, who could not justly be held to the same strict responsibility, and to whom Congress designed to extend the privilege of redemption on more liberal terms. The persons described in this second class are such that their lands, in consequence of their non-residence or disability, would generally be in the "charge" of some other person. Hence the act, in terms, gives the privilege of redeeming, within two years, to "the guardian, trustee, or other person having charge of the person or estate" of the
642 owner. But *the plain intention of the act was to secure the privilege of redemption to the owner, to whom no fault could be imputed, and for whose benefit the redemption was to be made. Suppose the land of a non-resident alien, or of a loyal citizen beyond seas, is not in the charge of any agent or other person—might not the owner redeem through the agency of a friend, deputed for that purpose only? Or, might he not, upon coming home within the two years, redeem in proper person? Or suppose a minor has no guardian, and neither he nor his estate is, in any legal sense, or actually, in the charge of any other person, as may well be the case if he manages his own affairs and controls his own actions—is he to lose the privilege secured for his benefit, because the literal terms of the act cannot be complied with? It seems to me that this would be putting too strict a construction upon the act of Congress. It would destroy the sense and object of the law, in order to satisfy its letter. The rule is, that laws allowing redemption are to be construed liberally. Blackwell on Tax Titles, Ed. 1864, 432.

I think, therefore, that Mrs. Featherstonhaugh and Mrs. Young, the beneficial owners of the land, had the right to redeem in their proper persons, and that they must be understood to have done so in this case. The Commissioners appear to have so understood it, for they administered to those ladies the additional oath required by the act of March 3, 1865, sect. 7, which is to be taken by every "owner" who redeems. The certificate describes them as the owners, though it describes McPherson as the trustee. There is some ambiguity in the certificate as to whether these ladies took the oath to support the Constitution of the United States. It does not appear that they did not take this oath, as well as the other; and the language being ambiguous, we may presume that they, as well as McPherson, took this oath, in order to
643 sustain the certificate, *ut res magis valeat quam pereat." If they did

not, why was not the additional oath, required by the act of March 3, 1865, administered to McPherson, as well as to them?

But perhaps the true construction of the certificate is, that McPherson alone took the oath to support the Constitution of the United States, and that Mrs. Featherstonhaugh and Mrs. Young alone took the other oath required by the act of March 3, 1865. That would be in accordance with a strict and literal construction of the act of Congress. The act of 1862, and the amendment of 1863, require that the person who redeems as guardian, trustee, or person having charge of the property or person of the owner, shall take the oath to support the Constitution. The act of March 3, 1865, provides that "no owner" shall redeem without taking the additional oath prescribed by that act.

Assuming this to be the true construction of these acts, the question is, whether the redemption was invalid for want of proper authority in McPherson. He was not, strictly and legally, the trustee of these ladies in respect to the land to be redeemed, because the jurisdiction of the court which appointed him did not extend over that land. But no doubt both he and they thought he was the trustee in respect to these lands, as undoubtedly he was their trustee in respect to other property. He may, too, for aught that appears, have been acting under this impression, and been actually in "charge" of all the trust property. In making the redemption, he acted for these ladies, and with them, and professedly as their trustee. He was not an intruder or volunteer. And the Commissioners, whose duty it was to ascertain his relation to the property, recognized him as a person who had a right to redeem. Every substantial purpose of the act of Congress was, therefore, fully satisfied; and

644 considering that an act allowing redemption is to be construed liberally, so as to promote the beneficent intention of the legislature, and not strictly, I think we are fully authorized to hold that the redemption in this case was valid and effectual, as a redemption by McPherson.

The next error assigned is the refusal of the court to give the instructions moved by the defendant.

The first instruction proceeds on the assumption that the devise was void under the 6th section of the act of Congress passed July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." This section declares, that if any person engaged in armed rebellion against the United States, or aiding or abetting such rebellion, shall not, within sixty days after public warning and proclamation duly made by the President, cease to aid, countenance, and abet such rebellion and return to his allegiance, all the estate of such person shall be subject to seizure, and it shall be the duty of the President to seize the same as before provided in the act; and that "all

sales, transfers, or conveyances of any such property, after the expiration of said sixty days from the date of said warning and proclamation, shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section." The 5th section of this act provides that "to insure the speedy termination of the present rebellion, it shall be the duty of the Pres-

645 ident *of the United States to cause the seizure of all the estate and property, money, stocks, effects and credits" of the persons thereafter named, "and to apply and use the same and the proceeds thereof for the support of the army of the United States." After enumerating the several classes of persons whose property is thus liable to seizure, the section concludes as follows: "And all sales, transfers, or conveyances of any such property shall be null and void, and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section." The 7th and 8th sections make provision for the condemnation and sale of the property thus liable to seizure under the 5th and 6th sections.

It is obvious from the provisions of this act, that it was designed as a war measure, and the 5th section expressly declares that the seizure of property which it authorizes is provided "to insure the speedy termination of the present rebellion." The act proposed to aid this object by the seizure and confiscation of the property of certain classes of persons described, and of all others who should disregard the proclamation of the President provided for in the 6th section. The provisions of the 5th and 6th sections making void all sales, conveyances, and transfers of property declared liable to seizure and confiscation, must be construed with reference to the objects and general provisions of the act. They were necessary to prevent these objects and provisions from being defeated by the sale, conveyance, or transfer of property, before seizure, by persons embraced in the described classes. The object was to provide, that no sale, conveyance, or transfer should interfere with the seizure and sale provided for by that act. This construction satisfies the terms of law, and is consistent with its policy. To carry its operation to

646 *the extent contended for by the counsel for the defendant, is not necessary to accomplish the objects of the act; is not necessary to satisfy the fair meaning of the language; and imputes to Congress a purpose for which no good reason can be assigned, and which can hardly be sustained upon any construction of its powers. If the construction contended for is right, then the other provision that no person embraced in the described classes shall be allowed to maintain a suit for the possession or use of any property made liable to

seizure, must be held to be a perpetual bar, until the act is repealed, to a recovery in any such suit.

The court properly refused to give this instruction.

It seems that the same construction was put upon this provision of the act of Congress by the Supreme Court of Tennessee, in the case of *Galbraith v. McFarland*, 3 Cald. R. 267, and by the Court of Appeals of South Carolina, in *Pope v. Chaffin*, noticed in *Amer. Law Review*, April, 1868, p. 578.

The second instruction asked for declared, that if the jury should believe from the evidence that the plaintiff was removed from the office of trustee, and McPherson substituted as trustee in his stead, by a decree of the Supreme Court of the District of Columbia, then the plaintiff was not entitled to recover.

The court was justified in refusing this instruction, on the ground that it proposed to submit to the jury, as a question of fact, what was properly a question of law for the court. Whether the plaintiff was removed or McPherson substituted as trustee, in respect to the land in controversy in this suit, depended upon the construction and legal effect of the decree of the Supreme Court.

This instruction proceeds on the assumption, that it was competent for the court of the District, by the mere force of its decree, to operate upon the title to land in Virginia, so as to divest it out of Nutt and to vest it in McPherson. This cannot be maintained, and the instruction was properly refused for that reason. See 1 Rob. New Pract. 336-343; *Story Confl.* §§ 544, 545; *Watkins v. Holman*, 16 Peters R. 25; *McLawrin v. Salmon*, 11 B. Mon. R. 96.

The petition treats this instruction

647 as involving the question, whether Nutt made or could make a valid disclaimer by parol of the estate devised to him by Mrs. Hunter. But certainly it involves no such question. That question may be raised under the exception to the refusal of the court to grant a new trial, though no error has been assigned on that ground.

The bill in the case in the Supreme Court of the District alleged that Nutt, the plaintiff, declined to accept the trusts conferred upon him by the will of Mrs. Hunter, and asked the appointment of another person to execute the trusts in his stead. Nutt, in his answer, admitted that he had declined to accept the said trusts. It is insisted that this answer is proof of a parol disclaimer by Nutt of the title to the land in controversy, and that the effect of such disclaimer was to divest the title out of him.

Whether an estate of freehold in land can be effectually disclaimed by parol, so as to divest the title of the devisee, has not been settled by the decisions of this court. In *Bryan v. Hyre*, 1 Rob. R. 94, it was conceded that the question did not arise. The case cannot be regarded, therefore, as settling the question against the validity of

such a disclaimer, though the opinion of Judge Allen is said by the report, in general terms, to have been concurred in by the other judges who sat in the case. It is not necessary to determine that question in this case. If we assume it to be true, as contended for, that a freehold estate in land may be disclaimed by parol, the question remains whether such disclaimer is proved in this case, in respect to the land in controversy. That depends on Nutt's intention. His answer does not specify the particular trusts which he had declined. A large amount of property, real and personal, had been devised and bequeathed to him in trust, all of which seems to have been in the District of Columbia, except the sixty acres of land in controversy in this suit. The bill to which the

648 answer was made was filed in the District, in a court which had no jurisdiction over the land in Virginia. It was for the jury to say, upon the answer and all the other evidence, whether Nutt had made a disclaimer of title to the land involved in this suit. The fact that he subsequently instituted this suit, was a fact which they might consider in making up their opinion on this question. The verdict finds, in effect, that Nutt had made no such disclaimer in respect to this land. We cannot say that the verdict should be set aside on that ground. This view is sufficient to dispose of the question of a parol disclaimer, without adverting to any other.

The next instruction asked for affirms that the writ of unlawful detainer is not an appropriate remedy in this case. The reason assigned in the petition is, that the title alone is involved. This instruction too was properly refused. The Code, ch. 134, section 1, gives the remedy of unlawful detainer where there has been an unlawful entry upon land, or where the entry having been lawful, the tenant detains possession of land after his right has expired, without the consent of him who is entitled to the possession, and where such unlawful possession has not continued for three years. The controversy in such a case, though it determines only the right of possession, may turn altogether upon the validity of the title under which the defendant claims to hold the possession.

The only remaining instruction asked for affirms, that to entitle the plaintiff to recover, he must show that the certificate of redemption was forwarded by the commissioners to the Secretary of the Treasury, and that the purchase money was refunded to the defendant by a draft on the Treasury of the United States. This proposition is based on the 7th section of the act of March 3, 1865, which provides, "that in any case in which lands shall be redeemed after sale

649 made by the board of commissioners, and after the money received by them on the sale of such lands has been paid into the treasury, by the owner complying with all the provisions of the law relating to redemption necessary to be complied with on his part, the said board

not, why was not the additional oath, required by the act of March 3, 1865, administered to McPherson, as well as to them?

But perhaps the true construction of the certificate is, that McPherson alone took the oath to support the Constitution of the United States, and that Mrs. Featherstonhaugh and Mrs. Young alone took the other oath required by the act of March 3, 1865. That would be in accordance with a strict and literal construction of the act of Congress. The act of 1862, and the amendment of 1863, require that the person who redeems as guardian, trustee, or person having charge of the property or person of the owner, shall take the oath to support the Constitution. The act of March 3, 1865, provides that "no owner" shall redeem without taking the additional oath prescribed by that act.

Assuming this to be the true construction of these acts, the question is, whether the redemption was invalid for want of proper authority in McPherson. He was not, strictly and legally, the trustee of these ladies in respect to the land to be redeemed, because the jurisdiction of the court which appointed him did not extend over that land. But no doubt both he and they thought he was the trustee in respect to these lands, as undoubtedly he was their trustee in respect to other property. He may, too, for aught that appears, have been acting under this impression, and been actually in "charge" of all the trust property. In making the redemption, he acted for these ladies, and with them, and professedly as their trustee. He was not an intruder or volunteer. And the Commissioners, whose duty it was to ascertain his relation to the property, recognized him as a person who had a right to redeem. Every substantial purpose of the act of Congress was, therefore, fully satisfied; and considering that an act allowing *redemption is to be construed liberally, so as to promote the beneficent intention of the legislature, and not strictly, I think we are fully authorized to hold that the redemption in this case was valid and effectual, as a redemption by McPherson.

The next error assigned is the refusal of the court to give the instructions moved by the defendant.

The first instruction proceeds on the assumption that the devise was void under the 6th section of the act of Congress passed July 17, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." This section declares, that if any person engaged in armed rebellion against the United States, or aiding or abetting such rebellion, shall not, within sixty days after public warning and proclamation duly made by the President, cease to aid, countenance, and abet such rebellion and return to his allegiance, all the estate of such person shall be subject to seizure, and it shall be the duty of the President to seize the same as before provided in the act; and that "all

sales, transfers, or conveyances of any such property, after the expiration of said sixty days from the date of said warning and proclamation, shall be null and void; and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section." The 5th section of this act provides that "to insure the speedy termination of the present rebellion, it shall be the duty of the Pres-

645 ident *of the United States to cause the seizure of all the estate and property, money, stocks, effects and credits" of the persons thereafter named, "and to apply and use the same and the proceeds thereof for the support of the army of the United States." After enumerating the several classes of persons whose property is thus liable to seizure, the section concludes as follows: "And all sales, transfers, or conveyances of any such property shall be null and void, and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described in this section." The 7th and 8th sections make provision for the condemnation and sale of the property thus liable to seizure under the 5th and 6th sections.

It is obvious from the provisions of this act, that it was designed as a war measure, and the 5th section expressly declares that the seizure of property which it authorizes is provided "to insure the speedy termination of the present rebellion." The act proposed to aid this object by the seizure and confiscation of the property of certain classes of persons described, and of all others who should disregard the proclamation of the President provided for in the 6th section. The provisions of the 5th and 6th sections making void all sales, conveyances, and transfers of property declared liable to seizure and confiscation, must be construed with reference to the objects and general provisions of the act. They were necessary to prevent these objects and provisions from being defeated by the sale, conveyance, or transfer of property, before seizure, by persons embraced in the described classes. The object was to provide, that no sale, conveyance, or transfer should interfere with the seizure and sale provided for by that act. This construction satisfies the terms of law, and is consistent with its policy. To carry its operation to

646 *the extent contended for by the counsel for the defendant, is not necessary to accomplish the objects of the act; is not necessary to satisfy the fair meaning of the language; and imputes to Congress a purpose for which no good reason can be assigned, and which can hardly be sustained upon any construction of its powers. If the construction contended for is right, then the other provision that no person embraced in the described classes shall be allowed to maintain a suit for the possession or use of any property made liable to

seizure, must be held to be a perpetual bar, until the act is repealed, to a recovery in any such suit.

The court properly refused to give this instruction.

It seems that the same construction was put upon this provision of the act of Congress by the Supreme Court of Tennessee, in the case of *Galbraith v. McFarland*, 3 Cald. R. 267, and by the Court of Appeals of South Carolina, in *Pope v. Chaffin*, noticed in *Amer. Law Review*, April, 1868, p. 578.

The second instruction asked for declared, that if the jury should believe from the evidence that the plaintiff was removed from the office of trustee, and McPherson substituted as trustee in his stead, by a decree of the Supreme Court of the District of Columbia, then the plaintiff was not entitled to recover.

The court was justified in refusing this instruction, on the ground that it proposed to submit to the jury, as a question of fact, what was properly a question of law for the court. Whether the plaintiff was removed or McPherson substituted as trustee, in respect to the land in controversy in this suit, depended upon the construction and legal effect of the decree of the Supreme Court.

This instruction proceeds on the assumption, that it was competent for the court of the District, by the mere force of its decree, to operate upon the title to land in Virginia, so as to divest it out of Nutt and to vest it in McPherson. This cannot be maintained, and the instruction was properly refused for that reason. See 1 Rob. New Pract. 336-343; *Story Conf.* §§ 544, 545; *Watkins v. Holman*, 16 Peters R. 25; *McLawrin v. Salmons*, 11 B. Mon. R. 96.

The petition treats this instruction 647 as involving the question, whether

Nutt made or could make a valid disclaimer by parol of the estate devised to him by Mrs. Hunter. But certainly it involves no such question. That question may be raised under the exception to the refusal of the court to grant a new trial, though no error has been assigned on that ground.

The bill in the case in the Supreme Court of the District alleged that Nutt, the plaintiff, declined to accept the trusts conferred upon him by the will of Mrs. Hunter, and asked the appointment of another person to execute the trusts in his stead. Nutt, in his answer, admitted that he had declined to accept the said trusts. It is insisted that this answer is proof of a parol disclaimer by Nutt of the title to the land in controversy, and that the effect of such disclaimer was to divest the title out of him.

Whether an estate of freehold in land can be effectually disclaimed by parol, so as to divest the title of the devisee, has not been settled by the decisions of this court. In *Bryan v. Hyre*, 1 Rob. R. 94, it was conceded that the question did not arise. The case cannot be regarded, therefore, as settling the question against the validity of

such a disclaimer, though the opinion of Judge Allen is said by the report, in general terms, to have been concurred in by the other judges who sat in the case. It is not necessary to determine that question in this case. If we assume it to be true, as contended for, that a freehold estate in land may be disclaimed by parol, the question remains whether such disclaimer is proved in this case, in respect to the land in controversy. That depends on Nutt's intention. His answer does not specify the particular trusts which he had declined. A large amount of property, real and personal, had been devised and bequeathed to him in trust, all of which seems to have been in the District of Columbia, except the sixty acres of land in controversy in this suit. The bill to which the 648 answer was made was filed in the

District, in a court which had no jurisdiction over the land in Virginia. It was for the jury to say, upon the answer and all the other evidence, whether Nutt had made a disclaimer of title to the land involved in this suit. The fact that he subsequently instituted this suit, was a fact which they might consider in making up their opinion on this question. The verdict finds, in effect, that Nutt had made no such disclaimer in respect to this land. We cannot say that the verdict should be set aside on that ground. This view is sufficient to dispose of the question of a parol disclaimer, without adverting to any other.

The next instruction asked for affirms that the writ of unlawful detainer is not an appropriate remedy in this case. The reason assigned in the petition is, that the title alone is involved. This instruction too was properly refused. The Code, ch. 134, section 1, gives the remedy of unlawful detainer where there has been an unlawful entry upon land, or where the entry having been lawful, the tenant detains possession of land after his right has expired, without the consent of him who is entitled to the possession, and where such unlawful possession has not continued for three years. The controversy in such a case, though it determines only the right of possession, may turn altogether upon the validity of the title under which the defendant claims to hold the possession.

The only remaining instruction asked for affirms, that to entitle the plaintiff to recover, he must show that the certificate of redemption was forwarded by the commissioners to the Secretary of the Treasury, and that the purchase money was refunded to the defendant by a draft on the Treasury of the United States. This proposition is based on the 7th section of the act of March 3, 1865, which provides, "that in any case in which lands shall be redeemed after sale made by the board of commissioners, 649 and after the money received by them on the sale of such lands has been paid into the treasury, by the owner complying with all the provisions of the law relating to redemption necessary to be complied with on his part, the said board

shall certify to the Secretary of the Treasury the fact that such lands have been redeemed, the amount of the purchase money paid by the purchaser, and when said purchase money was paid, together with such other circumstances as the Secretary, by general regulations or special instructions, shall require; and the Secretary, on being satisfied that the lands have been duly redeemed, shall repay, by draft drawn on the Treasury of the United States, the said purchaser the principal and interest of said purchase money; and the purchaser shall forthwith deliver possession to the owner so redeeming as aforesaid."

This provision was designed for the benefit of the purchaser, so as to enable him to obtain the repayment of the money, after it had been paid by the commissioners into the treasury. The act of February 3, 1863, already quoted, made provision for the commissioners returning the purchase money where it remained in their hands at the time of the redemption. But the validity of the redemption did not depend upon the return of the purchase money. And so in cases where the money is paid into the treasury, it is not necessary for the party claiming under a redemption, to show that the money has been refunded to the purchaser. If the refusal of the Secretary to refund the purchase money would entitle the purchaser to withhold the land, that would be matter of defence to be proved by him. But the law does not make the Secretary a judge to determine the validity of the redemption, as between the former owner and the purchaser. He is only to revise the certificate of redemption for the purpose of deciding whether the money shall be withdrawn from the treasury.

650 If the owner has made redemption in the manner required by law, his title is complete, even though the Secretary should refuse to do justice to the purchaser by refunding the purchase money.

Upon the whole, I think there is no error in the judgment, and that it ought to be affirmed.

The other judges concurred in the opinion of Joynes, J.

Judgment affirmed.

651 *Faulkner & als. v. Davis & als.

April Term, 1868. Richmond.

[98 Am. Dec. 698.]

1. **Deeds of Trust—To Secure Purchase Money—Cloud on Title—Injunction.***—A court of equity will enjoin a sale under a deed of trust given to secure the purchase money of land, where there is a cloud upon the title which would occasion a sacrifice at such sale.

***Deeds of Trust—Cloud on Title—Sale—Injunction of.**—It is a sound proposition of law that a court of equity will enjoin a sale under a deed of trust, especially when given to secure the purchase money of land, where there is a cloud upon the title which would

2. **Chancery Courts—Jurisdiction to Sell Infants' Land.***

—It seems that in Virginia, a court of equity has not authority, under its general jurisdiction as guardian of infants, to sell their real estate whenever it is for the advantage of the infants to do so.

3. **Statute—Sale of Infants' Land—Remedial;—**The statutes in relation to the sale of infants' lands are remedial in their nature, and should be construed liberally.

4. **Same—Same—Jurisdiction of Courts of Equity. §—**By the act of February 18, 1863, sess. acts ch. 34, p. 29, and the previous acts on the subject, courts of equity had authority to sell the land in which infants had an interest, whether in possession or remainder, vested or contingent, if the proper parties could be brought before the courts.

5. **Case at Bar.**—Two vacant lots in the city of Richmond are conveyed to trustees in trust for N and his wife L, and the survivor of them for life, and

occasion a sacrifice at such sale. *Gay v. Hancock* 1 Rand. 72; *Miller v. Argyle*, 5 Leigh 400; *Beale v. Seiveley*, 8 Leigh 675; *Long v. Israel*, 9 Leigh 508; *Bank v. Hupp*, 10 Gratt. 53; *Rossett v. Fisher*, 11 Gratt. 499; *Peers v. Barnett*, 12 Gratt. 416; *Bryan v. Stump*, 8 Gratt. 247; *Muller v. Stone*, 84 Va. 637, 6 S. E. Rep. 223.

In *Rosenberger v. Keller*, 23 Gratt. 494, the court said: "The numerous adjudged cases on this subject will show that this court has gone very far in staying the collection of the purchase money for land upon proof of a defect of the title where no suit is pending, or even threatened. But even here a distinction has always been made between an injunction to a judgment for the purchase money and an injunction to a sale under a deed of trust. In the latter case the court interferes the more readily upon the ground of removing a cloud upon the title, in order to prevent a sacrifice of the property; whereas, in a like case, the court will not interfere with the vendor in enforcing his judgment, since the doubt about the title may eventually turn out to be frivolous and groundless. *Miller v. Argyle's Ex'or*, 5 Leigh 400, 508; *Koger v. Kane*, *Ibid.* 606." See also, as to this last point, *Peers v. Barnett*, 12 Gratt. 415; *Beale v. Seiveley*, 8 Leigh 608.

A court of equity should enjoin a sale by trustees, where the title to the property is disputed, and full value could not probably be had for it; even if that fact was known to all the parties to the deed, when executed. *Lane v. Tidball*, *Gilmer* 130.

See the principal case distinguished in *McClougherty v. Croft*, 43 W. Va. 373, 37 S. E. Rep. 246.

See generally, monographic note on "Injunctions."

†**Chancery Courts—Jurisdiction to Sell Infants' Lands.**—In *Hoback v. Miller*, 44 W. Va. 638, 29 S. E. Rep. 1015, the court said: "There is no right in equity to sell the lands of an infant, except so far as the statute enables equity to convert this land into money. The common law preserves his inheritance until his majority, and ties his hands from its waste and sacrifice, by imposing disability upon him. *Faulkner v. Davis*, 18 Gratt. 663; *Bart. Ch. Prac.* p. 551, § 170; 2 *White & T. Lead. Cas. Eq. pt. 2*, p. 1504." (Italics ours.)

‡**Statute—Sale of Infants' Lands—Remedial.**—The proposition of the principal case that the statutes in relation to the sale of infants' lands are remedial was approved in *Vaughan v. Jones*, 23 Gratt. 456; and that they should be construed liberally, in *Troth v. Robertson*, 78 Va. 581.

§**Same—Same—Jurisdiction of Courts of Equity.**—See *Christian v. Worsham*, 78 Va. 105.

at the death of the survivor to be conveyed by the trustees to the children of N and wife, who should be living at the death of the survivor, and the descendants of such of the children as should be then dead leaving descendants; and upon the further trust, that if N should think it expedient to sell the lots, or any part of them, the trustees should permit him to do so, the proceeds of sale to be secured and held upon the same trusts. N dies without selling the lots, leaving his wife and five children surviving him. The trust to sell continues, and a court of equity may execute it.

652 *6. Chancery Practice—Representation of Parties.—Upon a bill filed by the widow of N against the children and trustees for a sale of the lots, the court may decree a sale; and the descendants of any child dying in the lifetime of the widow, will be bound by the decree; the parties before the court representing any such descendants who may become entitled under the trusts of the deed. Upon the doctrine of the representation of parties, see the opinion of MONCURE, P.

7. Chancery Practice—Case at Bar.—Although the bill was prepared with reference to the sale of the land of infants under the statute, yet all the facts having been stated in it, and all the proceedings having been regularly conducted, it was competent for the court to make a decree therein for

***Chancery Practice—Representation of Parties.**—The first Virginia case in which the doctrine of representation is considered and expressly applied is *Baylor v. Dejarnette*, 18 Gratt. 166-177, and there the English decisions are collected and reviewed. The subsequent Virginia cases on the point are collected in a *foot-note* to *Baylor v. Dejarnette*, 18 Gratt. 152, all of which cite the principal case as authority.

See, on the point, 2 Min. Inst. (4th Ed.) 238, 248, 249, 422; *McArthur v. Scott*, 118 U. S. 340, 5 Sup. Ct. Rep. 672; *Reed v. Alabama, etc., Co.*, 107 Fed. Rep. 595, 596, in all of which cases the principal case is cited; and see also, the discussion in the principal case, pp. 688, 692.

In 2 Min. Inst. (4th Ed.) 238, it was said: "It seems, indeed, that, independently of the Virginia statute (Va. Code 1873, ch. 112, §§ 20 to 24; Va. Code 1887, ch. 107, §§ 2432 to 2436) last cited, or of any special statute, whenever the court of chancery has power to decree the conversion of real estate into personal, it may do so notwithstanding the contingent interest of some of the parties who are not yet in being, or not ascertained, provided all the parties are brought before the court that can be brought before it, and especially where the rights of the non-existent, or as yet unascertained, parties will be represented and sufficiently defended by the persons who are made parties, and who have motives of self-interest and affection to make such defence. And this is styled the doctrine of the representation of parties." See also, Pol. Supp. to Va. Code, § 2432a.

Owners of vested estates in reversion and remainder, whether by legal or equitable title, are indispensable parties to a chancery suit to sell the fee; and the presence as parties of a tenant for life, or of the trustee holding for them, does not make them parties by representation, and a sale under the decree will not affect or pass their right in the land. Tenth headnote to *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. Rep. 411, in which case the principal case is cited and approved.

the sale of the property, if upon these facts, upon any ground whatever, the court of chancery had authority to make such a decree.

By deed bearing date the 18th of June, 1840, Lucy Nelson Call and Ann Cameron, the widow and the only child and devisee of Daniel Call, deceased, conveyed to Philip St. George Ambler and Wm. Marshall Ambler, two half acre lots of land in the city of Richmond, Nos. 781 and 782, the one at the corner of Marshall and Ninth streets, and the other on Clay and Ninth streets, upon the following trusts, viz: That the said trustees, and the survivor of them, shall permit Daniel N. Norton and Lucy M. his wife, and the survivor, to hold, use and enjoy the said lots or parcels of ground, with all their appurtenances, without claim or charge, during their joint lives, and the life of the survivor of them, (if the same be not sold as hereinafter provided for), and at the death of the said Daniel N. Norton and Lucy M. his wife, the said Philip St. George Ambler shall hold the said lots and their appurtenances to and for the use and benefit, and as the property of the child or children of the said Lucy M. Norton by her present husband, the said Daniel N., who may be living at the death of the said Lucy M. Norton, their mother, and the child or children then living of any child or children of the said Lucy M. by the said Daniel N. Norton,

653 *who may have died in the lifetime of the said Lucy M.; and shall so convey the lots and appurtenances to the said child or children and grandchild or grandchildren of the said Lucy M. Norton and Daniel N. Norton when required, after the death of the said Daniel N. and Lucy M. Norton. And upon this further trust, that if, in the opinion of the said Daniel N. Norton, it shall become expedient to sell the lots and their appurtenances, or any portion of them, or either of them, the said Philip St. George Ambler and William M. Ambler, and the survivor of them, shall permit him, the said Norton, to do so, the price or purchase money for the same being adequately and legally secured to the uses and trusts hereinbefore described, the lawful interest annually arising therefrom to be paid to the said Daniel N. Norton during his life, and to the said Lucy M. after his death, if she shall survive him, during her life, and the principal and all interest thereon accruing after the death of the said Daniel N. and Lucy M. Norton, to be held by the said Philip St. George Ambler and William M. Ambler, and the survivor of them, as the lots would have been if not sold. There were covenants by the trustees, but the deed was not signed by them.

Daniel N. Norton died in 1841, or early in 1842, leaving Lucy M., his widow, and five infant children, surviving him, and without having exercised the power of sale vested in him by the foregoing deed. And Mrs. Norton having qualified as guardian of her children, she in June, 1847, filed her bill in her own right, and as guardian of

her children, for the purpose of obtaining a sale of the real estate of the children. In her bill, which was sworn to by her, she set out the estate of the children, and amongst it, the two lots mentioned in the deed from Mrs. Call and Mrs. Cameron, a copy of which was filed with the bill; and she alleged that the interest of the children required a sale of *the real estate, or some part of it, and the investment of the proceeds of the sale in some way to produce a larger income. She therefore prayed for a sale of the real estate, and its investment in a more productive fund; and for general relief.

The only defendants to this bill were the children of Daniel H. and Lucy M. Norton, only one of whom was over the age of fourteen years when the bill was filed. The case seems to have been prepared as prescribed by the statute; and on the 23d of June a decree was made referring it to a Commissioner, to enquire and report whether it was for the interest of the infant defendants that their real estate should be sold, and if sold, how the proceeds of the sale should be invested. The Commissioner reported in favor of selling the real estate; and on the 28th of June, 1847, the court made a decree appointing Commissioners, with authority to sell the same. These Commissioners proceeded to sell a part of the property; but the two lots before mentioned were not sold. In 1853 another decree seems to have been made for the sale of these lots; and under this decree the lot at the corner of Marshall and Ninth streets was sold; but Benjamin Davis, the purchaser of a part of it, objecting to the title because the trustees, Philip St. George and William M. Ambler, were not parties to the suit, Mrs. Norton, in October, 1853, filed an amended and supplemental bill, in which she stated the sale of the lot and the objection which had been made by Davis, and she made parties not only the trustees, and the children, but the purchasers of the lot, and prayed that the sale which had been made might be enforced.

The cause was regularly matured upon the amended bill, and came on to be heard on the 9th of February, 1854, when the court confirmed the sale which had been made, and decreed that when the purchasers had paid up *the purchase money, Commissioners named in the decree, should convey to such purchaser, his heirs or assigns, all the estate, right, title and interest of all and any of the parties to the cause in or to the lot purchased by him. And on the 21st of the same month this decree was modified as to Davis, on his motion, and he was decreed to pay the whole of his purchase money at once, and upon such payment a Commissioner named was directed to convey to him all the estate, right, title and interest of all and each of the parties to the suit in and to the lot purchased by him.

On the 1st of April, 1854, the commissioners conveyed to Davis the lot purchased by him; and he, in May, 1857, acquired

another adjoining part of the lot referred to in the bill, at the corner of Marshall and Ninth streets, giving him sixty-five feet of ground on Marshall street; and on this lot he made very valuable improvements. By deed bearing date the 26th of September, 1865, Davis, in consideration of \$25,200, conveyed with general warranty, the whole of the said two lots, with the improvements thereon, to Faulkner, Carrington & Co. This deed described the ground as the same conveyed by the commissioners under the decrees in the case of Norton v. Norton, and reference was made to these deeds and the papers in that case; and there were covenants that he had right to convey, against encumbrances, and for quiet enjoyment. And on the same day Faulkner, Carrington & Co. conveyed the same to Wellington Goddin in trust to secure the payment of \$17,480, the balance of the unpaid purchase money.

In March, 1866, Faulkner, Carrington & Co. applied by bill to the Judge of the Hustings Court of the city of Richmond, in which, after setting out the sale and conveyance to them by Benjamin Davis, and their conveyance to Goddin in trust to secure the unpaid purchase money, as
656 *hereinbefore stated, they allege that about the time that the first deferred payment of the purchase money fell due, they determined to sell the property, and had negotiated a sale of it at \$19,500 cash, provided the title was good. That the plaintiffs having been informed at the time of their purchase that Davis had derived his title under a decree of the Circuit Court of the city of Richmond in a suit still pending therein, entitled Norton's guardian v. Norton and others, and that the possession for ten or twelve years under the title so acquired had not been disputed by any one, felt no apprehension on the score of the title; but that the counsel who had been employed to investigate it by the purchaser, suggested a doubt as to the same, inasmuch as the children of Mrs. Norton, who were parties to the suit, took contingent remainders in the property, dependent on their surviving their mother; and consequently, if any of them should die during her lifetime, leaving children, such last mentioned children would take as purchasers under the deed from Mrs. Call and Mrs. Cameron, and might not be bound in the suit. That the purchaser thereupon declined to proceed with the contract.

They further say, that Davis has directed the trustee Goddin to proceed to execute the trust, in consequence of the non-payment of the first of the three notes given by them for the purchase money of the property; and that a sale under the circumstances, when the contract for the sale they had made has been repudiated by the purchaser on the ground of an alleged defect of title, without any determination of that question, must result in irreparable loss to the plaintiff. They, therefore, pray for an injunction to restrain the sale under the deed of trust until the further order of the court;

that the court may decide upon the validity of the title; and for general relief. The injunction was granted.

657 *Davis demurred to the bill; and also answered. He says, the plaintiffs had full time and opportunity to investigate the title after their purchase, before the deed was made to them. He denies that there is any defect in the title, and insists that the title to the lot is perfect and complete: first, because the power of sale in Daniel N. Norton was a trust for the benefit of his wife and children as well as himself, which it was competent for a court of equity to execute by the hand of another trustee. Secondly, because Lucy M. Norton was the natural guardian of her children, and it was competent to the court of chancery upon her bill to render such a decree as it did render. Thirdly, because the property was a trust estate, and was peculiarly the subject of the jurisdiction and control of the court of chancery; and it was perfectly competent to it, therefore, to render such a decree as it did.

He further says, that every person who was in being and interested in the property was a party to the suit of Norton v. Norton, and they represented all who could by possibility by subsequent birth become interested in it; and therefore the objection that the unborn grand-children of Mrs. Norton were not made parties to that suit does not exist. He relies further on the length of time that had elapsed since the decree had been made, without any appeal therefrom; and his own possession of thirteen years, without any question of his title.

The cause came on to be heard on the 7th day of February, 1867, when the injunction was dissolved. And from this decree, the plaintiffs obtained an appeal to this court.

Steger and John Howard, for the appellants.

Green and Lyons, for the appellees.

658 MONCURE, P. This is an appeal from a decree of the *Hustings Court of the city of Richmond, dissolving an injunction which had been awarded by the judge of said court, to enjoin the sale of certain real estate in the said city, under a deed of trust, upon the ground that there was a cloud over the title, which would prevent a sale of the property at its fair value, until such cloud should be removed. The property had, on the 26th of September, 1865, been sold and conveyed by the appellee Benjamin Davis, to the appellants Faulkner, Carrington & Russell, at the price of \$25,200, of which the sum of \$8,400 was paid in cash, and the balance by three negotiable notes, at four, eight and twelve months, with interest aggregated on the several instalments; and, on the same day, a deed of trust had been executed by the purchasers, in the ordinary form, to secure the payment of the deferred instalments as they became payable. Default having been made in the payment of the first deferred instalment, the trustee in the deed of trust was required by Davis to proceed, in pur-

suance of its terms, to sell the property thereby conveyed; which sale was about to be made accordingly, when it was enjoined as aforesaid. The alleged cloud over the title, on which the claim to an injunction was founded, appears from the bill to be as follows: that the title to the property in question had been derived by the said Davis, under a decree or decrees of the Circuit Court of the said city, in a suit still pending therein, entitled "Norton's guardian v. Norton, &c.;" that the children of Mrs. Norton, who were parties to the suit, took only contingent remainders in the property, dependent on their surviving their mother; and consequently, if any of them should die during her lifetime leaving children, such last mentioned children would take as purchasers under the deed under which she and her children derived their title to the property, and might not be bound by the decrees in the said suit. It is not pretended

659 that there was any fraud or concealment *on the part of Davis in the sale and conveyance made by him. He fully and fairly communicated to his vendees all the facts in regard to his title. In his deed to them, the property is described not only by its location and mete and bounds, but also as "being the same real estate conveyed to the said Davis by two deeds, the first from George N. Johnson and Andrew Johnston, Commissioners of the Circuit Court of Richmond in the case of Norton v. Norton, &c., dated 1st April, 1854, the second from George Gavinzel and wife, bearing date 11th May, 1857,—each of the deeds convey a moiety of the land hereby conveyed; the latter moiety was conveyed to the said Gavinzel by said Andrew Johnston, surviving Commissioner, by deed dated 10th April, 1856—all of which said deeds are duly recorded in Richmond Hustings Court, to which, as well as the papers in the said case of Norton v. Norton, &c., reference may be had for greater certainty." It does not appear that said Davis ever had any doubt about his own title, or any cause to doubt it; but, on the contrary, it appears that he had perfect confidence in it. He had acquired title under a decree made by a Judge of great ability, and remarkable, as was said in the argument, for his caution in dealing with the rights of infants and others under disability; and in a suit conducted by counsel distinguished alike for their integrity and their legal knowledge and experience. He had been in the peaceable, undisturbed and unquestioned possession of the property for ten or twelve years, during which time (besides paying the original purchase money), he had erected the most costly improvements upon it. No person had ever doubted his title, and non-constat that any person having, or who may hereafter have, any claim to the property or an interest therein, ever will. If, under these circumstances, his title can now be impeached by his vendees, and the supposed defect 660 therein be good ground for *their withholding payment of the purchase

money, it would afford just cause for reproach to the law or its administration: and the more especially, as all the persons interested in the property and in esse when the decrees were made, were parties to the suit, (which was regularly conducted as to them,) and would be effected in the same way by a sale of the property, as would be any of their descendants who might afterwards come into being and become interested therein, and whose interest would depend on the remote and multiplied contingencies of their being born, of their surviving both their parents and grandmother, Mrs. Norton, and of their parents dying before Mrs. Norton.

The proper time for a purchaser to enquire into the title and satisfy himself about it, is while the contract of sale remains executory. A purchaser at a judicial sale, ought to make such enquiry before the confirmation of the sale by the court; and a purchaser at a private sale, ought to make it before he receives possession of the property and a deed from the vendor. In neither case will the purchaser be compelled to accept a bad or doubtful title, unless he has agreed to do so. But having accepted the title, and received the deed, he will generally have to look only to the covenants contained in the deed, for his indemnity and protection against any defects which may be in the title. If there be no covenant in the deed covering such defects, he will be without remedy, for he will have no right; unless, indeed, the vendor has been guilty of fraud, or there has been such mistake as to require a court of equity to afford relief. If there be such a covenant in the deed, the vendee has his remedy thereon at law; and a court of equity will interpose in his behalf to arrest proceedings for the collection of the purchase money, only on the ground that a suit has been brought or is threatened against him on account of such defect, 661 or that such defect *certainly exists, (Ralston, &c., v. Miller, &c., 3 Rand. 44,) or that some other peculiar equity exists in the case. If there be a defect in the title known to the vendee at the time of the sale, it is at least questionable whether he would be entitled to any relief on account of it, either at law or in equity, even though it might seem to be covered by the covenants of the deed. A vendor of a horse with warranty of soundness, is generally not bound to make good a visible defect, such as the loss of an eye, the loss of which is plainly visible. The covenant of warranty is construed not to extend to such a defect, as that could not have been the intention of the parties. The same principle would seem to apply to a sale of real estate. To be sure, a purchaser might be informed of a fact which constituted a defect of title, and still not know that it did, nor intend to accept the title subject to such a defect. Or, knowing that it was a defect, he might be willing to purchase the property with a covenant of general warranty to protect him in case of eviction.

In either of these cases the covenant would cover the defect; but in the latter case, generally, the only remedy of the purchaser would be at law, after eviction, and he would have no right, in the absence of fraud or mistake, to withhold the payment of the purchase money, which, by the very terms of the contract, he bound himself to pay, notwithstanding the defect. The complainants in this case, at the time of their purchase, had, as before stated, full knowledge of the fact which is supposed to constitute the alleged defect of title; but they did not believe that it was such a defect. They say in their bill, that "having been informed at the time of their purchase, that the title of the property in question had been derived to the said Benjamin Davis under a decree or decrees of the Circuit Court of the city of Richmond, in a suit still pending therein, entitled 'Norton's guardian v. Norton, &c.,' 662 and that the possession *for ten or twelve years under the title so acquired had not been disputed by any one, they felt no apprehension on the score of the title, nor any doubt but that it would be approved upon examination." Therefore, if there be such a defect of title as is now alleged, it cannot be considered as having been waived by the purchasers, but is embraced by the covenants contained in the deed, which are broad enough to cover it.

The purchasers claim to be entitled to relief in this case by injunction, not to a suit at law for the recovery of the purchase money or a part thereof, but to a sale of the property under the deed of trust, and that, upon the ground that there is a cloud over the title arising from the alleged defect therein, which would occasion a sacrifice at such a sale. And the authorities on which they rely in support of this claim, are Lane v. Tidball, Gilm. 130; Gay v. Hancock, &c., 1 Rand. 72; and Miller v. Argyle's ex'or, 5 Leigh 460. These authorities seem fully to sustain the claim, if there be such a defect of title; and the vital question in this case, therefore, is, Does the alleged defect exist?

Whether there be such a defect or not, depends upon two questions: 1st. Whether the court under whose decree the sale was made under which the title was acquired by Davis, had jurisdiction of the subject matter; and 2dly. Whether the suit in which the decree was rendered was defective for the want of proper parties. And these questions I will now proceed to consider in their order.

First. Had the court jurisdiction of the subject matter? Was it competent for a court of equity to make such a decree, supposing that it had all proper parties before it?

There are two general grounds of equity jurisdiction, on either of which, it is contended by the counsel for the appellee Davis, that it was competent for the court to make such a decree. One of them 663 is, that the property, or *rather some

interest therein, belonged to infants; and the other is, that it was a trust subject.

As to the ground that the property, or some interest therein, belonged to infants: It has been supposed and contended by some, and even decided by courts, that a court of chancery is the general guardian of infants within its jurisdiction, and has an inherent power to decree a sale of their real estate whenever it is for their advantage to do so. Some of the earlier English cases seem to tend that way. But the more recent cases, commencing with a decision of Lord Hardwicke, have tended the other way, and held that an infant's inheritance is never bound by the act of the court. *Taylor v. Phillips*, 2 Ves. R. 23; *Simpson v. Jones*, 2 R. & M. R. 365; *Calvert v. Godfrey*, 6 Beav. R. 97. In the last case a purchaser of an infant's estate under a decree of the court was discharged from his purchase on the ground that the court had no jurisdiction to sell or convert an infant's real estate, upon the notion that it would be beneficial. See also 1 *Spence's Equity* 613, and cases cited in a note. In the States of this Union the decisions of the courts on this question have been conflicting. The jurisdiction was upheld in the following, and perhaps some other cases: *Matter of Salisbury*, 3 John. Ch. R. 347; *Huger v. Huger*, 3 Des. R. 18; *Stapleton v. Langstaff*, Id. 22; *Williams v. Harrington*, 11 Ired. 616; and *Ex parte Jewett*, 16 Alab. R. 409; while it was denied in the following, and some other cases: *Rogers v. Dill*, 6 Hill's R. 415; *Baker v. Lorillard*, 4 Comst. R. 257; and *Williams' case*, 3 Bland Ch. R. 186. In this State there has been, I believe, no express adjudication of the question. President Tucker pronounced a very decided opinion against such jurisdiction in the case of *Pierce v. Trigg*, 10 Leigh 406; and though what he

664 said on that subject was only an obiter dictum, yet it has been generally regarded and acted upon as a sound exposition of the law. Beyond all question, it is the law of England; but whether it be law in this country or not, regarding the question as a new one, would seem to depend, in a great measure, on the different state of things which exists here in regard to real estate, from that which exists in England, and the effect which that difference ought to have in producing a corresponding modification of the English law; upon the principle which has been often recognized, and in *Ex parte Jewett*, supra, was recognized by the Supreme Court of Alabama in regard to this very question, that the common law moulds and adjusts itself so as to suit the successive changes which occur in the condition of things to which it is, in different places and at different times, applied. I think, however, that the question ought now to be considered as settled in this State, and in accordance with the views of President Tucker; especially as that seems also to have been the view on which the Legislature of the State has always acted, first in passing special acts for the sale of real estate of

infants, as was formerly the case, and then in passing general acts on the subject, and extending them from time to time, as necessity or convenience seemed to require. It is under these general acts, or one or more of them, therefore, that the jurisdiction of a court of equity to sell the real estate of infants, on the ground of infancy merely, must be derived. I will briefly review these statutes.

The first of them is to be found in 1 R. C. 1819, pp. 409, 410, ch. 108, §§ 16-23, being a portion of the general act concerning guardians, &c., passed February 18, 1819. The provisions of that statute are familiar to us all, as all of us have often, no doubt, proceeded under it to obtain a decree, at the suit of a guardian for the sale of the real estate of his ward. It is confined 665 in its terms to a *case in which the real estate sought to be sold belongs to the infant only, and in which no other person has any interest in it, present or future, vested or contingent.

The next statute on the subject is the act passed March 3d, 1827, Sup. R. C. p. 134, ch. 104, which declares that the sixteenth section of the act of 1819 before referred to, "shall be held and construed to extend as well to cases where more than one infant shall be interested in the land sought to be sold, as where any one or more of those interested shall be of full age. The meaning of this act is sufficiently apparent, and it seems, by its terms, to be confined to a case in which the real estate sought to be sold belongs to the infant parties and to the other parties directed to be convened before the court by summons or by publication, and in which the interest of the parties respectively is vested and not contingent.

The next statute which will be noticed, although it does not directly belong to the branch of the subject I am now considering, but is indirectly connected therewith, and was afterwards consolidated with those before mentioned, is the act authorizing the sale of trust estates in certain cases, passed January 20th, 1832, Sup. R. C. 208, ch. 150. The provisions of this act are also sufficiently familiar to us all, and need not be further noticed, at least for the present.

In the Code of 1849, the statutes aforesaid (with some others which had been passed having some connection with the subject, but not noticed in the foregoing review because not material to the present enquiry), are condensed, and form title 36, chapter 128, of that Code, the subject of it being, "lands of persons under disability."

The next statute in order is the act of February 18, 1853, concerning the sale of estates belonging to infants or insane persons, or held for cestuis que trust. Acts of 1852-3, p. 49, ch. 30. This act is 666 merely an amendment, *though it may be a very material amendment, of sections 2, 5 and 7 of chapter 128 of the Code just referred to. The amendment of the second section inserts therein these words, as descriptive of the estate for the sale of

which a bill is thereby authorized to be filed: "Whether the estate of the minor or insane person, or of any of the persons interested, be absolute or limited, and whether there be or be not limited thereon any other estate vested or contingent, and whether the guardian, committee or trustee, or the minor, insane person or any of the persons interested, reside in this State or not." The amendment of the fifth section need not be noticed. The only amendment of the seventh section seems to be an addition at the end of it in these words: "And for the protection of the rights of all persons interested therein, whether such rights be vested or contingent;" which was made in consequence of the amendment of the second section. The amendments made by this act are embodied in chapter 128 of the Code of 1860.

The next statute in order, and the last on the subject, is the act of March 15, 1858, entitled "An act to authorize the sale of estates subject to a limitation contingent upon the dying of any person without heir or heirs of the body, or children or offspring or descendant or other relative"—Acts of 1857-8, p. 46, ch. 46. The first section of that act declares, "that when any estate, real or personal, is given by deed or will to any person, subject to a limitation contingent upon the dying of any person without heir or heirs of the body, or issue of the body, or children or offspring or descendant or other relative, it shall be lawful for the Circuit Courts, upon a bill filed by the person holding the estate subject to such limitation, in which bill all persons then living and contingently interested shall be made defendants, to decree a sale

of such estate, real or personal, and to
667 invest the proceeds of sale, *under the decree of the court, for the use and benefit of the person so holding the estate, subject to the limitations of the deed or will creating the estate: provided, however, that the bill of the plaintiff shall set forth the facts which, in his opinion, would justify the sale of the said estate; to be verified by the affidavit of the party." The second, third and fourth sections prescribe rules and modes of proceeding similar to those prescribed in regard to the sale of infants' and trust estates. The fifth section is in these words: "The decree rendered in such suit shall be as binding upon all persons who may be born thereafter and become interested in the said estate, in like manner and to the like extent as it is upon the parties to the said suit." This last act is embodied in chapter 116 of the Code of 1860, concerning the creation and limitation of estates, and their qualities, and forms the twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth sections of that chapter, p. 561.

These are all the acts which seem to have any material relation to the subject; and the question is, whether, under them or any of them, when the decree was rendered under which the sale was made to Davis, the court had jurisdiction of the subject

matter upon the ground merely that infants had an interest in the property.

The last act, that of March 15, 1858, may be passed by, for the present at least, with only a few observations. It was passed long after the sale to Davis, and therefore cannot, directly, apply to the case, though it may be useful for the purpose of illustration. And then, too, it is not confined to infants, nor indeed does it mention infants, or refer to infancy at all, at least by name, but expressly applies to any estate, real or personal, given by deed or will to any person, though not under disability, or whether under disability or not, subject to a limitation contingent upon the dying of any person without heirs, &c. It certainly

668 *provided for cases which, or, at least, some of which, had been provided for by no former statute: that is, cases in which there might be no living person under any disability having any interest in the estate. It does not refer to trust estates, but applies, if it is not confined, to any legal "estate, real or personal, given by deed or will to any person, subject to a limitation contingent, &c.;" and authorizes a decree for the sale of the estate to be made, "which shall be as binding upon all persons who may be born thereafter and become interested in the said estate, in like manner and to the like extent, as it is upon the parties to the said suit."

Then in regard to the prior statutes, how does the matter stand?

The learned counsel for the appellants argued this case as if the court, in "Norton v. Norton, &c.," had decreed the sale of mere possibilities, the contingent right of the children of Mrs. Norton to the property in the event of their surviving her. If that had been the only right proposed to be sold, no court, whatever might have been its jurisdiction, would, in the exercise of its judicial discretion, have decreed the sale. We can hardly suppose a case in which it would appear with sufficient certainty to justify such a decree, that the interest of infants would be promoted by a sale, and no court would involve their rights in such a gambling speculation. The decree was for the sale of the property out and out, just as if it had been the absolute estate in fee simple of an individual owner. The only effect of the decree was to convert the real estate into money, and to leave that money, or the property in which it might be invested, in the place of the real estate sold, subject precisely to the same rights and interests, present or future, vested or contingent, to which that estate was subject at the time of the sale.

The statutes referred to, and especially the early ones, *seem literally to
669 apply only to real estate belonging absolutely, in whole or in part, to one or more infants; and the counsel for the appellants argued for such a literal construction, and that in construing statutes giving a special jurisdiction, we ought to construe them strictly. These statutes are eminently remedial, and were dictated by a

policy which seems rather to require that they should receive a liberal construction, so as to advance the remedy and promote the policy of the Legislature. We can readily see how the interest of an infant would be promoted by a sale of real estate, in which he has only a contingent interest, as well and as much as by a sale of real estate belonging to him absolutely. And there would seem to be the same reason for giving a court of chancery the power to decree a sale in either case. Both cases, then, come within the reason and the policy of the law, and the only question is, whether the letter of the law should be construed so strictly as to shut out one of these cases.

This court has indicated a decided disposition to adopt the liberal rather than the strict rule of construction. In a very early case, which occurred shortly after the first of these statutes, to-wit: the case of Garland &c. v. Loving &c., 1 Rand. 396, James Loving, by deed dated the 24th of August, 1819, conveyed a tract of land to Lunsford and Samuel Loving, in trust for the support of himself and wife, for the schooling and raising of his children, and after his death, for his children in fee; and by another deed dated the 25th of October, in the same year, he conveyed other property to the same trustees, on nearly the same trusts. Shortly thereafter the said James Loving and the two trustees contracted to sell the said tract of land to Nathan Lofftus for \$10,000; and Garland and Whitehead, guardians of the infant children of James Loving, united with Samuel and Lunsford Lov-

670 ing, the *trustees, in a bill against James Loving, his wife and the said infant children, and Lofftus, &c., the object of which bill was to obtain a confirmation of the sale, or a resale of the land, upon the ground that it would manifestly be for the benefit of the infants. The suit was conducted according to the directions of the statute in 1 R. C. 1819, p. 409, under which it was brought. The chancellor dismissed the bill for several reasons, which he assigned, one of which was, "because the infants had nothing but an equitable interest in the subject which would not accrue to them till after the death of their father." This court reversed the decree of the chancellor, being of opinion that the case was a proper one "for the consideration of the Superior Court of Chancery, under that part of the act of Assembly concerning guardians, orphans, &c., which prescribes the mode by which a guardian may procure a sale of the real estate of his ward." And the court was further of opinion that if, under all the circumstances which were referred to in the opinion, a sale manifestly to the interest of the infants could be made, it would be proper to decree the same, taking care that the proceeds thereof should be properly invested and secured for the use of the cestui que trusts, according to their rights as they then appeared or might thereafter appear, or the rights of any future cestui que trust (after born children of

James Loving) who might be entitled under the deed aforesaid; and that it would be competent for the chancellor, instead of directing a resale, to confirm that already made to Lofftus, under the terms and conditions aforesaid, provided he was willing to abide thereby, and James Loving and wife were also willing to unite in the conveyance, and to invest and secure the proceeds thereof as aforesaid, in the same manner as if such sale had originally been made in pursuance of a decree of the court. Now such was the liberal construction put by this court upon the statutory

671 *power of the court of chancery to decree a sale of real estate in which infants are interested, when that power existed in its simplest form. And the power was held to be applicable to a case in which the interests of the infants was joint and not several, future and not present, and was liable to be reduced by the subsequent birth of other children, who would become entitled to an interest in the property. That case alone goes very far to sustain, if it does not fully sustain, the power of the court in the case we are now considering, without reference, for the present, to the question of parties, which we will consider by and by, and when we come to consider which we will have occasion to notice further the case of Garland v. Loving. And that effect is greatly augmented by the subsequent statutes before referred to, passed after that case occurred and before the sale was made in Norton v. Norton.

In Cooper v. Hepburn, &c., 15 Gratt. 551, a guardian of his infant children filed a bill for the sale of the real estate held by himself for life and by his infant children in remainder; and it was sold accordingly. This was held by this court to be authorized by the statute. "The language of the law," said Judge Daniel, in whose opinion the other Judges concurred, "as it stood, whether at the date of the original decree, or at the date of the order of June, 1852, directing the Commissioner to execute the original decree, is, I think, sufficiently broad to cover the case. The term 'real estate' applies as well to life estates or estates in remainder, as to absolute or entire fees." "It is not difficult to conceive of numerous instances," he further said, "in which the want of a power in the courts to sell the remainder of a ward, would occasion the most serious injury to his future interests. The call for a sale of the real estate of an infant, looking to his interest alone, may be just as obvious and urgent in the case where he is the owner of a por-

672 tion, as where he is the owner of *the whole of the fee; and no good reason is perceived why language broad enough to cover both cases should be construed to have conferred the power to sell in the one case, and to have withheld it in the other." It will be observed in regard to this case, as in regard to the case of Garland v. Loving, that the interest of the infant wards was liable to be reduced by the birth of after born children, and yet it was held that the

court had a power to decree a sale of the entire estate.

In *Talley, &c., v. Starke's adm'x, &c.*, 6 Gratt. 339, a testator directed his estate, after payment of his debts, to be kept together until his youngest child should come of age, to be controlled and managed by his executor and his wife with their best discretion, so as to make it productive of the greatest amount of profits for the support of his wife and children. It was held that a court of equity might direct a sale of the real estate under the statutes, 1 Rev. Co. 409, 410, &c., if it was for the benefit of the infant children, and those who were of age consented. Indeed, no question was raised in that case as to the nature of the interest of the infants in the real estate decreed to be sold; that interest being an uncertain present interest in the profits, and uncertain future interest in the estate itself, that is, uncertain as to its proportion; but the question was, whether the direction of the testator that his estate should be kept together, amounted to an absolute prohibition of a sale thereof in the meantime, which would have made it incompetent for the court to decree such a sale. But the court, construing the statutes according to their obvious meaning and policy, held that there was nothing in the will which could prevent the exercise of the power.

My attention has been called by my brother Joynes to a recent case in Kentucky involving the construction of a similar statute to those we are now considering, which has an important bearing upon this case.

673 I mean *Nutter &c. v. Russell, &c.*, 3 Metc. R. 163, decided by the Court of Appeals of that State in 1860; in which it was held that the words "real estate," as used in the first section of article 3, chapter 86, of the Revised Statutes of that State, relating to the sale of the estate of infants on a petition to the Circuit Court, import lands, tenements and hereditaments, and all rights thereto and interests therein, other than a chattel interest, and that a contingent remainder, or an interest in the nature of an executory devise, may be sold under the statute. The words of the section above referred to are: "The real estate of an infant, idiot, or lunatic, held by descent, devise, or by contract, whether in possession, reversion, or remainder, may, on a petition to the Circuit Court of the county in which the same, or the greater part thereof, lies, be decreed to be sold." 2 Rev. Stat., Stanton's ed. p. 304, ch. 86, art. 3, § 1. "All difficulty," said the court, "with respect to the import of the words 'real estate,' as here used, is removed by another provision of the Revised Statutes, which declare that the words 'real estate,' or 'land,' in the statute law, shall be construed to mean lands, tenements and hereditaments, and all rights thereto and interests therein, other than a chattel interest." 1 Id. p. 261, § 13. There is a similar provision in our Code, p. 115, ch. 16 § 17, rule 10th. "The clause of the will," continued the court, "gives to each of the dev-

isees a future interest in the lands devised to the others, contingent on the happening of the event mentioned. This interest may, perhaps, be more properly and technically denominated an executory devise, and not a contingent remainder. The distinction, however, is immaterial. It is unquestionably an interest in the land, and is, therefore, comprehended within the statutory definition of the words real estate, although it be not, strictly speaking, an estate 'in possession, reversion, or remainder.' These

674 latter expressions "cannot be construed as limiting or restricting the power of the Chancellor to the sale of such interests only as fall technically within one or the other of these three classes of estates or interests. The evident intention of the Legislature was to subject to the jurisdiction of the Chancellor any interest of an infant in real estate, whatever might be the character of that interest," &c. "No reason of policy can be suggested for excluding from the operation of the statute an interest in the nature of an executory devise, that would not apply with equal propriety to an interest in remainder, whether vested or contingent; and it cannot be denied that a contingent remainder is embraced by the terms of the statute as they have been expounded." The court then, after commenting on the case of *Jackson v. Waldron*, 13 Wend. R. 178, which had been cited to show that such an interest as the court had been considering was a naked possibility, as it is called, and not assignable or releasable, said it was unnecessary to decide that point upon general principles; "for, according to our own statutes," as the court proceeded to say, "any interest in or claim to real estate may be disposed of by deed or will in writing. Any estate may be made to commence in futuro, by deed in like manner as by will, and any estate which would be good as an executory devise or bequest, shall be good if created by deed." 2 Rev. Stat., § 6, p. 226." We have a provision precisely like this in the Code, p. 559, ch. 116, § 5. "The effect of this enactment," said the court, "is to obviate at once all the difficulties growing out of the distinctions which had been established by judicial construction between such estates as were alienable and such as were not. It will not be doubted, we suppose, that under this statute, every conceivable interest in, or claim to real estate, whether present or future, vested or contingent, and however acquired, may be disposed of by deed or will. Why, then,

675 may not the Chancellor decree a sale of any interest owned by an infant in real estate, which might be disposed of by an adult owner? and is it not manifest that the law which clothes the Chancellor with this power was intended to embrace every such interest?" "Cases such as the one now under consideration may very often arise, in which the sale of a future and contingent estate will as certainly and as effectually redound to the interest of the infant owner, as the sale of any other

estate." The purchasers in that case, which was a proceeding under the Revised Statutes aforesaid for the sale of real estate of infants, sought to get rid of their purchases upon the ground that the Circuit Court had no power to order a sale of the contingent interest of the infants in the lands sold. That court, upon final hearing, overruled the objection, and confirmed the sale; and the Court of Appeals affirmed the decree. Of course the sale in that case was of the entire and absolute estate, and not of the contingent interests merely. The proceeds of sale and the subject in which they might be invested, were to stand in the place of the estate sold, and be subject to the same uses and limitations.

The decisions I have referred to seem to leave no room for doubt that a court of equity had jurisdiction under the statutes before referred to, to decree a sale of the property in question, on the ground that infants were interested therein—provided there be no insuperable difficulty in regard to parties—a branch of the subject which will be considered presently.

I will now proceed to consider the other ground of equitable jurisdiction on which it is contended that it was competent for the court in *Norton v. Norton, &c.*, to decree a sale of the property in question; and that is, that it was part of a trust subject. The trust having been created by a deed bearing date the 18th of June, 1840, between

Lucy Nelson Call, widow of Daniel 676 Call, and Ann Cameron, *his only child and residuary devisee of the first part, P. S. Ambler and Wm. M. Ambler of the second part, and Daniel N. Norton and Lucy M., his wife, of the third part, whereby the parties of the first part, in consideration of five dollars paid by the parties of the second part, and "of the love and affection which she the said Lucy Nelson" bore "to the said Daniel N. Norton and Lucy M., his wife," conveyed to the said Amblers and the survivor of them and the heirs of such survivor, two certain lots of ground in the city of Richmond, particularly described in the said deed; but upon this special trust and confidence that the said P. S. Ambler and W. M. Ambler, and the survivor of them, shall permit the said Daniel N. Norton and Lucy M., his wife, and the survivor, to hold, use, and enjoy the said lots of ground, without claim or charge, during their joint lives and the life of the survivor of them, (if the same be not sold as hereinafter provided for,) and at the death of the said D. N. Norton and Lucy M., his wife, the said Amblers shall hold the said lots and their appurtenances to and for the use and benefit and as the property of the child or children of the said Lucy M. by her husband, the said Daniel N., who may be living at the death of the said Lucy M., and the child or children then living of any child or children of the said Lucy M. by the said Daniel N. who may have died in the lifetime of the said Lucy M.; and shall so convey the lots, &c., to the child or children and grandchild or grand-

children of the said Lucy M. and Daniel N. when required after the death of the said Daniel N. and Lucy M.; and upon this further trust that if, in the opinion of the said Daniel N., it shall become expedient to sell the lots, &c., or any portion of them or either of them, the said Amblers and the survivor of them shall permit him, the said Norton, to do so, the purchase money for the same being adequately and legally 677 secured to the uses and trusts *before described, the interest annually arising therefrom to be paid to the said Daniel N. during his life, and to the said Lucy M. after his death, if she shall survive him, during her life, and the principal and all interest thereon, accruing after the death of the said Daniel N. and Lucy M., to be held by the said Amblers and the survivor of them as the lots would have been if not sold. And then follow the usual covenants by the trustees for the execution of the trusts, though the deed was not signed by them, but only by the parties of the first part.

In regard to the power of a court of chancery to decree a sale of the property in question on the ground that it was a trust subject, it is contended by the counsel for the appellee, Davis, that such a power existed either under the jurisdiction which that court has over the subject of trusts and trust estates generally, or under the peculiar provisions of the deed which created the trust subject in this case, or under the statutes in regard to the sale of trust estates.

That the property at the time it was decreed to be sold in *Norton v. Norton, &c.*, was a trust estate in the meaning of the law which gives to the court of chancery jurisdiction in regard to trusts, and also in the meaning of the statutes which give to that court power to decree the sale of an estate in trust when the interest of the beneficiaries in the trust will be promoted by such a sale, I think there can be no good ground to doubt; and I need not, therefore, notice the difference between the English statute of uses and ours. Under either, I think, the estate created by the deed of the 18th of June, 1840, before mentioned, would clearly be considered as a trust estate, unaffected by the statutes of uses, at least during the life of Mrs. Norton.

That trust estates, and especially those in which infants are interested, are 678 peculiarly within the cognizance, and *under the control of a court of chancery, there can be no doubt. Whether that court, in the exercise of its general jurisdiction, has power to decree a sale of real estate which is held in trust for the benefit of infants or others under disability, merely upon the ground that the interest of the beneficiaries would be promoted by a sale, is a question which need not be considered in this case, if there be anything in the deed creating the trust, or any statute law which confers the power upon such court. I will, therefore, proceed to consider those questions; and

First, Does the deed confer the power?

The grantors in that deed could hardly have supposed that the interest of the beneficiaries in the deed probably would not require a sale of the trust subject and reinvestment of the proceeds before the time would arrive for the division of the subject among the children and grandchildren to whom it was contingently limited in remainder. The property consisted of vacant lots, eligibly situated, in the heart of an improving city. Their chief value consisted in their being speedily improved and built upon, and that was impossible while they were held in trust. So long as they remained as they were, they would be comparatively unproductive, both to the tenants for life and the contingent remaindermen. By selling them at a good price, which their location and the existing state of improvements around them would then command, a fund might be raised which would afford the means of support to the life tenants and of support and education for their children. By withholding the power to make a sale until after the death of the life tenants, not only would the property be rendered unprofitable during that period, but the tide of improvement might turn in another direction, and the property be thus rendered less salable. At all events it was obviously important that the trustees, a court of chancery if necessary, should be entrusted with the power to make a sale and conversion, if, and whenever, in the exercise of a sound discretion, it might seem proper to do so. Now let us look at the deed and see if it does not confer such a power, either expressly or by strong implication. We find that it does expressly confer such a power on one of the life tenants. "And upon this further trust that if, in the opinion of the said Daniel N. Norton, it shall become expedient to sell the lots," &c., or any portion of them or either of them, the trustees and the survivor of them "shall permit him, the said Norton, to do so," the purchase money to be secured and applied to the uses and trusts declared by the deed. Now it would be strange if the grantors in the deed only intended to give a power of sale to Dr. Norton, to be exercised if, in his opinion, it should become expedient, and of course to be confined to the period of his life, which might terminate at any time, and did actually terminate a year or two thereafter—his wife, the said Lucy M., the other life tenant, having already survived him more than twenty-five years. The grantors knew that this event might take place, and they could not have intended that in such event no power of sale should anywhere exist, however expedient it might in fact become to make such a sale. They must, therefore, have refrained from expressly conferring a power of sale on the trustees simply because they supposed the trustees would have such power as incident to their office and estate as trustees. And this seems probable from the form of their expression, that if it should become expedient, in the opinion of Dr. Norton, to make a sale, the trustees

should permit him to do so. Thus the power is not directly given to Dr. Norton by the framers of the trust, but the trustees are authorized in a certain contingency to impart to him a portion of the general power with which, as it seems, they were supposed to be invested. The grantors, in that view, gave a power of sale to the trustees by implication. But, at all events, the power conferred on Dr. Norton was trust power, to be exercised for the benefit, not only of himself, but of all others who were interested in the trusts of the deed; that is, of his wife, children and grandchildren. Will a court of chancery suffer this most necessary power to die, merely because Dr. Norton has died? and died, too, almost as soon as the power was given; although the necessity for it might long survive, and has already survived more than a quarter of a century? Is it not a settled rule of that court, that a trust shall never fail for the want of a trustee? But it is said that this power was discretionary in Dr. Norton, and now that he is gone, cannot be exercised. Is not that too strict and literal a view, and does it not sacrifice substance to form? The trust is, that the property shall be sold, if it shall become expedient. Now it is true that the framers of the trust referred the question of expediency to the opinion of Dr. Norton; and so long as he lived, he was a safe depository of such a trust. But that was a mere means of accomplishing an end; and a court of chancery will not permit the end to be lost because the means marked out have been lost, but will devise other means to accomplish the end. The fact to be ascertained in order to exercise the power is, that it is expedient to make a sale. And that fact the court of chancery is as competent to ascertain as was Dr. Norton. There are many cases in which discretionary powers are also trust powers, which can and will be enforced by a court of chancery. And although that court will never interfere with the exercise of a discretion which has been conferred by the author of a trust so long as it is fairly exercised, yet there are many cases in which the court will prevent its improper exercise, and will itself exercise it when the person on whom it is conferred refuses to do so, or is prevented by death or otherwise from doing so. The case in which a husband by his will gives property to his wife during her life in trust for the support of herself and her children, according to her discretion, is a familiar case of this kind. The case of *Hewett v. Hewett*, 2 Eden's Ch. R. 332, decided by Lord Chancellor Northampton in 1765, which was cited and much relied on by the counsel for the appellee Davis, is also a case of this kind, and a very important and interesting case it certainly is. It was decided by a very great Judge, after full argument and long deliberation; the case having been held under advisement for two years, because, as the Lord Chancellor observed after its argument, "it was

a new case, and might be of great importance to the parties, and might be a leading case," as it certainly is. According to the marginal abstract of the reporter, the case was this: "Power contained in a will for the devisees for life, when in possession, to cut down timber, as four trustees or the survivors or survivor of them should assign, allow of or direct, all the four trustees being dead: Held, that the court would execute the trust by referring it to a master to see what timber was fit to be cut down from time to time." The counsel for the defendants argued, that "the power given to the trustees is a naked power, which if it cannot exactly be complied with, is at an end. The books are full of instances of this nature;" and they proceeded to cite many. But the court, as before stated, decided otherwise. I, therefore, think that the deed in this case created a trust power of sale, which it was competent for the court of chancery, after the death of Dr. Norton, to execute, and that the court had jurisdiction on that ground to make the decree which was made in the case of "Norton v. Norton" for the sale of the property in question."

Secondly. Had the court jurisdiction to make such a decree under the statutes in regard to the sale of trust estates? The statute on this subject which was in 682 force "when the original decree was made in "Norton v. Norton, &c.," was the act of January 20th, 1832, entitled "an act authorizing the sale of trust estates in certain cases," Sup. R. C. p. 208, ch. 150, before referred to. That statute enacts "that where any person or persons for whose benefit any estate is held in trust, or the trustees holding any estate for the use of others, shall think that his or her interest, or the interest of those for whose use the estate is held, will be promoted by a sale of the estate or any part thereof, it shall be lawful," &c. There is not a word in that statute which is not appropriate to this case, which is also plainly within its spirit and policy. Why, then, does it not apply to the case? In my opinion, it clearly does, and under it the court had jurisdiction to decree the sale in question. The Code of 1849, ch. 128, § 2, makes no material change of the law in this respect. The act of February 18, 1853, Sess. Acts 1852-3, p. 49, ch. 30, which also applies to this case, having been enacted before the sale to Davis was made, seems to put the question completely at rest, if there could have been any room for doubt before. That act is amendatory of the 128th chapter of the Code, and applies as well to trust estates as to the estates of infants and insane persons. It amends the 2d section of that chapter by inserting therein the words, "whether the estate of the minor or insane person, or of any of the persons interested, be absolute or limited, and whether there be or be not limited thereon any other estate, vested or contingent, and whether the guardian, committee or trustee, or the minor, insane person, or any of the

persons interested, reside in this State or not." Now in this case, Mrs. Norton was one of the persons interested in the trust estate. Her interest therein was a limited estate, and there was limited thereon a contingent estate to the child or children of herself by Dr. Norton who might be in being at her death, and the child or children

683 *then living of any child or children, &c., who may have died in her lifetime. This case, therefore, comes within the express terms of the last mentioned act; as the third section of the act amendatory of § 7 of ch. 128 of the Code, further shows.

I am of opinion, therefore, that on the several grounds aforesaid, a court of chancery had jurisdiction to make the decree which was made in Norton v. Norton, &c., for the sale of the land in question, unless there was an insuperable difficulty in the way in regard to parties. If such jurisdiction existed on any one or more, though not on all, of those grounds, that is enough for the purposes of this case. Although, for reasons apparent on the face of the bill, it was originally framed with special reference to the statutes in regard to the sale of real estate belonging to infants, or in which they are interested, the requisitions of which statutes were strictly complied with, yet as all the facts of the case are fully set out in the bill, and all the proceedings in the suit were regularly and legally conducted, it was competent for the court to make a decree therein for the sale of the property in question, if upon those facts, on any ground whatever, a court of chancery had jurisdiction to make such a decree. The trustees, though not made parties to the original bill, for reasons therein stated, were yet made parties by an amended bill before the sale to Davis was confirmed.

Then the only remaining question to be considered and disposed of is, whether the suit was defective for want of necessary parties? If it was, of course the title acquired by Davis, by his purchase under the decree made in that suit, was also defective.

All the persons interested under the deed of trust of the 18th day of June, 1840, aforesaid, who were in being—the widow of Dr. Norton, and their five children, and the trustees—were parties to the suit; and 684 the only alleged *defect consists in this, that by the terms of the deed, the trust subject, at the death of Mrs. Norton, is to be held by the trustees for the use, and as the property of, the child or children of Mrs. Norton by Dr. Norton who may be then living, and the child or children then living of any child or children of the said Norton and wife who may have died in her lifetime; so that, as is contended by the counsel of the appellants, the grandchildren of said Norton and wife, who may thus become interested in the trust subject, not being parties to the suit, they will not be bound by the decrees made therein, and therefore, to the extent of their contingent possible interests, at least, the title of Davis is defective.

The answer made to this objection by the counsel of Davis is, that although those unborn grandchildren were, of course, not personally parties to the suit, because it was impossible to make them such parties, yet they were parties to the suit by representation, and will be as effectually bound by the decrees made therein, as if they had been in being and made personally parties to the suit. It is contended that they were represented by their mother and their parents, if not by the trustees also.

It is certainly a general rule in regard to suits in equity, that "all persons having an interest in the object of the suit, ought to be made parties." Calvert on Parties to Suits in Equity, p. 11. "It is a rule," says that author, "founded upon the advantage which all persons interested will derive from the completeness of the decree, and from the entire settlement of a matter in litigation; in other words, it is founded upon convenience, and the same principle guides our courts of equity in their mode of putting the rule into operation, as they never allow it to produce any inconvenience which can safely be avoided. With this view, they have adopted the principle of representation." Id., p. 19. The au-

685 thor then proceeds to examine "the doctrine of representation, in the course of which examination he refers to that representative character which is derived from the law, as in the case of executors and administrators, of assignees of bankrupts and insolvents, of corporations; Id. 20; or which arises where suits may be brought by or against certain persons on behalf, or on account of themselves and others having a community or similarity of interest. Id. 28. He then says: "Another kind of representation admitted in the practice of courts of equity, is the representation of all persons having interest in real property, subsequent to the first estate of inheritance, and liable to be defeated by a recovery. This representation takes place in the person entitled to the first estate of inheritance. The rule is firmly established, and the principle and extent of it may be extracted from the following dicta"—which he proceeds to quote from what Lord Eldon says in *Lloyd v. Johnes*, 9 Ves. R. 37, and Lord Northampton says in *Pelham v. Gregory*, 1 Eden. R. 520; and then says: "From these passages, it appears that the modification of the general rule has been adopted on grounds partly of necessity, partly of convenience, and upon a principle of justice to persons entitled to remote interests, that they may not be exposed to any vexations which the caprice or self-interest of those who actually enjoy or wish to claim a property might chance to produce. Another important principle in favor of this doctrine is, that in the person of the first tenant in tail there is brought before the court one, whose interest is of such a nature as to insure his giving a fair trial to the legal right. This last principle seems to have established the limit to the number of interests which may

be represented by the person entitled to the first estate of inheritance. Such interests may be described in different terms; they are interests which depend upon that first estate; which, together with that es-

686 tate, make up the fee simple; those "which come within the definition of a remainder, viz: 'a residue of an estate in land depending upon a particular estate, and created together with the same; they are interests which the tenant in tail can destroy, and which, for that very reason, there is peculiar propriety in empowering him to defend.'" Id. 50. "This kind of representation," he further says, "has even been carried further: it has been said by Lord Redesdale, that 'it is sufficient to bring before the court the first tenant in tail in being; and if there be no tenant in tail in being, the first person entitled to the inheritance; and if no such person, then the tenant for life. Many of the same principles which justified the court in proceeding when only the first tenant in tail was present, may be used in justification of this further step. There is in both cases the same necessity, the same convenience, and on the part of persons remotely entitled, the same liability to the vexatious litigation of the present possessors of the property.'" Id. 51. After quoting from what Lord Redesdale says in *Giffard v. Hort*, 1 Sch. & Lef. R. 409, the author proceeds: "The general principle of representation established in these cases may be thus expressed: 'In respect of the first estate of inheritance, and of all interests depending upon it, it is sufficient to bring before the court the person entitled to that first estate; and if there be no such person, then the tenant for life.'"

The dictum of Lord Redesdale, in *Giffard v. Hort*, which has been already quoted, will justify a statement of this kind of representation in these comprehensive words. It is however suggested that there should be some qualification in respect of the tenant for life; and that, except under very particular circumstances, no tenant for life would be considered capable of maintaining the suit, unless he were one to whose issue there was a remainder in tail. For instance, that if A were

687 tenant for life, with remainder "to B for life, remainder to B's unborn issue in tail; B as well as A must be made a party; and that if A were tenant for life, remainder to B's unborn issue in tail, remainder to C in tail, and C is living, C as well as A should be made a party. On the other hand, if in the first of these cases B, or in the second C, were not living, a plea of necessity might possibly be admitted for making A sole representative of the legal estate. No direct authority is produced for these latter suggestions, which are however thrown out for consideration, and are in some measure supported by the expressions quoted in the note below." Id. 52. The author then proceeds to show how "courts of equity, having adopted the principle of representation, work it out by

treating the persons represented as if they had been parties present;" (Id. 54) the object of the court in dealing with rights of this kind being "to settle them forever." Id. 59. The first section of the first chapter of the author's work treats of the general rule in regard to parties, before referred to. The second section treats of the "doctrine of representation" as a modification or qualification of that rule. And the third section treats of "exceptions to the general rule." This last section he thus commences: "The several kinds of representation which have been enumerated cannot properly be termed exceptions to the general rule; they are merely the modes, in which, for the sake of convenience, the court allows the several interests to be protected, with a view to make a complete decree." Id. 64. I have quoted thus freely from the work of Mr. Calvert, because it is a work of high reputation, and was very much referred to by the counsel on both sides in the argument of this case; and also, because I wished fully to show the nature and extent of the doctrine of representation, as understood in England, so far as it applies to this case, and that wherever it applies, the parties represented are as effectually
688 "bound by the decrees in the suit as if they had been parties in their proper persons. See also Mitf. Pl. 174, marg. and Story's Eq. Pl. §§ 144 and 145.

The only case decided by this court, in which the doctrine of representation has been considered and expressly applied, is the case of Baylor's lessee v. Dejarnette, 13 Gratt. 152; in which it was held—first, that the son of E took a contingent remainder in fee in the estate devised by B, dependent upon his being alive at the death of E; and secondly, that the son of E, not having been in being when the suit was revived against E, (though he was in being when the decree was rendered,) and having no certain interest in the estate, was not a necessary party, but is concluded by the decree against E, the tenant for life. Judge Lee, in his opinion in that case, in which all the other judges concurred, examined the doctrine quite fully, referring to most of the treatises and cases on the subject, and making quotations from several of them. He applied the doctrine to that case by holding a father, tenant for life of an estate, to be a sufficient representative of his son, who was contingently entitled in remainder to the estate, in a suit brought against the father to subject the estate to a charge thereon, and by holding the son to be concluded by the decree which was rendered in the suit against the father. Judge Lee, in speaking of the suggestion of Calvert, that the tenant for life, who should be regarded as representing the whole estate, must generally be one whose child, if he have one, will become entitled to the inheritance, and who would therefore be induced to make a proper defence, and thus take care of the inheritance for his children, says that Calvert admits there is no direct authority for the sugges-

tion, though he thinks it is countenanced by expressions to be found in several of the cases. Judge Lee further says: "The condition required by this suggestion
689 is, however, fully met in this *case, as the lessor of the plaintiff who would take the remainder in fee if he survived his father, is the son of the tenant for life who was made defendant." Id. 170. The same observation applies with increased force to this case, in which the unborn persons, who might come into being and become interested in the estate, were represented in the suit by their own parents, and moreover by their grandmother, the tenant for life, and the trustees. In Baylor v. Dejarnette, the son of E came into being pending the suit, and before the decree was rendered, and yet it was held not to be necessary to make him a party by an amended or supplemental bill, because "no estate vested in him upon his birth, and none could vest unless he fulfilled also the condition of surviving his father." Id. 169. In our case, not only at the time of the institution of the suit of Norton v. Norton, &c., but also when the decrees of sale were pronounced, and the sale was made and confirmed, all persons in being who had an interest in the estate, whether present or future, vested or contingent, were parties to the suit. It seems to me, therefore, that the case of Baylor v. Dejarnette is a direct and binding authority in favor of the doctrine of representation before referred to, and of its application to such a case as this. It is argued, that the doctrine is confined to cases in which the suit is brought to enforce a charge upon an estate affecting the whole fee, in which cases, it is said, that it would be very unreasonable and unjust that the party having the charge "should be delayed or embarrassed in enforcing it, by reason of limitations by way of remainder to persons whom it might be impossible or improper to make parties to the cause." Certainly it would be very unreasonable and unjust. But that is not the only instance in which it would be very unreasonable and unjust that a party should be delayed or embarrassed in the prosecution of his suit by reason
690 of such limitations. *And that case is put in the books and in the opinion of Judge Lee by way of instance, and not as a limitation of the rule, which exists wherever its reason exists, and that reason is to be found in the convenience and often the necessity of things. This rule of representation often applies to living persons, who are allowed to be made parties by representation for reasons of convenience and justice, because their interests will be sufficiently defended by others who are personally parties, and who have motives both of self interest and affection to make such defence, and it is therefore considered unnecessary to make such living persons parties, and indeed improper to do so, and thus compel them to litigate about an interest which may never vest in them. But the rule also often, and a fortiori, ap-

plies to persons not in being, and who of course may never be in being, who are allowed to be made parties by representation for reasons, not only of convenience and justice, but of necessity also, because it is impossible to make them personally parties. It will be found by an examination of all the cases, that the rule and the reason of it go to this extent, and that necessity is recognized as an all sufficient reason for it wherever such necessity exists. In *Giffard v. Hort*, supra, Lord Redesdale uses this language, which is quoted by Judge Lee in *Baylor v. Dejarnette*: "Where all the parties are brought before the court that can be brought before it, and the court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive. It has been repeatedly determined, that if there be tenant for life, remainder to his first son in tail, remainder over, and he is brought before the court before he has issue, the contingent remaindermen are barred." See also *Finch v. Finch*, 2 Ves. Sen. R. 491; *Calvert on Parties* 52, note 7. In England the cases to which the rule has been generally applied have been cases 691 in which entailed *estates were involved; and in this country we have no such estates. There have been there no such cases as the one we are now considering, because there the Court of Chancery has not yet, I believe, been authorized by statute to decree a sale of lands in which infants and others under disability are interested, on the ground that it would be to their advantage to do so. When it appears to the Court of Chancery there that an infant would be benefited by a sale of his real estate, all that the court will in general do in such a case is, to give leave to the infant or his friends to apply for an act of Parliament to authorize the sale; and such an act is, I suppose, always passed in such cases. But here, courts of chancery have been authorized by general statutes to exercise complete jurisdiction on this subject; and these statutes have, as before shown, been liberally construed, so as to advance the remedy and promote the policy of the Legislature. The same rules which apply to other suits in chancery apply also to suits brought under these statutes, except where they otherwise direct; and therefore the rule in regard to representation applies to the latter suits. That the rule in England applies to other cases than those in which a charge is sought to be enforced against an estate is shown by the case of *Gaskell v. Gaskell*, 6 Sim. R. 643, 9 Cond. Eng. Ch. R. 643, referred to in the argument of this case, and also in the opinion of Judge Lee, 13 Gratt. 168. In that case, a bill by a tenant for life, with remainder to his unborn sons in tail, for partition, was maintained, and the decree held binding on the sons when they should come into being. The tenant for life was there regarded as the representative of his unborn sons, though he was plaintiff; the Vice-Chancellor being of opinion that it made

no difference whether he was plaintiff or defendant, and saying that the court had frequently decreed partition where the tenant for life was defendant. There 692 is nothing peculiar in the *subject of partition which rendered the rule of representation applicable to that case. On the contrary, if there be any difference between that subject and any other in this respect, there would seem to be less reason for applying the rule to that subject than to others; for we know that a tenant for life or for years, who holds an estate jointly or in common with others, may have a partition of the estate, so far as he is concerned, without affecting the rights and interests of those who may be entitled to the estate in reversion or remainder, whether such interests be vested or contingent; and therefore it may be said, that there is no necessity for his asking for a partition which will affect those interests. Yet it is often convenient to do so, and that convenience is a sufficient reason for applying the rule of representation to the case.

But there is another view to be taken of the subject, which I think is perfectly conclusive of the case. I have shown that the Court of Chancery has jurisdiction of the subject matter, both in the exercise of its general jurisdiction over the subject of trusts for the purpose of enforcing the execution of the trusts and powers created and declared by the deed of the 18th day of June, 1840, aforesaid, and also in decreeing the sale of an estate in trust under the statutes before referred to. Let us first consider the case in the former aspect. I think I have shown that the deed confers a power of sale on Dr. Norton, which is a trust power for the benefit of others as well as himself, and which a court of chancery can execute notwithstanding the death of Dr. Norton. A suit has been brought for its execution, to which all persons in being having any interest in the subject or the trust were made parties: the trustees, the tenant for life, and the contingent remaindermen, being all those who apparently will be entitled to the estate at the death of the life tenant. Now can it be possible that this suit is defective for 693 *want of necessary parties because some of these contingent remaindermen may die in the lifetime of their mother leaving children who may survive her, and thus become interested per formam doni, and because such children were not, as they could not be, personally made parties? Can it be possible that a court of chancery is powerless during the life of Mrs. Norton, who has already survived her husband twenty-six years, to execute this trust power of sale, although the interest of all the living beneficiaries in the trust, and even of all beneficiaries therein who may hereafter come into being, would be promoted by the sale, and manifestly requires it? Powerless, because possibly persons not now in being may hereafter come into being, and become interested in the subject on the further and

double contingency of their surviving, first their parent and then their grandmother, and because the doctrine of representation does not apply to such a case? If ever there was a case to which it should apply, this, it seems to me, is one. The rule in regard to parties is a rule of convenience, and the court will never allow it to be so applied as to do an injury, to obstruct the administration of justice. To do so, would be to prefer the shadow to the substance, the means to the end; to sacrifice justice to the forms devised for its attainment. It seems to me that when, in a suit, brought to enforce the execution of such a trust, all persons in being who are interested in the object of the suit are convened before the court as parties, it is perfectly competent for the court to decree accordingly, and any title acquired under such decree is good, not only against those persons, but all others who may afterwards come into being and become interested in the trust.

Now let us consider the case in the other aspect; that is, as a case in which a trust estate was decreed to be sold under the statutes aforesaid. The case comes 694 within the "express terms of some of these statutes, as I have already shown. Especially does it come within the express terms, and true intent and meaning, of the act of January 20th, 1832, authorizing the sale of trust estates in certain cases; and of the Code of 1849, ch. 128, § 2; and of the act of February 18, 1853, amendatory of chapter 128 of the Code. When, therefore, the Legislature, in general terms, empowered a court of chancery to decree a sale of any trust estate, if it be clearly shown that the interest of the beneficiaries will be promoted, and the court is of opinion that the rights of no person will be violated thereby, did it not, by necessary implication, if not expressly, empower the court to use all the means which were necessary to accomplish the end in view? The Legislature knew that in many, if not most, trust estates, unborn persons might come into being and become interested. Did they mean to exclude all such estates from the operation of the law, when they came not only within its literal terms, but also within the spirit and policy of the law? If they had so intended, would they not so have expressly declared? Would they have left their intention in doubt in a case where there should be the greatest possible certainty? Is it not much more reasonable to suppose that they intended to embrace all trust estates which their words, and the spirit and policy of their law embraced? and to require only that all persons in being who were interested in the trust should be made personally parties to the suit, and to make the decree therein binding, not only on those parties, but all other persons who might thereafter come into being and be interested in the trust? In other words, to adopt the rule of representation before mentioned, and apply it to such unborn persons? Is there not at least as much reason for applying it to such a case as for

applying it to any other case in chancery? If it be a proper rule, and founded on convenience or necessity, in a suit brought

695 *to recover property, or enforce a charge against it, is it not at least as much so in a suit brought merely to change the form of the subject or investment, and that, too, for the benefit of all persons who are or may become interested therein? Is it not sufficient, in the latter case, to take care to guard the possible interest of unborn persons, by the presence, as personal parties to the suit, of all living persons who are interested therein, some or most of whom have the same interest in kind, though greater in degree, than that of those who may hereafter become interested and stand in the closest degree of relationship to them? The amendatory act of February 18, 1853, plainly contemplates cases in which unborn persons may become interested in the subject, for it expressly embraces estates on which contingent estates are limited, and we know that such contingent estates frequently, if not generally, enure to persons unborn at the time of the creation of the trust, and depend on the contingency of their being afterwards born. The act of March 15, 1858, before referred to, expressly declares that "the decree rendered in such suit (as is authorized by that act), shall be as binding upon all persons who may be born thereafter and become interested in the said estate, in like manner and to the like extent as it is upon the parties to the said suit." That act does not apply to this case, as already mentioned, but it shows that the Legislature certainly intended in that case to apply the rule of representation, and make the decree conclusive against persons who might be born after the decree and become interested in the estate, for they expressly said so. There is at least as much, and, indeed, the same, reason for applying the rule to the case of a sale of a trust estate, as to the case of a sale of an estate subject to a contingent limitation, as a trust may be, and, in fact, is, in this very case. If, therefore, the rule does not

696 apply to the case of a sale of a trust estate, it is only because the *Legislature has not expressly said so, and not because of any unfitness of the thing. But I have already shown, I think, that the Legislature did say so by strong implication, and that such is the proper construction and effect of the law. It is argued, I know, that the express declaration before referred to, contained in the act of March 15, 1858, shows that the Legislature did not intend to give the same effect to decrees made for the sale of trust estates under the statutes before mentioned, as those statutes contain no such express declaration. The answer to this argument is, that while it belongs to the Legislature to enact laws, it is the province of the courts to construe them; and though the opinion of the Legislature as to the meaning and effect of prior statutes, is entitled to great respect, it is by no means binding on the courts. But it does not follow, from

the terms used in the act of March 15, 1858, that the Legislature thereby intended to indicate any opinion in regard to the true construction of any prior statute. It was meet and fit that in the act of 1858 they should use such language as plainly to show their meaning, and leave no room for doubt or difficulty. They were not legislating in regard to the sale of trust estates, or they would have made the same express declaration in regard to them, as there was the same reason for doing so. They left them to stand where the law had already placed them.

In *Garland v. Loving, &c.*, before referred to, there is something in the opinion of the court delivered by Judge Coalter, apparently inconsistent with some of the views I have expressed. In that case it was possible that James Loving and wife might have other children who would become interested with those already in being in the estate which was sought to be sold, and the court seemed to suppose that it would be necessary to sell the estate, if sold

at all, subject to the contingent claim
697 of such after-born children; *thus ignoring, or taking no notice of, the doctrine of representation as applicable to the case. Notwithstanding this supposed difficulty, the court was of opinion that it was competent to a court of chancery to decree such a sale. "It will therefore," said the court, "be for the consideration of the Chancellor, whether a fair and proper sale of the property can be made under that condition, subjecting the fund, to be invested as aforesaid, to the purchaser for his indemnity against any such possible claim; of all which he will judge before the sale and arrangements are finally closed. If, under all these circumstances, a sale manifestly to the interest of the infants can be made, this court thinks it will be proper to decree the same, taking care that the proceeds thereof shall be properly invested and secured for the use of the cestui que trusts, according to their rights as they now appear, or may hereafter appear, or of any future cestuis que trust, who may be entitled under the deed aforesaid, with liberty to the parties from time to time to apply to the court for further directions."

Now it would certainly have been much better for all persons concerned, if the court had applied the doctrine of representation to that case, and made the decree for a sale conclusive against any such future possible claimant, instead of directing the sale to be made subject to his claim. That case was submitted to the court without argument, by Mr. Chapman Johnson, who was counsel for both parties. And the doctrine of representation, as applicable to the case, seems therefore to have been overlooked. But however that may be, the case was decided soon after the first statute on the subject of the sale of the real estate of infants was passed, and under that statute; and can afford, therefore, no binding rule in regard to the construction of subsequent statutes on the subject, if it can afford any

such rule at all, even in regard to the
698 statute *under which it occurred. But it is in direct conflict, even in this respect, with the case of *Cooper v. Hepburn, &c.*, supra, recently decided by this court. That case occurred under the original statute of 1819, amended by the act of 1827, which amendment, however, does not seem to make a material difference between the two cases in regard to the question we are now considering. In *Cooper v. Hepburn, &c.*, M, as guardian of his infant children, filed a bill for the sale of the real estate held by himself for life and by his children in remainder, and it was decreed to be sold accordingly. The purchaser was compelled to complete his purchase, although it was possible that other children might afterwards be born and become interested in the subject, the court having held that the remainder vested in the first child of M upon his birth, subject to open and let in the after-born children as they severally came into being. Thus the doctrine of representation was actually applied to the case, and it was just such a case in this respect as was that of *Garland v. Loving*. It is true, that neither in the argument of counsel nor in the opinion of the court in the case, was any express reference made to that doctrine. But it was no doubt because it was considered as a matter of course, both by counsel and court, that if the case came within the statute, as the court decided it did, then it could only be necessary to make all persons in being and interested in the subject parties to the suit, and the decree would be binding on any other children who might afterwards be born and become interested, and who were sufficiently represented by the children already in being and parties to the suit. The purchaser in that case was represented in this court, and no doubt in the court below, by able counsel, and used the most strenuous efforts to get rid of his purchase, which turned out to be a bad one for him, and, of course, a good one for the owners of the estate.

699 But he made no objection *on account of the possible interest of any child which might afterwards be born.

It was argued by the counsel for the appellants, that the Circuit Court did not intend, in the case of *Norton v. Norton, &c.*, to decree the sale of more than the interest of the parties to the suit in the real estate therein mentioned, and therefore sold it subject to the contingent interest of any other persons who might afterwards be born and become interested therein. And in support of this argument some of the decrees made in the case were referred to, in which the Commissioners were directed to convey to the purchasers respectively "all the estate, right, title and interest of all or any of the parties to this cause in and to the lot purchased by him." Now there can be nothing in this argument, if it be true, as I think I have shown, that the unborn persons who might come into being and become interested in the subject were, in fact, parties to the suit by repre-

sentation, for then they are included in the very terms of those decrees. But, on the other hand, the language of the decrees was not uniform in that respect. On the contrary, we find that in the first decree of sale, made in June, 1847, the Commissioners are directed to sell "the property above referred to and in the proceedings mentioned." And to the same effect is the decree of March 20th, 1848, confirming the sales which had previously been made, and directing conveyances to be made to the purchasers respectively. Certainly the court which decided, and the counsel who managed that cause, had no idea that the property was to be sold subject to the contingent interest aforesaid. The court would not have decreed such a sale, which must inevitably have occasioned a sacrifice of the property. If it had been intended to make such a sale, the intention ought to have been plainly expressed on the face of

the decree, so as to give notice to purchasers; *as was done by this court in *Garland v. Loving*. Certainly the purchasers of the property had no idea that it was sold subject to such a contingency; and the court and counsel must have known that they had not, and that they believed they were acquiring a perfect title. To impute to the court and counsel, under these circumstances, an intention to sell the property subject to the contingency aforesaid, would be to impute to them a fraud, of which they were incapable of being guilty. I know the learned counsel of the appellants in this case did not intend to make such an imputation, and would be among the last in the world to do so.

But it is said that all the descendants of Mrs. Norton by Dr. Norton may die in her lifetime, and thus, at her death, the trust purposes being fully accomplished or exhausted, and all the objects of the trust being extinct, the subject would result to the heirs at law of Mrs. Call, who were not parties to the suit of *Norton v. Norton*, and are, therefore, not bound by the decrees rendered therein. This is, certainly, a very improbable contingency; that all the five children of Dr. and Mrs. Norton, living at the time of the creation of the trust, and all their descendants afterwards to be born, should die in Mrs. Norton's lifetime; so improbable, that no provision whatever was made for it in the trust. Still it is a possible contingency; and if it should happen, the heirs of Mrs. Call, whoever and however numerous they may be, will become entitled to the trust subject. But surely this remote possible interest can interpose no obstacle to the sale of the trust estate under the statutes aforesaid. That sale does not extinguish nor diminish their interest, but only changes the form of the subject for the benefit of all parties concerned, as well those heirs as others, for whose use, whenever, if ever, they shall become en-

701 titled to it, the subject will be *secured and preserved. If the tenant for life and the contingent remaindermen in being, are sufficient representatives of the contin-

gent remaindermen not yet in being, who are all that can claim per formam doni, and all of whom come in before the heirs at law of Mrs. Call, who can come in only by operation of law after the exhaustion of the trust, surely they are sufficient representatives also of the heirs at law, whose interest is of the same nature, though not of the same degree, as that of the contingent remaindermen. If those heirs are entitled to any representation at all in such a suit, the trustees to whom a legal estate in fee simple is conveyed by the deed, would seem to be the most appropriate persons to occupy that position. But in fact, they are not entitled to representation in the suit at all. The property having been conveyed to the trustees and their heirs forever on the trusts declared in the deed, the heirs of the grantor have no interest in the subject, and are not to be regarded until all those trusts are satisfied. In a suit, therefore, for the execution of the trusts, they have no legal or equitable interest, and are not necessary nor proper parties. It is only when the trust fails, or is fulfilled, that their interest springs into existence rather than that the estate should escheat to the Commonwealth.

I have now, I believe, considered and disposed of all the questions which arise in this case. My opinion is no doubt too long. But the case was argued at very great length, as well as with very great ability, involves property of great value, and is very important not only in itself, but also in its relation to other cases, depending on the same questions which might hereafter arise. I have, therefore, thought it proper to express my views very fully on all these questions. My conclusion is, that there is no defect in, nor cloud over, the title 702 acquired by the appellee Davis *under the decrees in the suit rendered in the case of "*Norton guardian v. Norton, &c.*," and therefore that there is no error in the decree of the Court of Hustings, and that it be affirmed.

The other judges concurred in the opinion of Moncure, P.

Decree affirmed.

703 **Omohundro's Ex'or v. Crump.*

April Term, 1868, Richmond.

1. *Sale of Land—Notes—Confederate Currency.**—In November, 1861, C sells to O a tract of land, and O pays him one-fourth in cash, and gives him his notes for the balance, payable in one, two and three years. Nothing is said at the time as to the currency in which the notes are to be paid; but C accepts payment of the first two notes in Confederate currency. C is not bound to take Confederate currency for the last note; but is entitled to be paid in the legal money of the country.

**Notes—Confederate Currency.*—In *Hansbrough v. Utz*, 75 Va. 963, the court said: "I have quoted thus largely from the opinion of JUDGE JOYNES in *Omohundro v. Crump*, 18 Gratt. 703, because he has so

This was an action of debt in the Circuit Court of the City of Richmond, brought in March, 1866, by W. W. Crump against Silas Omohundro's executor, upon a negotiable note for \$1,714.66. Plea nil debit; and issue. Upon the trial, the parties waived a jury, and submitted the whole case to the decision of the court; and they agreed the facts.

It appeared that, on the 8th of November, 1861, Crump sold Omohundro a tract of land in Henrico county, for which he received one-fourth in cash by check on the Farmers' Bank; one-fourth in a note at one year; one-fourth in a note at two years; and the remaining payment viz., one-fourth by note at three years, is the note in controversy, it bearing date the day of the sale. Crump received payment of the two notes paid in Confederate money; though no such agreement was made at the time of sale. At the time of the sale, specie payments had been suspended, and there was a discount

704 of about ten per cent. on bank notes. Confederate money had begun to circulate at the rate of bank notes; but was not then the only circulating medium. When the note became due, Confederate money was worth about forty for one in gold.

The Circuit Court rendered a judgment for the plaintiff for the full amount of the note, principal and interest; and upon a writ of error to the District Court of Appeals at Williamsburg, that court affirmed the judgment. Omohundro's executor thereupon obtained a writ of error to this court.

Lyons, for the appellant, and Crump, for the appellee, submitted the case.

JOYNES, J. The note on which this ac-

clearly and concisely stated the rules of law applicable to this case, and there is nothing contrary to these views in the numerous decisions of this court with respect to contracts made during the term. The case of *Walker v. Pierce*, 21 Gratt. 722, so much relied on by the counsel for the appellant, is not at all in conflict with this view. In that case the obligation was dated *after* the 20th October, 1863, and the presumption declared by the statute expressly applied.

"I think the rule upon the authority of *Omohundro v. Crump*, which has never been questioned, may be stated thus: Wherever an obligation is given for the payment of so many dollars payable before the 20th October, 1863, the presumption is (in the absence of all proof as to the kind of currency in which it is to be paid) in favor of payment in a sound currency. Inquiry, of course, may be made as to the intentions of the parties, and very slight proof may change this presumption, *but in the absence of all proof*, the presumption, when the obligation is payable before the 20th of October, 1863, is in favor of a sound currency."

In *Lohman v. Crouch*, 19 Gratt. 342, the court said that the principal case should be distinguished from the case at bar because the transactions were of different dates and therefore had reference to different currency. In that case the notes were dated July 16, 1862, payable in twelve and twenty-four months respectively.

tion is founded was executed on the 8th day of November, 1861, for the payment of \$1,714.66, three years after date. It was given on account of the purchase money of land, sold for one-fourth cash, and the residue in one, two and three years. The cash payment was made by a check on the Farmers' Bank, and the first two notes were paid in Confederate notes; but it is stated in the facts agreed, that there was no agreement at the time of the sale that the notes should be paid in that currency. The question to be decided is, whether the third note was payable in Confederate notes.

The act of March 3, 1866, provides, that in any action founded on any contract, express or implied, made and entered into between the 1st day of January, 1862, and the 10th day of April, 1865, it shall be lawful for either party to show, by parol or other relevant evidence, what was the true understanding and agreement of the parties, either expressed or to be implied, as to the kind of currency in which it was to be fulfilled or performed, or in

705 *reference to which, as a standard of value, it was made and entered into.

This case does not come within the provisions of that act, because the note was made before the 1st day of January, 1862. It is doubtful, to say the least, whether parol evidence of the actual understanding and agreement of the parties as to the kind of currency in which a contract is to be fulfilled, which is expressed to be payable in "dollars" generally, would be admissible independently of the provisions of that act. The word "dollars" has a definite signification fixed by law, and it is laid down that "when the words have a known legal meaning, such, for example, as measures of quantity fixed by statute, parol evidence that the parties intended to use them in a sense different from their legal meaning, though it was still the customary and popular meaning, is not admissible." 1 Greenleaf Ev. § 280. See also *Smith v. Walker*, 1 Call 24; *Commonwealth v. Beaumarchais*, 3 Call 107. We need not decide whether such evidence could have been received in this case, because it is expressly stated in the facts agreed that there was no such actual agreement.

It is contended, however, that the law will imply an agreement, under the circumstances of this case, to accept Confederate money in payment of the note on which the action is founded. The argument is, that the note having been made after the establishment of the Confederate States, must be considered as made with reference to the actual currency of those States, and that as Confederate notes were the actual currency in those States at the time the note became payable, it was payable in that currency. It must be remembered, however, that Confederate notes were never made a legal tender. They were never the lawful money of the country, but only a substitute for money, like bank notes. Gold and silver were the lawful money of the Confederate States at the time this note

706 was *made, and also at the time it became payable, according to the provisions of the act of the Congress of the United States, expressly adopted by the Congress of the Confederate States. The principle of public law relied on by the counsel for the appellant, and quoted from Story Conf. § 242, presumes, in the absence of evidence to the contrary, that every contract is made with reference to the lawful currency of the country in which it is entered into. It does not presume it to be made with reference to any substitute for such currency which may happen to circulate. A contract made in Richmond before the war, for the payment of so many dollars, would not have been deemed payable in bank notes, though bank notes were then the common, and practically the exclusive, currency. And so in this case, if we apply to the Confederate States the principle relied on, the note must be deemed payable in specie, which was the lawful money of the Confederate States at the time it became payable.

There was no law of the Confederate States, or of the State of Virginia, controlling or affecting this legal presumption until the act of Assembly passed October 14, 1863. That act provided, that all contracts made and entered into on or after the 20th day of October, 1863, should be deemed payable in such currency as should, at the time of their becoming payable, be receivable in payments to the State of Virginia, unless that intentment should be expressly excluded. This act indicates the sense of the Legislature that there was no such presumption independently of its provision. The act of March 3, 1866, provided that, as to all contracts made after the 1st day of January, 1862, an enquiry might be made to ascertain what sort of currency was really contemplated by the parties. That act was wholly unnecessary, if, as now contended, every contract made in the Confederate States, must be deemed payable in the actual currency at the time of its becoming payable.

707 *Nor does the fact that the plaintiff accepted payment of the first two notes in Confederate money preclude him from insisting upon lawful money for the note now in question. Upon an enquiry into the actual intention and understanding of the parties, the fact that the plaintiff accepted Confederate money for the first two notes would be a circumstance having some tendency to show that there was an understanding that all the notes should be payable in that currency. But it would not be sufficient of itself to overcome the legal presumption in a case arising before the 20th day of October, 1863. A man before the war might forego his legal right to demand specie on any one or more of a series of notes, by accepting payment in bank notes, and even in depreciated bank notes, without affecting in any manner his right to demand specie on any other of such notes. And, in this case, it is expressly stated that there was no agreement at the

time of the sale that the notes should be payable in Confederate money. We are not at liberty, therefore, to make any inference of such an agreement as matter of fact.

The recent decision of this court in Dearing's adm'r v. Rucker, has no bearing on this case. The bond in that case was executed after the 1st day of January, 1862, and the facts stated satisfied the court that, "according to the true understanding and agreement of the parties," it was to be paid in Confederate notes.

There is no error in the judgment, and it must be affirmed.

The other judges concurred in the opinion of Joynes, J.

Judgment affirmed.

708

*Boulware v. Newton.

April Term, 1868, Richmond.

1. **Bonds—Confederate Currency—Case at Bar.***—N gives his bond to B, dated January 29th, 1863, by which, on demand, three months after notice to pay, he promises to pay to B five thousand dollars, without interest, in current funds; the money to be punctually paid at the end of three months after demand, and if not, to bear interest from demand; B not to be required to receive the money except at his pleasure. The bond is given for five thousand dollars Confederate notes, then delivered by B to N, which were then worth in gold but one-third of the amount. **Held:**

1. **Same—Same—Same.**—The contract is valid, and B is entitled to recover five thousand dollars in the currency of the day when the money is demanded.

2. **Usury—Principal Risked.**†—It is a contract in which the principal is at hazard, and therefore not usurious.

2. **Appellate Practice—Errors Prejudicial to Appellee.**‡—In a common law cause, a question having been decided in the court below against the appellee, the appellate court will consider it, and if it is erroneous, reverse the judgment on that ground.

***Bonds—Confederate Currency.**—The principal case was cited in *Kraker v. Shields*, 20 Gratt. 408; *Omohundro v. Omohundro*, 21 Gratt. 681; *Calbreath v. Va., etc., Co.*, 23 Gratt. 703; *Wrightsmen v. Bowyer*, 24 Gratt. 437.

The principal case was distinguished in *Miller v. Lynchburg*, 20 Gratt. 342; *Danville v. Sutherland*, 20 Gratt. 585; *Stover v. Hamilton*, 21 Gratt. 278; *Meredith v. Salmon*, 21 Gratt. 772; *Hilb v. Peyton*, 23 Gratt. 566.

See generally, monographic note on "Bonds."

†**Usury—Principal Risked.**—See monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 698, and cases there collected.

‡**Appellate Practice—Error Prejudicial to Appellee.**—In *Morgan v. Ohio River R. Co.*, 39 W. Va. 26, 19 S. E. Rep. 591, the court said: "It must not be thought, however, that, because an appellee has not appealed, an error against him cannot be corrected on a writ of error taken by another party; for the writ brings up the whole record, and any error to the appellee's prejudice may be corrected, though his interest be not identical with that of the appellant, but hostile.

This was an action of covenant in the Circuit Court of the county of Westmoreland, brought in October, 1866, by Wm. Boulware against Willoughby Newton, to recover the amount of a bond, which was in the following words and figures.

\$5,000. On demand, three months after notice to pay, I promise to pay to William Boulware the sum of five thousand dollars, without interest, in current funds; but it is understood and agreed, that the money is to be punctually paid at the expiration of three months after demand, and if not so paid, is to carry interest from the day of demand; and the said Boulware shall not be required to receive the money except at his pleasure. Witness my hand and seal this 29th day of January, 1863.

Willoughby Newton, [seal.]

The defendant pleaded covenant performed, and also filed a plea of usury. The facts on which this plea is based are, that the bond was given for a loan of five thousand dollars of Confederate States treasury notes, the actual value of which, compared with gold, was at the time twelve hundred and fifty dollars; and that the five thousand dollars was to be paid at the expiration of the three months after notice to pay in funds which should be current at that time.

The plaintiff took issue upon the pleas; and upon the trial of the cause, the jury found a verdict for the plaintiff for the sum of sixteen hundred and sixty-six dollars and sixty-six cents, with interest thereon from the 29th of January, 1863, till paid. The plaintiff thereupon moved the court for a new trial, on the ground that the verdict was contrary to the law and the evidence. But the court overruled the motion, and entered up judgment on the verdict; and the plaintiff excepted.

The facts stated are: The bond on which the suit was brought; a written notice from the plaintiff to the defendant, dated June 25th, 1865, demanding payment of the bond; the service of which was acknowledged by the defendant; and the facts that the consideration of the bond, and for which it was given, was the sum of five thousand dollars in Confederate treasury notes lent by the plaintiff to the defendant; and that the said notes, at the time so lent by the plaintiff and received by the defendant, were worth the sum of sixteen hundred and sixty-six dollars and sixty-six cents in gold.

The plaintiff obtained a writ of error to the District Court of Appeals at Fredericksburg; where the judgment was affirmed; and he then obtained a writ of error to this court.

and though the writ of error may be only to a certain judgment, and the error to his prejudice be in either that or another. *Boulware v. Newton*, 18 Gratt. 708; *Day v. Murdoch*, 1 Munf. 460; *Defarges v. Lipscomb*, 2 Munf. 451; *Lomax v. Picot*, 2 Rand. (Va.) 247; Opinion in *Burton v. Brown*, 22 Gratt. 14; *Bart. Law Pr.* 1354."

Halyburton, for the appellant.
Lyons, for the appellee.

RIVES, J. The verdict of the jury in this case is founded on the theory that the appellee's bond was a Confederate contract, payable in Confederate money, and to be scaled as of its date, 29th January, 1863, when such money bore to specie the relation of three to one. This led to the finding of \$1,666.66, with interest from the said date. A new trial was asked for, on the ground that this verdict was contrary to law and the evidence. It was refused, and a bill of exception taken, setting forth a very meagre state of facts proven on the trial. These facts consisted of the production of the bond; a demand of payment, acknowledged on the 25th June, 1865; the loan of \$5,000 in Confederate treasury notes, as the consideration of this bond; and the value of such notes at the time of the loan, ascertained to be the said sum of \$1,666.66 in gold. The legal construction, therefore, which we are now required to put upon this instrument, receives no aid from extrinsic evidence, and depends wholly upon its terms, with such lights as we may derive from the situation of the parties, the subject-matter of the contract, and contemporaneous events in the history of the times.

Remarkable as his contract is, in its most distinctive feature, it is admitted on both sides, that the parties contracted on equal terms, and were men of uncommon intelligence and business capacity; so that no inequality whatsoever in their relative situations has been insisted on or pretended as a ground to impeach the contract, or ask relief from its literal enforcement. They were both citizens of Virginia, and possessing equal means of information as to the past and present future of events bearing upon their contract, and likely, according to their respective beliefs and speculations, to influence, in the same or different ways, this agreement.

Contracts are usually referable, for their construction, to the laws of the country where made. Parties must be taken to contract in reference to them; and hence, the *lex loci contractus* is a prevailing canon of interpretation. In order, however, to test the applicability of this doctrine to our present enquiry, we must look to the situation of the parties, as affected by the remarkable political events that were then transpiring, and which might be naturally expected to enter into their consideration, and influence in some degree their agreement.

To this end, it is not necessary to enter at all into the vexed theories and controversies which engendered and attended the late war; we have only to seek for the facts of history, about which there is and can be no dispute. A contrariety of opinion exists as to the nature, the incidents and consequences of this struggle; but however differently viewed, it may be practically characterized, without offence to any of the opposing theories, as a revolution attempted, whether rightfully or wrongfully,

by the seceding States. It was so organized by these communities, and endowed with the attributes and prerogatives of a separate government, as to extort for the Confederacy, from foreign nations and the United States, the recognition of belligerent rights as belonging to it; and from the Federal judiciary, its acknowledgment as a de facto government. But still, during the pendency of the war, and while its result

712 was confessedly uncertain, it seems to me *scarcely correct to say that the citizens of the Confederate States had so completely thrown off the old, and established the new government, as to refer all their contracts to interpretation by the laws of the latter, as if its existence was undisputed. I can well understand how, in a long-established government, contracting parties, in the absence of any stipulation to the contrary, are ordinarily to be considered as contracting with reference to the laws of that government, and submitting their contracts to be interpreted by such laws. But what is there in this rule to confine the parties here, involved as citizens in a doubtful war, to an interpretation of their language by the laws of their existing government, and actually to inhibit them from contracting in respect to a new order of things? It was impossible not to foresee the probability of change in the currency; whether it should be by the substitution of another by the Confederate government when established, or by the return of Federal money through the restoration of Federal authority, was a consideration that might have fairly entered into the transactions of men. It would certainly curtail the freedom of such transactions to lay down the inflexible rule that parties in such a state of society cannot, on grounds of policy, be allowed to contract for payment in anything but their existing currency, and that nothing but a clear stipulation to the contrary can take their contract without this rule.

I do not at all dispute the authority of the English cases cited by the appellee's counsel. On the contrary, I think them founded on strong reasons, and proceeding from the laudable determination of the courts of that country to construe contracts so as to effectuate the intentions of the parties. But I confidently submit, the case is a very different one here. I shall follow the principle of these adjudications in seeking for the intentions of the parties to this bond when they used the terms "current *funds," and to that end can not 713 overlook the fact that they were treating "flagrante bello." I cannot be stopped on the threshold of this enquiry by the inexorable rule, contended for by the appellee's counsel, that these words must be taken, by necessary implication of law, as importing Confederate currency alone. This would be, in my opinion, to disregard the true reason of these authorities, and to deny to our citizens at that time, under all the contingencies and uncertainties of their condition, that absolute freedom of con-

tracting in view of all possible eventualities, which the principles of our common law secure to all, in spite of the changes of government. Political changes and the conflict of arms do not affect nor abrogate private contracts where they do not contravene public policy nor positive enactments. The business of life must go on; and unless the law upheld the contracts of men under such circumstances, not only at the time, but after the restoration of peace and a new order of civil polity, society would be disordered, and courts superseded in their most important functions. I cannot, therefore, agree with the able counsel for the appellees, that the parties here are precluded, by the reason, policy and intentment of the law, from affixing to the words "current funds" any other meaning than that of funds current at the date of the contract, and, consequently, "Confederate currency." On the contrary, I do not think these words, in the connection in which they are used, will bear this interpretation. I have two reasons for this opinion. The first proceeds from the well known condition of the currency at the time. It was greatly depreciated; and its depreciation was progressive, though with occasional and immaterial fluctuations. The question of the currency was most generally viewed apart from the fortunes of the Confederacy; and the success of the latter was by no means assumed as guaranteeing the 714 former. The assertion of *the appellee's counsel, namely, that while entertaining absolute faith in the triumph of the Confederacy, he was doubtful of the ultimate redemption at par of the Confederate treasury notes, describes truly the prevalent opinion in this State. In view of the practices of the Confederate Congress and the fate of other revolutionary paper issues, such as our Continental money, French assignats, &c., it would have been strange if there had not been a very general mistrust of the Confederate notes, in quarters even where no doubt ever intruded of the final establishment of the government that emitted them. The fact of such mistrust is conclusively proven by the depreciation of these notes after the brilliant successes of the Confederate arms in the fall campaign of 1862, just preceding this contract. I, therefore, deem this state of the currency, and of public opinion respecting it, as a material fact influencing the parties to this contract in designating "current funds" as the medium of payment, and declining to leave that important stipulation to reference or construction through their silence. My second reason for objecting to this interpretation of these words, arises out of the context. It is a promise "to pay, on demand, three months after notice to pay, the sum of five thousand dollars, without interest, in current funds." This obviously imports that the funds were to be current at the time of payment. We cannot suppose that the time of payment should be made to abide exclusively the pleasure of the obligee, if it were not for

the privilege thereby secured to him of awaiting and selecting a currency he might prefer to the existing currency. Whether that should be the currency of the Confederacy during the war, or after its cessation, or the currency of the United States upon the restoration of its authority over this State and its citizens, depended on contingencies, if not in the actual contemplation of the parties, at least in the scope of their contract. We cannot suppose that

715 *either the one or other of these parties, or, indeed, both, failed to consider the chances of the obligee being compelled to recall this loan, though at a sacrifice, before the termination of hostilities, or of his being enabled to await the advent of a sounder currency, in the event either of the establishment of the Confederacy, or its overthrow by the Federal arms. It will not do to say that such contingencies never entered into the calculations, or influenced the agreement of the parties; it is enough to know that the terms of the contract, whether so designed or not, are broad enough to cover them. The stipulation is express, that the obligee "shall not be required to receive the money, except at his pleasure." Why this remarkable provision? What purpose was it intended to subserve? I can conceive of no motive or speculation that led to it but this, namely, that inasmuch as the currency was then depreciated, and likely to undergo a further depreciation, the obligee might be thereby protected from the tender of a more worthless currency, and should have the option, without limitation as to time, to call for his money in a currency that might better suit him. The compensation for this privilege, on the obligor's behalf, was an exemption from interest till after the demand of payment. The treaty of the parties may be explained in this wise: Mr. Newton wants the use of these Confederate notes for some purpose or other not stated in this record; and in proposing to take them of Mr. Boulware, agrees, in view of their progressive depreciation, to protect him against loss from that source, and give him the benefit of any future improvement of the currency, by a stipulation that this money should be upon call for an indefinite period, to be fixed at the sole pleasure and will of Mr. Boulware. At the same time, and as a return for this large concession, he requires of Mr. Boulware that the obligor should not account for interest until after formal demand,

716 nor be *bound to pay until after three months' notice of such demand. This seems to me to portray accurately the character of the negotiation that led to this bargain; and serves to elucidate the contract in which it resulted. Hence, the agreement of Mr. Newton is to pay the \$5,000 without interest, at the call of Mr. Boulware, in such funds as might be current at the time of payment. In the event that has happened, this seems to be improvident; but in another event, this might not have been so. If from the ravages of war his creditor had been so reduced, or from

other causes so inclined, as to call for payment in the fall of 1864, then Mr. Newton would have realized a profit upon the adventure, proportioned to the sacrifice of the principal occasioned by the actual and lamentable depreciation of the currency at that time. The imputed hardship of the bargain in this respect, might, for aught we know, have been obviated by the use to which Mr. Newton applied this money. If he discharged therewith a specie debt, as was sometimes, though rarely done at that date, or purchased property at the same standard, he could in no event be injured. But whether this was done or not is matter of conjecture, merely employed by way of illustration. Let the bargain, however, be as imprudent and hard as it may be, if it is thus clearly written, and properly construed, there can be no relief against it in this form of action, and under these pleadings. If assailed as an unconscionable bargain, it must be in another forum.

An action of covenant has been brought on this agreement, and a question arises, What shall be the measure of damages? The statement in the bill of exceptions shows, that the consideration of this undertaking consisted in Confederate treasury notes of the nominal amount of \$5,000. These notes, from their depreciation, did not fulfill the proposed function of a representative of money; hence the Legislature,

in order to prevent hardships and
717 *effectuate justice in private dealings in this fluctuating currency, resorted to scaling; and this court, as in case of depreciated bank notes, has treated these notes as a commodity in trade. While the common understanding and the literal form of the transaction justified the court below in describing it as a loan in Confederate treasury notes of \$5,000, we must look beyond the mode of expression into the actual substance of the contract. Had the contract contemplated the re-payment of that sum in the same currency in which it was received, then it would indeed have been substantially a loan; but I have endeavored to show that such was not the understanding of the parties, and that for the use of these notes the covenantor bound himself to pay the stipulated sum at a future and undefined time, in a currency that might be either better or worse, at the election of the covenantee. Hence, I take it that the price of this commodity was agreed, and that the only measure of damages for non-performance is that agreed price, namely, \$5,000 in "funds current" at the time of payment.

From the view I have thus taken, I conclude that this is a contract of hazard. In the contingency of a demand of payment by the obligee when "current funds" were more worthless than at the date of the contract, much of the principal would have been lost. Of course it is not to be supposed that the creditor would make the demand and give his notice at such a time, unless driven to it by inexorable want. But who can undertake to say, in view of

the disasters that wrecked property and wealth to such an amazing extent, that this payment, however reduced by the state of the currency, might not have been necessary to the appellant before that currency totally expired by the overthrow of the Confederacy? Besides, the debtor had on his side the weight of all those considerations which

might have impelled to a call for this money, as a prudential step to escape the greater loss and the vexatious delay likely to attend the precarious credit, the deranged finances and the inflated currencies of the hostile governments.

I am sustained in these views by the case of *Brachan v. Griffin*, 3 Call 375. In that case Griffin agreed, in consideration of £25,000 paper money, to be paid him by Willis in the years 1780 and 1781, to pay the latter £2,500 in specie in 1790. Griffin brought his bill in chancery for relief against Brachan the assignee, upon special circumstances that need not be here stated. He failed, and the contract was held obligatory. Judge Fleming said, that "the contract in this case was founded upon speculation on both sides. Griffin thought the present use of the money would be advantageous to him; and Willis, that it would be more beneficial to receive the specie at a distant day. The contract seems to have been fully understood by the parties, and to have been fairly entered into upon both sides." Judge Carrington adopted the same view, and said: "This was a mere speculation upon the paper currency of the country. Griffin attached a value to the present use of a considerable sum of it; Willis calculated that it would be better to part with it and receive specie for it at a more distant period. Both of them acted fairly in making the contract, and there is nothing to taint or impeach it, if it has been complied with by Willis." The language thus quoted from these judges in their decision of that case is strictly applicable to this. The engagement of Newton to pay in "current funds" instead of specie does not make a difference between the cases so far as the principle of the adjudication is concerned, because of the maxim, that "that is certain which may be made so." Both of these contracts, therefore, may be properly termed "speculations upon the paper currency of the country."

The only remaining question in this case, that of usury, is virtually disposed of by the interpretation already placed upon this contract. It has not been deemed a loan in the strict sense of that word; and the contingency has been pointed out that put in risk the principal itself. Interest is expressly forborne; but that would not suffice, if, as a shift to avoid the terms of the statute, there was an agreement to pay at a future period for a present loan an aggregate sum exceeding the principal and interest of the sum borrowed. But wherever the re-payment of the principal as well as the interest is made to depend upon the happening of contingent events, and may thus be jeopardized, a reservation of a

larger sum than the interest, is accounted a compensation for the risk thus incurred and is not deemed usury. This principle is as old as the case of *Roberts v. Tremayne*, Cro. Jac. 507, where it was laid down: "If I lend £100 to have £120 at the year's end, upon a casualty, if the casualty goes to the interest only, and not to the principal, it is usury, for he is sure to have his principal again, come what will come; but if the interest and principal were both in hazard, it is not then usury." This ancient authority was impugned by counsel in the case of *Smith v. Nicholas, &c.*, 8 Leigh 330, but was amply vindicated upon authority and reason by Judge Tucker, who delivered the opinion of the court in that case, which vacated as usurious a contract whereby the lender, besides his principal, contracts to receive, in lieu of interest, something which may be worth more than six per cent. per annum, though it may perhaps be worthless, as the dividends on bank stock. He quotes with approbation the remark of Judge Pendleton in *Gibson v. Fristoe, &c.*, 1 Call 54,—"but if the principal, or any considerable part, be put in risque, it is not usury because the excess in the premium is a consideration for that risque;" and distinctly puts his decision on the ground "that where the interest only is at hazard, the statute is infringed by a contract for more than legal interest." Upon this same

foundation rests the doctrine of maritime losses upon bottomry and respondentia, of such universal use and importance in commerce. Here no interest accrues till after demand, and it is only in case the demand be not complied with that any can be due. The contingency or casualty in this case, therefore, affects only the principal; and because that may be worth more or less when called for in "current funds" than the aggregate sum of principal and interest on the original sum advanced is the cause which attests the risk of this trade, and frees it from the charge of usury. The finding of the jury, therefore, against this plea is justified by two reasons: first, because the transaction is not to be treated as a loan, but as an agreement to pay for a commodity; and secondly, because, in the language of Justice Bridgman, in *Soome v. Gleen*, Sid. R. 27, it was "a plain and square bargain, by which the principal was hazarded." Though it may be inferrible that the appellee might have acquiesced in the finding of the jury against him on this plea of usury, he is clearly entitled to avail of the appeal of his adversary to correct any error therein to his prejudice. The whole record is before us, and if it discloses an error that should enure to the advantage of the appellee, we are bound, I presume, to correct it. I have, therefore, examined the question arising under this plea with the same care I should have done if it had been made the subject of appeal by Mr. Newton.

I have thus endeavored to state plainly and succinctly my views of this contract,

and the questions raised upon it. I am sensible of the importance of avoiding any grounds of misapprehension and mistake. It would be scarcely proper at this time to anticipate and prejudge a question that may hereafter arise out of the obligation to pay in "current funds"—the synonym at 721 this time of "legal tenders" or national bank notes, which are now quotable at a common rate of depreciation—and out of the inability of the court to render any other judgment but one sounding in dollars and cents, and of course entitling the party to lawful money. This is a grave question, which may not arise, and should not be decided except in a proper case and upon the fullest consideration.

My investigation of this case has not been unattended by doubts and difficulties; but they have given way upon the anxious and careful deliberation I have given to this important inquiry. I have not felt the necessity of calling to my aid the rule that requires that all instruments should be construed "*contra proferentem*." Though the value of this rule has been decried, it seems to me to rest on sound reason; for it is to be presumed "that men will take care of themselves, and consequently that he who gives, and chooses the words by which he gives, ought to be held to a strict interpretation of them rather than he who only accepts." 2 Parsons on Contracts 507; Meyer v. Isaac, 6 Mees. & Welsb. R. 605. Had my hesitation been greater, and my doubts more serious, the balance might have been turned by this rule against the sole covenantor; but my mind was impelled in that direction by other principles of interpretation that I have already sufficiently indicated. The construction which I have thus reached obliges me to conclude that the judgment below should be reversed, and a new trial had in conformity with the principles herein declared.

The other judges concurred in the opinion of Rives, J.

Judgment reversed.

722 *Allen & als. v. Hart.

April Term, 1868, Richmond.

Forthcoming Bond—Plea of Set-Off.*—The defence of

***Forthcoming Bond—Plea of Set-Off.**—In *B. & O. R. Co. v. Jameson*, 13 W. Va. 840, the court said: "So in *Allen v. Hart*, 18 Gratt. 722, it was held, that under our statutes the defense of set-off is admissible in a motion on a forthcoming bond, taken on a warrant of distress: a decision based on previous Virginia decisions, that set-off was a good defense to an avowry for rent in an action of replevin. See *Turberville v. Self*, 2 Wash. 71, 4 Call 580; *Nicolson v. Hancock*, 4 H. & M. 491, and *Murray Caldwell & Co. v. Pennington*, 3 Gratt. 91."

See also, principal case cited and approved as to this point in *Washington v. Castleman*, 31 W. Va. 834, 8 S. E. Rep. 605; *Carter v. Grant*, 32 Gratt. 772. But such defense cannot be made to a forthcoming bond taken on an execution. p. 736, of principal case.

set-off is admissible in a motion upon a forthcoming bond taken on a warrant of distress.†

On the 8th of December, 1866, Benjamin Hart moved the Court of Hustings of the city of Richmond for award of execution upon a forthcoming bond which had been executed by J. V. H. Allen, treasurer National Express Company, M. G. Harman and Thomas Branch, and given under a distress warrant for rent. The distress warrant had been issued at the suit of Hart against The National Express and Transportation Company, and was levied on the property of the company. The rent claimed to be due was \$1,500, and the penalty of the bond was \$3,000.

On the hearing of the motion, the defendants offered to prove that the plaintiff was, before and at the time of the making and delivery of the said bond, indebted to the National Express and Transportation Company in a sum greater than the penalty of the bond, viz.: in the sum of \$5,000—it having been agreed between the parties that any such debt might be urged by way of set-off to the said bond, if evidence of such debt should be admissible. But the plaintiff objected to the introduction of this evidence; and the court sustained the objection. And the defendants excepted.

723 *There was judgment of award of execution in favor of the plaintiff for the penalty of the bond, to be discharged by the payment of \$1,546.10, and interest; and on a writ of error to the District Court of Appeals at Williamsburg, this judgment was affirmed. Allen, &c., then obtained a writ of error to this court.

Page & Maury, for the appellants.
Ould & Carrington, for the appellee.

MONCURE, P. This is a supersedeas to a judgment of the District Court at Williamsburg, affirming a judgment of the Court of Hustings for the city of Richmond, rendered on a motion on a forthcoming

See monographic note on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

Set-Off—Notice.—In *Richmond, etc., Ry. Co. v. Johnson*, 90 Va. 777, 20 S. E. Rep. 148, it was said: "It will thus be seen that, as respects notice, the statute (Va. Code 1887, sec. 3298), as was said by **MONCURE, P.**, in *Allen v. Hart*, 18 Gratt. 722, 734, puts payment and set-off on the same footing; so that to entitle the defendant to prove payment under the plea of *nil debet*, he must file with his plea such a descriptive account as section 3298 requires. 1 Bart. Law Pr. (2d Ed.) 492, 498."

Same—Statute Construed Liberally.—In Virginia, the statute of set-offs has been liberally construed with a view to the furtherance of its obvious policy, which is to prevent multiplicity of suits; and so far as can be conveniently done, to effectuate in one action complete justice between the parties. For this proposition, we find the principal case cited as authority in *Edmunds v. Harper*, 31 Gratt. 643; *Wartman v. Yost*, 22 Gratt. 605; *B. & O. R. Co. v. Jameson*, 13 W. Va. 846.

†See the statute quoted by **JUDGE MONCURE** in his opinion.

bond given under a distress warrant for rent. On the hearing of the motion in the Court of Hustings, the defendants in that court, who are the plaintiffs in error here, offered evidence tending to prove that the plaintiff in that court, who is the defendant in error here, was, before and at the time of the making and delivery of the said bond, indebted to the said defendants; or, which is the same thing, to the National Express and Transportation Company, a body politic and corporate, upon whose goods, chattels and effects the warrant of distress in the condition of the said writing obligatory named was levied, in a sum greater than the penalty of the said bond, to wit, in the sum of \$5,000; it having been agreed between the said plaintiff and the said defendants that any such debt might be urged by way of offset to the said bond, if evidence of such debt should be admissible; and the plaintiff thereupon objecting to the admissibility of the said evidence, the court rejected it, upon the ground that the defence of such offset was inadmissible in a motion upon a forthcoming bond taken under a warrant of distress. To this ruling of the court a bill of exceptions was taken, which presents the only question we

724 have to decide *in this case. That question, as already shown, is, Whether an offset, or a set-off, as it is more commonly called, is a good defence to a motion on a forthcoming bond taken under a distress warrant?

A forthcoming bond was for the first time authorized by law to be taken under a distress warrant at the Revision of 1849. So much of the law as is material to this case is contained in the Code, ch. 189, "of forthcoming bonds," §§ 1, 2, 3, 4 and 5, and is as follows:

1. The sheriff or other officer levying a writ of fieri facias, or distress warrant, may take from the debtor a bond with sufficient surety, payable to the creditor, reciting the service of such writ or warrant, and the amount due thereon, (including his fee for taking the bond, commission and other lawful charges, if any), with condition that the property shall be forthcoming at the day and place of sale. Whereupon such property may be permitted to remain in the possession and at the risk of the debtor.

2. If the condition of such bond be not performed, the officer unless payment be made of the amount due on the execution or warrant, (including his fee, commission and charges as aforesaid), shall, within thirty days after the bond is forfeited, return it, with the execution or warrant, to such court, or the clerk's office of such court, as is prescribed by the 27th section of chapter 49. The clerk shall endorse on the bond the date of its return; and against such of the obligors therein as may be alive when it is forfeited and so returned, it shall have the force of a judgment. But no execution shall issue thereon under this section.

3. The obligors in such forfeited bond

shall be liable for the money therein mentioned, with interest thereon from the date of the bond till paid, and the cost; the obligee or his personal representative shall be entitled to recover the same by action or motion.

725 *4. In an action or motion on such bond, when it is taken under a distress warrant, the defendant may make defence on the ground that the distress was for rent not due in whole or in part, or was otherwise illegal.

5. If any such bond be at any time quashed, the obligee, besides his remedy against the officer, may have such execution on his judgment, or issue such distress warrant as would have been lawful if such bond had not been taken.

In a note of the Revisors to chap. 148, § 7, of their report, p. 735, they say, in reference to the abolition of the action of Replevin, (which they recommend), and of the remedies which they propose to substitute in its place, as follows: "The act of 1822-3, p. 31, ch. 29, § 3, after reciting that doubts exist whether the action of replevin, as provided for by the common law of England, is not still in force in this State, declared that the action should be construed to exist in no other cases than should arise under and by virtue of the act in 1 R. C., p. 446, ch. 113, concerning rents. If it is to exist in no other cases, we think it better to abolish it altogether, and to attain its objects by other means. In the case of an attachment, the defendant from whom rent or money is claimed, or a third party claiming the property attached, can assert his rights before the court to which the attachment is returnable. In the case of a distress, we have in a subsequent chapter (concerning interpleader and the settlement of the right to property distrained or levied upon), placed a third party claiming property distrained, upon the same footing as if he claimed property taken under execution. The only other case to which the writ of replevin is now applicable in Virginia, is that of a tenant illegally distrained upon. We propose that a tenant be permitted to give a forthcoming bond when his goods are distrained for rent, in like manner as a debtor may give such

726 bond when his *goods are taken under execution; and that on a motion on a forthcoming bond taken under a warrant of distress, the tenant be allowed to controvert the legality of the distress. Thus all the purposes for which the writ of replevin is now resorted to in Virginia, will be attained by other remedies with which counsel in this State are more familiar." "If the action of replevin were retained, we think it would be better to extend it as a means of retaining specific property, to other cases than those of distress and attachment for rent." "Seeing, however, that it has been the pleasure of the General Assembly to narrow its range to a few cases, and that in those cases it is a remedy attended with a good deal of inconvenience, we have thought that it would probably suit

counsel in this State and the community best to drop it altogether, and to adopt in lieu of it the other remedies mentioned in this note."

Thus it appears, that the defence which a tenant may make to an action or motion on a forthcoming bond taken under a distress warrant, was intended by the Legislature to be a substitute for his common law remedy by the action of replevin, which was abolished by the Code. It seems to be material, therefore, to enquire, in the first place, whether the defence of set-off could be made in that action.

It seems to be well settled in England, that a set-off cannot be pleaded to an avowry for rent. *Babington on Set-off*, p. 8, 6 Law Library; 2 *Pothier on Obligations* by Evans, p. 115; *Sapsford v. Fletcher*, 4 T. R. 511. In that case Lord Kenyon, Ch. J., said: "It is much to be lamented that it should have been so decided; however, for the sake of certainty in the law, we must submit to those decisions till the Legislature alter the law."

On the other hand, it was at least as well settled in this State, that a set-off was a good defence to an avowry for rent in an action of replevin; as the cases cited 727 by the *counsel for the plaintiffs in error plainly show. *Turberville v. Self*, 2 Wash. 71, decided in 1795; same case, 4 Call 580; *Nicholson, &c., v. Hancock, &c.*, 4 Hen. & Mun. 491, decided by Chancellor Taylor in 1809; and *Murray, &c., v. Pennington*, 3 Gratt. 91. *Turberville v. Self* was an important case, and was argued by Washington and Marshall on opposite sides. It is imperfectly reported in 2 Wash.; but is fully reported in 4 Call, from Mr. Marshall's notes. The latter report was not published until 1833; which accounts for its not having been referred to by Chancellor Taylor in *Nicholson, &c., v. Hancock, &c.*, supra, nor in 1 Rob. Pr., old ed., p. 420.

The language of the English statutes of set-off, 2 & 8 Geo. 2, is different from that of ours. "Where there are mutual debts between the plaintiff and defendant, &c., one debt may be set against the other," &c., is the language of those statutes; *Bab. on Set-off*, 2; while that of our act of December 29, 1806, which was in force until the Revisal of 1849, was, "when any suit shall be commenced and prosecuted, &c., for any debt due by judgment, bond, bill, or otherwise, the defendant shall have liberty, upon trial thereof, to make all the discount he can against such debt; and upon proof thereof, the same shall be allowed in court." 1 R. C. 1819, p. 487. The language of the law, as it stands in our Codes of 1849 and 1860, is substantially the same, or, at least, has the same meaning: "In a suit for any debt, the defendant may, at the trial, prove, and have allowed against such debt, any payment or set-off which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise." Code, ch. 172, § 4.

The difference between the language of the statute of set-off in other States and that of ours may perhaps sufficiently account for the apparent conflict of some of the judicial decisions of those other States 728 with our decisions before *referred to.

In this way, the cases cited by the counsel for the defendant in error, of *McMahon v. Tyson*, 23 Geo. R. 43; *Sketoe v. Ellis*, 14 Ill. R. 75; and *Rae v. Halbert, &c.*, 17 Ib. 572; may be explained. For example: the statute of set-off in Illinois provides, that a defendant "in any action brought upon any contract or agreement, either express or implied, having claims or demands against the plaintiff, may set up the same, and have them allowed him upon the trial." In the case last cited, it was held that a judgment is not a contract within the meaning of this statute; the court being of opinion that the words "action," "contract," and "agreement," in the statute, were used in their ordinary sense, and not with the intention of embracing every imaginable litigation, upon every cause of action. *Id.* 580. Now it happens that in our act of 1806, "debt due by judgment" is expressly enumerated as one of the causes of action to which the right of set-off applies; and in the Code the words are, "In a suit for any debt," which, of course, embraces a debt due by judgment.

The reason on which the English decisions, that a set-off is not a good defence to an avowry for rent in an action of replevin, were founded is, "that the statutes make mention only of mutual debts; therefore the demand, as well of the plaintiff as of the defendant, must be a debt; and a set-off is not allowed in actions for torts, as upon the case, trespass, replevin, or detinue." *Bab. on Set-off*, p. 8. In other words, the action of replevin was regarded in this respect as an action *ex delicto*, as it certainly is in form, and so not within the terms of the statutes. Our courts, on the other hand, regarded the action, after the defendant's avowry for rent, as, in substance, an action *ex contractu*, by the defendant against the plaintiff, for the rent; and as therefore coming within the true intent and meaning, if not the literal terms also, of the act. Lord

729 *Kenyon, as we have seen, regretted that the English courts had not placed the same construction on their statutes. There is another very material respect in which the construction of the English statutes and ours has been different; and that is, that in England it has been held that the set-offs relied on as a defence, must have been due to the defendant at the commencement of the action; *Id.* p. 9; while with us, "discounts are allowed up to the time of the trial; but not so as to destroy the plaintiff's action and entitle the defendant to costs. If, therefore, after suit brought, the defendant buys bonds due by the plaintiff, though he may discount them on the trial, there will be a judgment for costs against him." 2 Tuck. Com., book 3, p.

108, and cases cited. This course of decision in this State shows, that the statute of set-off has been liberally construed, with a view to the furtherance of its obvious policy, which is to prevent multiplicity of suits, and, as far as conveniently can be done, to effectuate in one action complete justice between the parties.

Before the revision of 1849, our statute provided that "the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law, or of fact, as he shall think necessary for his defence. 1 R. C. 1819, p. 510, § 88. Thus showing that the Legislature regarded the action of replevin, though commencing as an action *ex delicto*, in form, as becoming, in effect, after the avowry, an action *ex contractu*, brought by the defendant against the plaintiff for the recovery of the rent claimed in the avowry. When the action of replevin was afterwards abolished by the Code of 1849, the language of the above provision was changed to suit the case, and made to read thus: "The defendant in any action may plead as many several matters, whether of law or fact, as he shall think necessary." Code, ch. 171, § 23.

Such was the nature of the action of replevin, and such the rights of the plaintiff therein, according to the decisions of our courts, when it was abolished by the Legislature at the revision of 1849, and another remedy substituted in its place, which was professedly intended to be, not only a simpler and easier remedy than the old one, but at least as beneficial, especially to the tenant. It was to attain, said the revisors, by means more familiar to counsel in this State, "all the purposes for which the writ of replevin" was then resorted to in Virginia. Now the writ of replevin was then resorted to for two principal objects; first, to retain possession of the goods distrained for rent until it could be judicially ascertained whether any rent was due, and if so, how much; and secondly, to afford an opportunity of making all the defences which the tenant was entitled to make against the landlord's demand for rent; one of which defences, as we have seen, was, to set-off against that demand any debt due by the landlord to the tenant. The tenant had had no day in court, and the object of the writ was to give him a day in court, and enable him, in the meantime, to retain possession of his property distrained by his landlord.

Let us now look again at the remedy provided by the Legislature, on the recommendation of the revisors, in lieu of the writ of replevin. It is by giving a forthcoming bond, on which a judgment can be obtained only "by action or motion." By giving this bond, the tenant certainly attains the first object which was formerly attained by the writ of replevin: that is, he acquires the right to retain possession of the property distrained; and he also attains the other object formerly attained by that writ: that is, he acquires the right of making, in the action or motion on the bond, all the

defences which he could formerly have made in the action of replevin, including the defence of set-off. That he acquires the right to make that defence would seem to me to result from the terms of the new law "without reference to what

was said by the revisors, and even without reference to the decisions of our courts before referred to, in regard to the action of replevin. There was a difficulty in applying the defence of set-off to that action as being in form an action *ex delicto*, which difficulty does not exist in regard to an "action or motion" on the forthcoming bond; and even according to the doctrine of the English courts, I cannot see why "set-off" would not be a good defence to such an action or motion. But certainly I think it is, when we also take into view the decisions of our courts and recommendation of the revisors aforesaid. Such would be my construction of the Code, chapter 189, if it had not contained the fourth section. And I do not think that section restricts, if it does not enlarge, the tenant's right of defence. The words of that section, as before stated, are: "In an action or motion on such bond, when it is taken under a distress warrant, the defendants may make defence on the ground that the distress was for rent not due in whole or in part, or was otherwise illegal." It was properly conceded in the argument, that that section was not intended to embrace all the defences which may be made to such an action or motion; but that other defences, such as "non est factum," "conditions performed," &c., may still be made. Why then, also, may not the defence of set-off, supposing it not to be embraced in the terms of the fourth section above mentioned, still be made? It was argued, that common law defences not embraced in those terms still may be made, but not statutory defences; and that the fourth section was intended to give the only statutory defences which could be made in such a case. But why so? There is nothing exclusive in the language of the fourth section. It affirmatively declares that certain defences may be made, and not that certain other defences

may not, or no other defence may, be made. Why, then, may not the defence of set-off, given by the Code, ch. 172, § 4, be made in the case? The case comes within the literal terms of that section, and also within its spirit and policy. It was well settled that set-off was a good defence in the action of replevin, and the new remedy adopted by the Code in lieu of that action, was recommended by the revisors because, while it was a simpler remedy than that action, it at the same time would be as effectual, in all respects, as was that action. It seems, therefore, to follow, as matter of necessity, that the right to make this defence must be found either in the fourth section of chapter 189, before mentioned, or somewhere else in the Code. If it be not in the said fourth section of chapter 189, concerning "forthcoming bonds," I find it in the fourth section

of chapter 172, concerning "payment and set-off," before referred to. If it could be found no where else in the Code than in the fourth section of chapter 189, then I would find it there; and I think the words of that section are sufficiently broad to embrace it, if it be necessary to do so in order to effectuate the manifest intention of the Legislature. That such was the manifest intention of the Legislature is, I think, beyond all controversy. It is almost impossible to suppose that the Legislature intended to take away from a tenant this well-settled right of defence which he had, and to compel him to pay the full amount of his rent to his landlord, though the latter might be indebted to him in a larger amount. The tendency of legislation has been altogether the other way. If the Legislature had intended to take away this well-settled right, they would have done so plainly, and not by mere implication. Instead of that, they have used language in perfect consistence with the continuance of the right, and which was recommended by the revisors as effectual to secure all the benefits which could have been derived from

the action of replevin, including, of course, the right *of set-off. Then I say again, that if it were necessary to effectuate this manifest intention of the Legislature, I would find the right to make the defence of set-off in the fourth section of chapter 189: "In an action or motion on such bond, &c., the defendants may make defence on the ground that the distress was for rent not due in whole or in part, or was otherwise illegal." May it not well be said, that the rent is not due in whole or in part when the landlord owes to the tenant a debt exceeding or falling short of the amount of the rent, and such a debt as would, beyond all question, be a good set-off against the rent in an action therefor? It is argued that these words, "for rent not due in whole or in part," apply to "payments," but not to "set-offs;" and that a set-off is not a payment. Strictly speaking, this may be so. Undoubtedly there is a difference in our law between a payment and a set-off; differing in this respect from the civil law which made a set-off a payment eo instanti that it became a set-off. "It is evidently a principle of natural reason and justice," says Evans in his Appendix No. 13 to Pothier on Obligations, 2 vol., p. 112, "that when two parties are mutually indebted, the balance only shall be paid, and that one of the parties shall not be compelled to pay the debt which he has incurred, and be left to sue for that to which he is entitled. This principle forms an essential part of the civil law, and the effect of such mutual debts in destroying each other is distinguished by the term compensation; the extinction or reduction of one debt ensues immediately and by operation of law upon the other being contracted, as is shown by the chapter to which this appendix refers." Our law gives to the defendant an election to make his counter claim a set-off against that of the

plaintiff, or bring his separate action for it. When he elects to make it a set-off, he gives to it, in most respects, the effect of a payment, and it just as effectually bars and extinguishes *the plaintiff's demand as would a payment of the same amount. Of course he cannot, by pleading set-off, take away the jurisdiction of the court in which the suit is brought, as he might by pleading and proving payment, because non constat, when the plaintiff brought his suit, that the defendant would elect to plead his set-off. Our statute treats of payment and set-off together, and places them upon the same ground in prescribing the mode of relying upon them as matters of defence. "In a suit for any debt, the defendant may at the trial prove, and have allowed against such debt, any payment or set-off which is so described in his plea, or in any account filed therewith, as to give the plaintiff notice of its nature, but not otherwise." Code of 1860, p. 716, § 4; and to the same effect is 1 R. C. 1819, p. 510, § 87.

But it is argued that there is something in the nature of a forthcoming bond which is incompatible with the right to make such a defence as that of set-off; that the law declares, that when the bond is forfeited and returned as therein mentioned, it shall have the force of a judgment; and that no defence can be made to a motion on the bond which cannot be made to a scire facias on the judgment, except where the statute otherwise plainly authorizes. Whatever may be the force of this argument, I think I have shown that the statute does plainly authorize this defence, and therefore it may be made according to the concession of the argument. But I think too much effect is given in the argument to the words, "shall have the force of a judgment." Even in regard to a forthcoming bond taken under an execution, it had the force and effect of a judgment only sub modo, even under the old law which existed before the Code took effect. In Lipscomb's adm'r v. Davis's adm'r, 4 Leigh 326, it was held that the statute of limitations, 1 Rev. Co. ch. 128, § 5, whereby the remedy on a judgment

by debt or scire facias is limited *to ten years, is no bar to a motion on a forthcoming bond of more than ten years' standing. Tucker, P., in his opinion in that case, in which the other judges concurred, said: "Admitting, however, that the bond has, to some intents, the force of a judgment as soon as it is filed, I think it obvious that it has not all the effect of a judgment, until there has been an award of execution. No execution can be sued on it, at the mere will of the party; the authority of the court must first be obtained by motion." "Moreover, it cannot be obtained by scire facias, but the motion and the action of debt are the only remedies. Then, again, though the statute gives to the bond the force of a judgment, still it looks upon it, until execution has been awarded, in a far different light." The Judge then proceeds to show in what respects the bond

differs from a judgment, and the effect of such difference; and concludes his opinion thus: "Upon the whole, I am well satisfied that this provision of the statute of limitations does not apply to a forthcoming bond before the award of execution. But when upon motion, execution is awarded, it acquires all the characteristics of a judgment, and from that moment is within the statute. The party can never after elect to consider it as a common law bond; he has fixed its character as a judgment; he can now take out execution at his pleasure. If he fails to do so within the year, he is driven to his scire facias; and if his failure continues for ten years, he is barred forever." Now this decision was made under the old law, contained in 1 R. C. 1819, p. 530, § 16, as amended by the act of February 23, 1822, Sup. R. C. 270, which authorized, first the clerk, and then the court, to award execution on the bond; whereas, by the Code, ch. 189, § 2, which gives to the bond the force of a judgment, it is expressly declared that "no execution shall issue thereon under this section;" but by the next section, 3, it is declared that "the obligee, or

736 *his personal representative, shall be entitled to recover" the money mentioned in the bond, with interest and costs, "by action or motion."

But whatever may be the defences which may be made to a motion on a forthcoming bond taken under an execution, the question is very different in regard to defences which may be made to a motion on a forthcoming bond taken under a distress warrant. The Legislature found it convenient to adopt the forthcoming bond as the means of affording a substitute for the action of replevin; but they did not intend thereby to adopt, in regard to such a bond, all the consequences which flowed from a forthcoming bond taken under an execution; or rather, they did not intend to place the two bonds on the same footing in all respects. The radical difference between the two cases consists in this: that when a forthcoming bond is taken under an execution, it is a part of the process of the execution of the judgment, and partakes of all the finality which belongs to the judgment. When the bond falls, the execution on which it was taken falls with it, and the judgment stands in full force, subject to the right of the plaintiff to sue out a new execution thereon. The plaintiff having obtained his judgment, the defendant can not obstruct its execution by making defences which he might have made, but neglected to make, before the judgment which concludes him was obtained. But in the case of a forthcoming bond, taken under a distress warrant, there has been no judgment. The tenant has had no day in court; and when the bond is quashed, the landlord falls back upon no judgment, but upon his mere claim for rent, for which he may sue or distrain, as before. This is a palpable distinction between the two cases, and to that distinction we must look in determining upon the rights of defence which may be made to an action

or motion on the bond in either case.

737 There is no magic in "the words, 'forthcoming bond,'" which can take away or prevent the defence of set-off in this case. They well enough define the meaning and object of the instrument to which they are applied, but we must take care not to be misled by them. The difficulty arises from the use which has been made of them in regard to executions on judgments, and the force of a judgment which has always been given to them by law when forfeited and returned, because they then stand in the place of the judgments in satisfaction of which they were taken. And the present law continues to say in regard to all forthcoming bonds, whether taken under an execution or under a distress warrant, that when forfeited and returned as therein mentioned, "they shall have the force of a judgment." We have seen in what a limited sense these words were used, even in regard to a bond taken on an execution under the former law; and they must have been used in a still more limited sense in the present law, especially in regard to a bond taken under a distress warrant. They were no doubt used in the latter case to give to the landlord the additional security (for the amount of rent due him) of the lien of a judgment on the real estate of the obligors; but certainly not to take away from the tenant a just defence, to which he was before entitled, against the claim of the landlord. These views afford a sufficient answer to the cases of the Bank of the United States v. Patton, &c., 5 How. Miss. R. 200; and Kelly v. Lank, &c., 7 B. Mon. R. 220, cited by the learned counsel for the defendant in error. Those cases arose under the forthcoming bond law of Mississippi, which is similar to our former law on the subject.

For the foregoing reasons, I am opinion that "set-off" is an admissible defence in a motion upon a forthcoming bond taken under a warrant of distress; that the Hustings Court erred in excluding the evidence offered in that court tending to prove such a set-off as is mentioned in the

738 *bill of exceptions; that the judgment of the said Hustings Court, and also the judgment of the said District Court affirming it, are both erroneous; that the said judgments be reversed, with costs; and that the cause be remanded to the said Hustings Court for a new trial to be had therein, according to the principles above declared.

The other judges concurred in the opinion of Moncure, P.

The judgment of the court is as follows: The court is of opinion, for reasons stated in writing and filed with the record, that the defence of set-off is admissible in a motion upon a forthcoming bond taken under a warrant of distress; that the said Hustings Court erred in excluding the evidence offered in that court tending to prove such a set-off as is mentioned in the bill of exceptions; and that the said judgment of

the said Hastings Court, and also the said judgment of the said District Court affirming it, are both erroneous. Therefore it is considered, that both of the said judgments be reversed and annulled, and that the plaintiffs recover against the defendant their costs by them expended in the prosecution of their writs of supersedeas in this court and the said District Court respectively. And it is ordered, that this cause be remanded to the said Hastings Court for a new trial to be had therein of the motion on the said forthcoming bond; on which new trial the defence aforesaid, if again offered to be made, and the evidence aforesaid, if again offered to be introduced, are to be admitted. Which is ordered to be certified to the said District Court, and by the clerk thereof to the said Hastings Court.

739

*Cronie v. Hart & als.

April Term, 1868, Richmond.

1. Conveyance to Wife—Bill to Set Aside—Case at Bar.

—There is a conveyance of land to a trustee for the separate use of M, the wife of C, who is indebted at the time. Creditors of C file a bill charging that the conveyance is fraudulent, and intended to hinder and delay the creditors of C, and that the consideration of the deed was paid by C; and C and M and the trustee are made parties defendants. C and M answer, denying the fraud; and C says, he had executed a deed to E conveying his property to secure his creditors, which had been sold, and the proceeds were then in the hands of E; and he exhibits the deed, which provides for the debts of some of the plaintiffs. He says further, that \$2,000 of the purchase money was derived from the sale of M's interest in her father's estate; and the balance was derived from the profits of the land. **Held:**

It is error to set aside the deed before directing:

1st. Same—Same—Same.—That E should be made a party, and having an account of the trust fund in his hands, and having it applied to the payment of such of the debts of the plaintiffs as were secured by that deed.

2d. Same—Same—Same.—An enquiry whether there was any agreement that the proceeds of the sale of the wife's property should be applied to her use; and whether it had been so applied.

3d. Same—Same—Same.*—Whether the debts could not be paid out of the rents and profits in five years. Code of 1860, ch. 186, § 9.

In June, 1866, Hart, Hayes & Co., and others, creditors of Henry R. Cronie, 740 filed their bill in the Circuit *Court

*Bills to Subject Land—Inquiring into Rents and Profits.—In *Horton v. Bond*, 28 Gratt. 820, BURKS, J., delivering the opinion of the court, said: "Before a court of equity can properly order a sale of the debtor's land to satisfy a judgment lien, it must be made to appear to the court that the rents and profits of the land in five years will not discharge said judgment. Code of 1873, ch. 182, § 9. And this must be made to appear even against fraudulent alienees. *Cronie v. Hart* and others, 18 Gratt. 739." See also, *foot-note* to *Horton v. Bond*, 28 Gratt. 815.

of the county of Henrico, in which, after setting out the indebtedness of Cronie to the plaintiffs, which was for the most part by judgments rendered in the county court of Caroline county, they state that Cronie, who had lived in Caroline county in 1860, had afterwards removed to the county of Henrico, where he had accumulated a large amount of money, which he had endeavored to conceal from his creditors; and they charge, that in pursuance of this fraudulent purpose, he did, about the 8th of October, 1861, purchase of Robert A. Lancaster, a parcel of land in the county of Henrico, which they describe; and fraudulently procured said Lancaster and wife to convey the same to Wellington Goddin in trust, for the sole and separate use of Mary E. Cronie, the wife of the said Henry R. Cronie. A copy of this deed is filed with the bill.

They further charge, that the whole consideration for the said sale moved from Henry R. Cronie, and that the conveyance to Mary E. Cronie is wholly voluntary, and the result of a fraudulent agreement between the said Henry and the said Mary to elude and defraud the plaintiffs and others, the creditors of the said Henry; and that he is, in fact, the sole owner of said land. They charge that Cronie has no personal property known to the plaintiffs out of which their judgments can be satisfied. And making Cronie and his wife and Wellington Goddin, the trustee, parties defendants, they call upon them to answer all and every matter and averment alleged in the bill; and they pray that the land, or so much as may be necessary for the purpose, may be sold, and the proceeds of sale applied to the payment of the debts of the plaintiffs; or that the deed may be declared null and void, and that the land may be subjected to the liens of their judgments; and for general relief.

Henry R. Cronie and Mrs. Cronie filed separate answers. Cronie, in his answer, admits the plaintiffs' judgments. He says that he lived at the Bowling Green, in Caroline county, in 1860, and under the political excitement then existing, he was compelled to leave that place, and he removed to Richmond. That it is not true that at the time the judgments were rendered against him he was wholly without means to discharge them. That he owned a house and lot at the Bowling Green for which he had given \$1,600, and a stock of goods and furniture worth at least \$1,000, all of which he conveyed to Eustace Moncure as trustee, with instructions that the proceeds of the property, when sold, should be used to pay off all the defendant's honest debts. That the property had been sold, and the trust fund still remained in the hands of the trustee; though owing to his inability to be present to protect his interests it sold for but \$1,250. He denies that he had endeavored fraudulently to conceal his property from his creditors. He denies that the land mentioned in the bill was purchased with his money; he says,

the money was derived from the sale of Mary E. Cronie's undivided interest in her father's estate, consisting of land and negroes, to Thomas J. Roach for the sum of \$2,000, and from the products of the land. He denies that the conveyance from Lancaster and wife to Goddin was fraudulently procured by him; or that any consideration for the sale moved from him; or that the said conveyance was voluntary on his part; or that any fraudulent agreement existed or exists between himself and his wife; or that he is sole owner, or is entitled to any interest in the land referred to. Denies all the allegations of the bill inconsistent with the answer; and all the fraud, combination and confederations charged or insinuated in the bill.

The defendant filed with his answer the deed of trust executed by him to Moncure; and also the deed by which he and his wife conveyed to Roach the wife's undivided interest in the estate of her father

742 George B. Farish, on *the consideration of the sum of two thousand dollars. This deed is dated November 1st, 1860. The interest did not take effect in possession until after the death of Mrs. Cronie's mother, who was alive when the answer was filed. He also filed a copy of the will of Farish, the father of Mrs. Cronie.

Mrs. Cronie, in her answer, says, the property was purchased for her sole and separate use, and conveyed to Mr. Goddin as trustee; but that no part of the means of her husband entered into the consideration of the purchase. She refers to and adopts the answer of her husband, and denies all the fraud, &c., charged in the bill.

In May, 1867, the cause came on to be heard upon the bill, answers and exhibits, when the court held that the deed from Lancaster and wife to Goddin was null and void as to the creditors of Cronie; and the cause was referred to one of the commissioners of the court to ascertain and state the amount of the debts of the defendant Cronie, and to whom due.

The commissioner reported a number of debts due to the plaintiff and others, amounting to upwards of \$2,400; and the cause coming on again to be heard on the 8th of November, 1867, it was decreed, that unless the defendant Henry R. Cronie do pay to the several parties named in the report the sums reported due to them within ninety days, commissioners named should proceed to sell the land described in the bill, or so much as should be necessary, upon the terms of one-fourth cash and the residue at four and eight months, and deposit the money in bank. From this decree, Mary E. Cronie by Henry R. Cronie, her next friend, applied to this court for an appeal, which was allowed.

Johnson & Guigon, for the appellant.

Page & Maury, for the appellees.

743 *RIVES, J. This is a bill by judgment creditors of the husband, to set

aside as fraudulent a settlement upon his wife. Its allegations are that the husband was wholly insolvent, and that the consideration for the deed of 8th October, 1861, whereby the land therein described was conveyed to a trustee for the separate use of the wife, moved from him alone, and that the deed was the product of a fraudulent agreement between himself and wife to defraud his creditors, and that the husband was in truth the owner of the land conveyed. These charges of fraud are distinctly denied in the answers of both husband and wife. The husband in his answer denies his insolvency; and as proof of his ability as well as intention to provide for his creditors, exhibits his trust deed of 29th August, 1860, by which he dedicated his property, estimated at \$2,600, to their satisfaction. He then proceeds affirmatively to state how the settlement came to be made, namely: that the purchase money to the extent of two thousand dollars was derived from the sale of his wife's undivided interest in her father's estate to one Thomas J. Roach; and in corroboration thereof, exhibits the will of her father to establish her interest, and also the deed of himself and wife, of 1st November, 1860, conveying this interest to said Roach, and acknowledging the receipt of two thousand dollars therefor. He accounts for the balance of the purchase money to procure the deed to the wife, by stating it was derived from the products of the land. This is the state of the pleadings. No proofs were taken. The court thereupon proceeded to decree, upon default of payment within ninety days, the sale of the land in question.

The question is, therefore, made, whether this decree was not premature, and whether there should not have been a reference to a master to ascertain whether, and to what extent, a good consideration existed 744 for the settlement *aforesaid; whether there should not have been some account required of the trust fund, so as to fix the amount due; and, finally, whether there should not have been an enquiry, under the ninth section of chapter 186 of the Code, p. 771, into the sufficiency of the rents and profits of said real estate to satisfy these creditors in five years.

It is contended, with much ingenuity, that the deed to Roach imports a conversion to the husband, and extinguishes by the wife's privity her interest in the fund. This is perhaps so on the face of the instrument; but inasmuch as it discloses the sale of the wife's contingent interest, it is open in equity to proof that the husband was permitted to receive the fund arising therefrom upon an express trust for the settlement thereof upon the wife. That there was such understanding is rendered probable by the fact that the husband, having by his deed of 29th August, 1860, disposed of all his property for the benefit of his creditors, could scarcely have procured his wife's assent to the sale of her contingent interest in her father's estate, and to his receipt of the proceeds, without some

agreement on his part to invest it for her separate use. The fraud was responsively denied; it was not proven; and this affirmative statement of the origin and character of this settlement was *prima facie* corroborated by the exhibits and the facts and dates of the transaction. It was erroneous, therefore, to assume the fraud as established, and to premit a reference to the master to report the facts of such alleged settlement.

Judgment creditors are not to be delayed in the enforcement of their liens, unless in conformity with the principles and practices of the court, to which they resort. If the want of a settlement of the trust subject, devoted by the debtor to these creditors, was the only ground for delaying the sale prayed for, it might, perhaps, be disregarded; but when, on another account, 745 a reference was *necessary, and no further delay would be incurred, it was proper to direct the trustee to be made a party, and to require him to render his account before the same master to whom the other enquiry had been directed.

In respect to the third and last enquiry suggested, it will be seen, the language of the Code is very clear. After declaring, that "the lien of a judgment may always be enforced in a court of equity," it does not authorize such court to decree a sale of real estate, or any part thereof, unless "it appear to such court that the rents and profits of the real estate, subject to the lien, will not satisfy the judgment in five years." This enactment was doubtless designed to clear up the difficulties arising under our decisions of *Haley v. Williams*, 1 Leigh 140; *Blow v. Maynard*, 2 Id. 29; *Tennent's heirs v. Patton*, 6 Id. 196; *McClung v. Beirne*, 10 Id. 394; and *McNew v. Smith*, 5 Id. 84, cited by the counsel for the defendants in error; and to fix the grounds and extent of equitable jurisdiction in the enforcement of judgment liens. These cases left it in doubt what were the precise limits of the discretion to be exercised in decreeing satisfaction out of the rents and profits; so that it was peculiarly fit for the Assembly to step in and regulate the matter by positive enactment. This it has done in language clear enough to comprehend all imaginable cases; nor does it seem to me there is any ground to suppose from the report of the revisors, as was ingeniously contended for, that the case of original equitable jurisdiction to set aside a fraudulent conveyance was not designed to be embraced by these terms.

But under the authority of *Manns v. Flinn's adm'r*, 10 Leigh 93, it is contended that it is now too late to raise this objection in this court; or rather to treat it as a ground of reversal. That was the case 746 of an interlocutory *decree where the party having ample opportunity to apply to the court to alter the decree in that particular, and failing to do so, could not object to an affirmation, whereby the cause was remanded, with direction to alter the decree and direct satisfaction out of the

rents and profits, if such alteration be asked, and if the debt can be satisfied out of the rents and profits within a reasonable time. Here, however, for reasons already assigned, this is not a case of affirmation, and there being a necessity for reversing the decree on distinct grounds of error, the principle of this decision does not apply; and the appellant has an excuse for not raising this question below, because the controversy was directed wholly to the liability of this land, to the liens that were asserted by the bill.

For these reasons, I am of opinion the decree in this cause should be reversed, and the cause remanded with a view to the enquiries I have indicated.

The other judges concurred in the opinion of Rives, J.

JOYNES, J., read the decree of the court as follows:

The court is of opinion, that before proceeding to declare the conveyance of the tract of land in the proceedings mentioned from Robert A. Lancaster and wife to Wellington Goddin, in trust for the separate use of the appellant, to be null and void as to the creditors of the appellee Henry R. Cronie, the said Circuit Court should have directed an enquiry by a commissioner to ascertain whether or not the appellant united with her husband, the said Henry R. Cronie, in the deed of November 1, 1860, conveying the contingent interest of the appellant under the will of her father to Thomas J. Roach, upon an agreement that the money paid by the said Roach to the said Henry R. Cronie as the consider- 747 ation of said deed, or any *part thereof, should be invested and secured by the said Henry R. Cronie for the separate use and benefit of the appellant; and if so, whether the said sum, or any part thereof, or an equivalent for it, was applied by said Henry R. Cronie, in pursuance of such agreement, towards the payment of the purchase money of the tract of land aforesaid conveyed by the said Lancaster and wife in trust for the appellant as aforesaid; the court being further of opinion, that if there was such an agreement in reference to the money received by said Henry R. Cronie under the said deed of November 1, 1860, and if the said money, or any part thereof, was, in pursuance of said agreement, applied by said Cronie towards the payment of the purchase money of the said tract of land, then to the extent of the sum so applied, the trust in favor of the appellant created by the deed aforesaid from said Lancaster and wife, is valid against the creditors of said Henry R. Cronie.

And the court is further of opinion, that inasmuch as some of the creditors of Henry R. Cronie, whose claims are reported by the commissioner, are provided for by the deed of trust of August 29, 1860, in the proceedings mentioned, it would be contrary to equity to allow them to disturb the settlement made upon the appellant by the

said deed of November 1, 1860, until they have exhausted the fund thus provided for the payment of their debts; and it would also be contrary to equity, in case the tract of land aforesaid should not sell for enough to pay all the debts, to allow the creditors thus provided for to participate with other creditors in the proceeds of the sale of such land in proportion to the full amount of their debts, leaving them to resort to the fund provided by the deed of August 29, 1860, for the payment of the residue of their said debts. The court is, therefore, 748 of opinion, that the *said Circuit Court should have required the plaintiffs in that court to amend their bill and make E. Moncure, the trustee in the said deed of trust of August 29, 1860, a party defendant, and should have proceeded to take an account of the said trust fund, and to apply the same to the debts provided for by the said deed, so as to ascertain the balances, if any, remaining due upon the said debts.

And the court is further of opinion, that the said Circuit Court should not have proceeded to decree a sale of the said tract of land, without first ascertaining by evidence, or by an enquiry by a commissioner, in pursuance of the provision of ch. 186, § 9 of the Code of 1860, that the debts chargeable upon the said land could not be satisfied by the rents and profits thereof in five years.

The court is, therefore, of opinion, that the said decree of November 8, 1867, and the previous decree of May 4, 1867, are erroneous. Wherefore it is decreed and ordered that the said decrees be reversed and annulled so far as they are hereinbefore declared to be erroneous, and that the same be affirmed in all other respects; and that the appellees, except Henry R. Cronie and Wellington Goddin, and except William R. W. Garrett, executor of Lewis W. Garrett, deceased, out of their own estate, and the said William R. W. Garrett, executor of Lewis W. Garrett, deceased, out of the assets of his testator in his hands, pay to the next friend of the appellant his costs by him expended in the prosecution of the appeal aforesaid here. And the cause is remanded to the said Circuit Court for further proceedings to be had therein, in conformity with this opinion and decree. And it is further ordered, that the costs hereby decreed to be paid to the appellants shall, after the same shall have been paid, upon the application of any of the parties who shall have paid the same or any part thereof, be apportioned and distributed 749 by the said *Circuit Court among the several parties liable for the same under this decree, in proportion to the amount of their respective debts as reported by the commissioner, so that each of said parties shall, as among themselves, bear only his ratable proportion thereof; which is ordered to be certified, &c.

Decree reversed.

750 *Arents v. The Commonwealth.

April Term, 1868, Richmond.

1. **Municipal Bonds—State as Guarantor—Statute.*—**The acts of March 20, 1848, and of March 20, 1851, authorized the guaranty of the State upon the bonds of the city of Wheeling, to pay her subscription to the stock of the Baltimore and Ohio Railroad Company, payable to bearer and transferable by delivery, though not payable to the company, but to a third person.
2. **Coupon Bonds—Contract of Guaranty—Assignability of.**—If the contract of guaranty of a coupon bond transferable by delivery is not negotiable at law along with the bond and coupons, it is assignable in equity, and an interest in it passes in equity to each successive holder of the bond or coupon.
3. **Same—Same—Enforcement of.**—To give effect to the manifest intention of the parties, the right to enforce the guaranty, unless lost by laches or otherwise, must be held to be co-extensive with the right to enforce payment of the bond or coupon. The guaranty, as an accessory to the bond or coupon, follows it and adheres to it in equity, and the right to enforce the guaranty must be determined by the right to demand payment of the bond or coupon.
4. **Contract of Guarantor—Intention Governs.†—**Though in general the contract of a guarantor is to pay, if after due diligence the debt cannot be made out of the principal, yet the intention of the parties must govern, and if it was the guarantor's intention to make himself liable on the default of the principal debtor, without the use of the ordinary means to compel payment by him, or proof of his insolvency, he will be held liable accordingly.
5. **Coupon Bonds—Purposes of Coupon.**—In coupon bonds, the contract to pay principal and interest is in the bond, and whatever the form of the coupon, it answers substantially the same purpose, which is to afford to the holder evidence 751 *of his right to demand what is due on the bond, and a convenient mode of collecting it.
6. **Coupons—Bills of Exchange.**—Though coupons are in the form of orders to pay money, they are not to be regarded as bills of exchange.

*See generally, monographic note on "Municipal, County and State Bonds" appended to DeVoss v. City of Richmond, 18 Gratt. 338.

†**Contract of Guarantor—Intention Governs.**—In *Welsh v. Ebersole*, 75 Va. 666, the court said: "In the first place, it is important to inquire into the rights and obligations resulting from a guaranty and an assignment. A guaranty is not an absolute undertaking as in case of suretyship, but a conditional one to answer for the debt, default or miscarriage of another. The guaranty of payment of a bond or note is an undertaking, on the part of the guarantor, that he will pay the debt if the principal does not. According to some authorities the guarantor contracts to pay if by the exercise of due diligence the debt cannot be made out of the principal. In every case we must look to the terms of the guaranty and the circumstances under which it was made to ascertain the character and extent of the undertaking."

The principal case was also cited on the subject in *Cochran v. United States*, 157 U. S. 286, 15 Sup. Ct. Rep. 632. See also, an article entitled "Liability of Guarantor," 2 Va. Law Reg. 78-81.

7. *Same—Diligence Required of the Holder of.*—The degree of diligence required of the holder of a coupon is to be ascertained by reference to the relations of the parties. It must be presented for payment within a reasonable time after it becomes due and payable, so as to save the liability of the guarantor in case of any injury resulting from delay.

8. *Same—When Payable.*—Though it is not required that a coupon shall be presented for payment on the day it becomes due, it is nevertheless regarded as due and payable on the day fixed for the payment of interest.

9. *Same—Same.*—Though the coupon is made payable at a named banking house on presenting to them the proper coupon, it is still due and payable on the day when the interest is due, as specified in it.

10. *Same—Stolen—Overdue—Rights of Holder for Value.*—Coupons stolen after the day when they had become due and payable, though they afterwards come into the hands of a *bona fide* holder for value, cannot be held by him against the rightful owner.

This was a proceeding under the statute in the Circuit Court of the city of Richmond by George Arents against the Auditor of Public Accounts, to recover the amount of a number of coupons for interest due upon bonds issued by the city of Wheeling, and guaranteed by the State of Virginia. They were for interest due upon the bonds, for January and July 1862, 1863, and January, 1864.

The auditor filed his answer to the petition, and objected to the payment of the amount claimed, on the grounds: First—That the coupons held by Arents were stolen or abstracted from the Second Auditor's office in the city of Richmond; and due notice thereof had been given warning all persons against trading for them. Second

—That the claim of the petitioner was equally obligatory upon the State of West Virginia; and that the whole claim should not be demanded of the State of Virginia.

The petitioner, by its attorneys and the Attorney General on behalf of the Commonwealth, agreed to waive their right to a jury, and to submit the whole matter of law and fact to the judgment of the court; and the facts were agreed.

The city of Wheeling, under the authority of the act of March 20, 1848, and the act of March 29th, 1851, issued her bonds to the amount of five hundred thousand dollars, in

Negotiable Instruments—Overdue—Subject to Equities.—It is a well established principle of law that a party, who takes a negotiable instrument by endorsement or delivery, after it became due, gets no better title than the party had from whom he received it. The principal case was cited as authorized in this proposition in *Smith v. Lawson*, 18 W. Va. 235, 240; *Cussen v. Brandt*, 97 Va. 9, 32 S. E. Rep. 791. See also, *Davis v. Miller*, 14 Gratt. 1.

Gibert v. Washington, etc., R. Co., 33 Gratt. 599, cites the principal case among others as authorizing the proposition that coupons carry interest from time there is default in paying them. See also, 8 Am. & Eng. Enc. Law (2d Ed.) 10.

sums of one thousand dollars each, which were guaranteed by the State of Virginia, for the purpose of paying the subscription of the city to the stock of the Baltimore and Ohio Railroad Company. These bonds, with their coupons, are in the following form:

"Know all men by these presents: That the city of Wheeling, in the State of Virginia, justly owes Selden, Withers & Co., or bearer, one thousand dollars, which she hereby promises to pay in good and lawful money of the United States, at the banking house of Duncan, Sherman & Co., in New York, on or before the 1st day of July, 1872, with interest thereon at the rate of six per centum per annum, payable half-yearly at the said banking house, on the first of January and the first of July in each year, from the date of this bond until the principal be paid, on presenting to the said banking house the proper coupon hereunto attached." These bonds bore date the 1st day of July, 1852.

"Guarantee of the State of Virginia:

"I, Robert Butler, treasurer of the Commonwealth of Virginia, in conformity to an act of the General Assembly of Virginia passed on the 20th of March, 1848, do hereby pledge the faith of the State for the punctual payment of the interest and the ultimate redemption of the principal sum of money appearing due by the above bond, according to the terms therein specified.

753 "Coupon, city of Wheeling, guaranteed by the State of Virginia. Duncan, Sherman & Co., of New York, will pay the bearer thirty dollars, the half-yearly interest on the Wheeling bond 269, due 1 January, 1867.

"M. Nelson, Mayor."

These bonds were negotiated and put into circulation by the city of Wheeling, and about the time of the maturity of the several coupons described in the petition, the government of Virginia at Richmond took up these coupons; and whilst they were in possession of said government, they were abstracted and taken from the office of the Second Auditor. In November, 1864, Arents, not knowing that these coupons had been so taken and abstracted from said office, bought the same, in the city of Richmond, from the Farmers' Bank of Virginia, in the regular course of business, (the said bank being in the habit of dealing in such securities,) and gave to the bank full value therefor; and then became, and has continued to be, the bona fide holder of them for value. Afterwards, on or about the , in the year 1865, the Commonwealth caused a notice to be published in a paper in the city of Richmond, forewarning all persons from trading or dealing with said coupons.

From the 16th of August, 1861, to the 3d of April, 1865, all commercial or other intercourse between Richmond and New York, at which latter place said coupons were payable, and between Richmond and Wheeling, was prohibited; and in a reasonable time after said prohibition was removed, the

petitioner duly presented said coupons at the banking house of Duncan, Sherman & Co., in New York, and demanded payment thereof, which was refused. A like presentment and demand was made upon the city of Wheeling, with the like result; though it was agreed that Wheeling had paid all the other coupons held by the State on said guaranteed bonds, and was only
754 waiting to "have the right to these coupons settled, when she would pay them. The cause came on to be tried on the 2d of August, 1867, when the Circuit Court rendered a judgment in favor of the Commonwealth, with costs; and ordered that the coupons referred to in the petition of the plaintiff be delivered to the Second Auditor of the State, for the benefit of the Commonwealth. Arents thereupon obtained a writ of error to his court.

Wise & Fitzhugh, for the appellant.

Robert Johnston and Crump, for the Commonwealth.

RIVES, J. Recent decisions of the Supreme Court of the United States have regarded and treated corporation and municipal bonds, with coupons, payable to bearer, as negotiable instruments. *Moran v. Commissioners of Miami County*, 2 Black's U. S. R. 722; *Mercer County v. Hackett*, 1 Wall. U. S. R. 83; *Gelpcke & als. v. City of Dubuque*, Id. 175; *Thomson v. Lee County*, 3 Wall. U. S. R. 327. They are negotiable securities, having all the qualities and incidents of commercial paper, and imparting to the holder a perfect title by delivery. This doctrine proceeds not only on grounds of public policy, but is designed to effectuate the intentions of the parties. Justice Wayne, in delivering the opinion of the court in *Moran v. Commissioners of Miami County*, says, with great propriety, that such bonds, with their interest warrants, are commercial securities, though they be not in the accustomed form of promissory notes, or bills of exchange, and that the parties intended them to be passed from hand to hand to raise money upon them, so that a full title was intended to be conferred on any person who became the legal holder of them."

These bonds of the city of Wheel-
755 ing, and their coupons, "are conceded to belong to this class of securities. The bond itself is payable to bearer "at the banking house of Duncan, Sherman & Co., in New York, on or before the 1st day of July, 1872, with interest thereon at the rate of six per centum per annum, payable half-yearly at the said banking house on the first of January and the first of July in each year, from the date of this bond, and until the principal be paid, on presenting to the said banking house the proper coupon hereunto affixed." The coupon is in a peculiar form; it is not, as is most usual, a mere warrant, ticket or memorandum for such an amount, payable at a certain place and time. In my view of this case, the legal nature of this coupon constitutes the very gist of this contro-

versy. I shall, therefore, be excused, for illustrating it by comparison of forms taken from adjudged cases. In *Woods v. Lawrence County*, 1 Black's U. S. R. 386, it was nothing more than a memorandum of the interest due, and of the time and place of payment. It was in this form:

"Lawrence County.

"Warrant No. 37, for thirty dollars,
"Being for six months interest on bond No. , payable on first day of January, A. D. 1873, at the office of the Pennsylvania Railroad Company, in the city of Philadelphia.

"\$30.

—, Clerk."

Here there was a precise stipulation of the amount, and of the time and place of payment.

The Wheeling coupon, it will be seen, materially differs from this; it is more like that given in the case of *Sheboygan County v. Parker*, 3 Wall. U. S. R. 93. There, it was said, "the interest warrants or coupons were not in the usual form of promises to pay, or of declarations that so much money was due the bearer at the semi-annual dates, but were drafts by 'Lewis Curtis, President of the Board of the Sheboygan Railroad Commissioners,' on the treasurer of the county of Sheboygan, in favor of the bearer for so much, and was signed by Williams as 'secretary.'" The record in this case gives us a sample of the Wheeling coupons, and it is as follows:

"Coupon, city of Wheeling, guaranteed by the State of Virginia. Duncan, Sherman & Co., of New York, will pay to the bearer thirty dollars, the half-yearly interest on Wheeling bond 269, due 1 January, 1867.

"\$30.

M. Nelson, Mayor.

This is clearly a check on a banking house, nor is any time appointed for its presentation. The date specified merely designates what half-yearly interest constitutes the amount of the check. It is not a draft on this house to pay on 1 January, 1867, to bearer, thirty dollars, being the half-yearly interest due on that day; but it is like all other checks, payable on presentation, without the appointment of any day therefor, and the concluding phrase of the check is merely designed to make it, when paid, a voucher for the discharge of the half-yearly interest due on 1 January, 1867.

The city of Wheeling, when enabled by the act of 20th March, 1848, to secure the State's guarantee upon her bonds as the means of making and securing her subscription to the capital stock of the Baltimore and Ohio Railroad Company, did not avail thereof until after the passage of the act of 29th March, 1851, "authorizing the issue of coupon bonds." This policy was doubtless dictated by the advantages found to attend this form of securities. By virtue of this change, two points were gained tending to facilitate the negotiability and marketable value of these securities: first, by making the principal and interest payable at places more eligible than that of their emission; and secondly, by attaching

interest coupons, which, upon being severed from the bond, admitted of an independent *and separate circulation. It is to be presumed, therefore, that the city of Wheeling, in awaiting this act and framing its securities thereby, had a special object in view; and that was, to conform them to the wants of trade, and endue them with the attributes of the most favored commercial paper. This was accomplished by selecting the city of New York as the place of payment, and putting the coupons in the shape of checks upon one of the leading banking firms of that city. This was doubtless effected by special treaty with these bankers, who, either out of funds to be provided by the city of Wheeling or advanced by themselves, agreed to pay these coupon checks or drafts when presented. These securities, therefore, possessed all the additional value to be derived from their redeemability in the great centre of national exchanges, and the premium they would bear on this account, in the more distant markets of the States. It was readily foreseen that from this cause the coupons especially would become, for small sums, a convenient form of Northern exchange, and, in fact, possess the faculty of a uniform currency at a time when the different values of bank notes made such paper most desirable for circulation. Had these bonds been payable in the usual form by Wheeling, and coupons, mere warrants for the interest, it is needless to say how much their value would have been affected and their circulation restricted by such a condition. Upon these instruments the guarantee of the State has been impressed according to the import, and in the very terms of the act authorizing it. Now, then, if Wheeling has derived particular advantages from the form she has chosen to give to her securities, and the inducements she has thereby offered the public to deal in them, it is neither for her nor her guarantor to escape legal liabilities arising out of the special nature of her contract with her creditors or those who, as bona fide holders, stand in their stead and possess their rights.

758 *The coupons, that form the subject of this controversy, were for the amounts of semi-annual interest falling due 1st of January and July, 1862, 1st of January and July, 1863, and the 1st of January, 1864. They had been paid and taken in by the State, and afterwards abstracted from the office of the Second Auditor. In November, 1864, the appellant, not knowing that they had been abstracted from said office, bought them of the Farmers Bank of Virginia, and thus became the bona fide holder of them for value. Under this state of facts, the appellant's title to recovery would be clear if it were not for the question that has been raised that these coupons were overdue, and thus open to equities existing between the original parties. As to the principle of law involved, there is no dispute. In *Fowler v. Brantly*, 14 Peters' R. 318, it is said, "a note overdue or a bill

dishonored is a circumstance of suspicion to put those dealing for it afterwards on their guard, and in whose hands it is open to the same defences it was in the hands of the holder when it fell due. After maturity such paper cannot be negotiated." To the same purport is our own decision in *Davis v. Miller*, 14 Gratt. 1. But when were these coupons mature? It has been assumed that the date, by which the half-yearly interest was designated as due, and for which the coupon was given, was also the date of its maturity. But I have heretofore endeavored to show that such is not the case. A slight attention to the wording of the coupon, satisfactorily dispels that false gloss. But resort is then had to the body of the bond, to prove that such is the meaning of the coupon. They are treated as inseparable; and it is contended that one must be explained by the other. While I hold them to be distinct, and differently framed so as best to subserve their respective ends, I concede the propriety of construing them as a whole. Let us, then, examine the bond, and ascertain from its language whether the payment of interest *is confined to the half-yearly dates; or whether it is not made to depend, as I contend, upon "the presentation of the proper coupon." These are the words: "with interest thereon at the rate of six per centum per annum, payable half-yearly at the said banking house on the 1st of January and 1st of July in each year from the date of this bond, and until the principal be paid, on presenting to the said banking house the proper coupon hereunto affixed." We must give a consistent interpretation to the whole phrase; it would scarcely be reasonable to treat the condition of presentation as surplusage; therefore, we must hold it as meaning that while the interest is due as described, it is not to be paid upon "the presentation of the proper coupon." My understanding of the coupon, then, corresponds exactly with the construction I place upon the bond.

Whether, therefore, I consider the bond or coupon separately or construe them together, I am constrained to believe that the latter is neither more nor less than a check, draft or bill of exchange, payable on demand. These three terms denote very nearly the same thing; and so far as any important legal consequences follow, may be deemed convertible terms. Thus, in *Keene v. Beard*, 98 Eng. C. L. R. 371, it was held, that "a check on a banker payable to bearer, was a negotiable instrument, and passed by endorsement so as to entitle the holder to sue the endorser thereon as in a case of a bill of exchange." *Erle, C. J.*, said, "a check is strongly analogous to a bill of exchange in many respects. It is drawn upon a banker, and though in practice the banker does not accept the draft, he might, for aught I know, do so. A check has also some of the incidents of a bill of exchange, if not all, as in respect of its passing by delivery, and also in respect of a bona fide holder taking it for value having a better title than

the person from whom he received
 760 *it." Byles, J., is more discriminating in his language; he says, "I conceive that a check is in the nature of an inland bill of exchange payable to the bearer on demand. It has nearly all the incidents of an ordinary bill of exchange. In one thing it differs from a bill of exchange: it is an appropriation of so much money of the drawer's in the hands of the bank on whom it is drawn for the purpose of discharging a debt or liability to a third person; whereas it is not necessary that there should be money of the drawer's in the hands of a drawee of a bill of exchange. There is another difference between the two instruments: in case of a bill, the drawer is discharged by default of due presentment; but in the case of a check, the drawer is not discharged by delay of presentment, unless it be shown that he has been prejudiced thereby; for instance, by failure of the banker, on whom it is drawn. In all other respects, a check is precisely like an inland bill of exchange." The principles of these decisions have been closely followed in our American courts. In *Cruger v. Armstrong and Barnwall*, 3 Johns. Cas. 5, it was held that a check, like a bill, should be presented for payment; and the following language was employed by the judges: Ratcliffe, J.,—"A check, though generally received as cash, when given in payment, is, in form and reality, a bill of exchange. It possesses all the requisites of a bill, and has been so treated. It has been held to be negotiable, and may be declared upon as a bill of exchange. (Chitty 16; 7 T. R. 423.) The draft itself implies that payment is to be demanded of the drawees. The person who takes it receives it on that condition. It is accordingly considered not as due from drawer, until such demand has been made and drawee refuse payment." Kent, J.,—"A check is not due until demanded, and even independent of authority, I consider this to be the import and nature of the agreement. The drawer undertakes
 761 *specially that the money shall be paid by the person on whom the check is drawn, and the money is supposed to be appropriated for that purpose in the drawee's hands. It would be unreasonable and contrary to the agreement for the holder, instead of resorting to the fund in the hands of the drawee, to make his demand promptly and in the first instance of the drawer himself. The drawer may not have the means of payment, except from the fund pointed out, that fund may be at a distance, and in the meantime his credit will suffer by drawing a check which he cannot instantly pay. He must not be understood as promising to pay, except upon the default of the drawee; and as Ch. J. Holt observed in *Tassell and Lee v. Lewis*, (1 Ld. Raym. 743,) if the payee does not like the check or that mode of payment, he ought to refuse it; but having accepted it, it is at his peril."

I have thus given at some length these judicial expositions of the nature, and func-

tion, and incidents of checks or drafts on bankers, because I deemed every sentence thereof as having an important bearing and shedding light upon our present enquiry. I do not think it can be successfully denied that these coupons belong to this class of negotiable instruments; and if so, it follows, from these authorities, that they cannot be deemed due until demanded. Parsons, in his treatise on Notes and Bills, vol. 1, p. 261, suggests the propriety of substituting for the usual phrase "after maturity," (and I may add "overdue,") the more descriptive one of "after dishonor;" because, as he says, "dishonor and non-payment at maturity are not necessarily the same thing: a note on demand is mature and demandable at once, but is not dishonored until a reasonable period of non-payment has elapsed." Adopting this language, then, as more suitable to this class of commercial paper, let us ascertain when this coupon should be considered
 762 dishonored. Parsons, in his *treatise already mentioned, after laying down the general principle "that bills or notes payable on demand have no definite time at which non-payment operates dishonor," proceeds to state "that a reasonable time must elapse before mere non-payment dishonors the bill or note. What is this time, has not been, and cannot be, fixed by any definite and precise rule. One day's delay of paper on demand certainly would not dishonor it; five years would. And in each case, how many days, or weeks, or months are requisite for this effect, must depend upon the test whether so long a time has elapsed that it must be inferred from the particular circumstances and general conduct of business men, both of which should be considered, that the paper in question must have been intended to be paid within this period, and if not paid must have been refused." This position is fortified by a great number of cases, which he cites to show that no definite time can be fixed to predicate dishonor of mere failure of demand; and that every case must be decided on its circumstances, as tending to forbid or excuse the ordinary diligence. In *Barough v. White*, 4 Barn. & Cress. 325, (10 Eng. C. L. R. 345,) Littledale, J., speaks of the promissory note in that case as "intended to be a continuing security; and that we could not treat it as overdue without evidence of payment having been demanded and refused." So in *Brooks v. Mitchell*, 9 Mees. & Welsb. R. 15, Parke, J., uses the same term in declaring "that a promissory note, payable on demand, is intended to be a continuing security."

Upon reason and authority, and the design of the contract, therefore, I consider these coupons, being drafts payable on demand, as continuing securities, and intended to perform the function of bank notes. We all know that like coupons constituted in fact a very convenient currency, and were frequently passed as such in the channels of exchange between the South and

763 North. What circumstance *of suspicion, then, should have arrested the attention and challenged the scrutiny of the purchaser in this case? It was not the fact of dishonor, because he well knew that from the existing state of war they could not have been presented for payment, and that any effort to collect them during the war was an offence against belligerent rights and positive enactments. Their chief value consisted in their being "Northern funds," which might be held up during hostilities and await collection at the end of the war. There was no mark upon them to show that they had ever been paid or in the possession of the guarantor. The State slept upon her loss and gave no public notice of it till the year succeeding the appellant's purchase of them. They were offered for sale by, and bought from, one of the State banks and State depositaries—a circumstance peculiarly fitted to satisfy the dealer of the unquestionable validity of the title. The bona fides of the holder is expressly found by the agreed statement of facts. Under such circumstances I can conceive of no grounds of suspicion, or requirement of law exacting of the buyer any precaution beyond that which he took, or subjecting him to any equities which the State may have against the embezzler of these notes.

But it may be objected that in my treatment of these coupons, as continuing securities, I am extending the liability of the State beyond her actual engagement. But such is not the case. She must stand to the terms of her agreement. Her faith is pledged "for the punctual payment of the interest and the ultimate redemption of the principal sum of money appearing due by the above bond, according to the terms therein specified." What were "the terms specified" as to payment for interest? Clearly, that it should be effected by drafts on Duncan, Sherman & Co. of New York, payable on demand to bearer. If, therefore, there is this capacity of negotiability

764 and circulation *impressed upon these coupons, it resulted from the contract of the city of Wheeling, from which she derived commensurate advantages, and which the State has chosen to endorse with her guaranty.

I think it must be admitted that if the appellant has to bear this heavy loss, it is very much due to official neglect in failing to indicate by some mark her redemption of these coupons, and promptly warning the public of their abstraction. There is no pretence of any "mala fides" on the part of this holder; he is conceded to be innocent and a purchaser for value; and hence, in view of the State's official neglect, I presume, she can only be relieved from this responsibility or recovery by some inexorable rule of law, and that is now said to be found in this doctrine of "overdue." I have endeavored to show by reasoning and authority that it is not applicable to these coupons; and that it is due alike to the contract of Wheeling and the guaranty of the State to maintain their negotiability till

after presentation. It is expressly found that they were presented within a reasonable time after the restoration of commercial intercourse between Richmond and New York; and I am clear that the existence of the war was a fact releasing the holder from the duty of presentation during its continuance.

For these reasons I am constrained, though with diffidence, to dissent from the affirmance of the judgment below.

JOYNES, J. This proceeding was instituted under the provisions of the Code which authorize proceedings against the Commonwealth by "any person having any pecuniary claim against the commonwealth upon any legal ground." Code ch. 45, § 11, ch. 46, § 1. The claim is founded upon the guaranty of the Commonwealth, endorsed by the treasurer upon certain bonds of the city of Wheeling. It is

765 *objected, on behalf of the Commonwealth, that the guaranty thus endorsed was not authorized by the act of March 20, 1848, in pursuance of which it purports to have been made, because the obligations on which the guaranty was endorsed are not "bonds," in the strict common law sense, and because they are not made payable to the Baltimore and Ohio Railroad Company. There is nothing in either of those grounds. The act of March 20, 1848, authorized the treasurer to endorse the guaranty of the Commonwealth, in a prescribed form, "upon the bonds of said city [of Wheeling] to be executed in payment of her subscription" to the stock of the Baltimore and Ohio Railroad Company, to the amount of \$500,000. Before the guaranty authorized by this act was endorsed, the act of March 29, 1851, was passed, by the third section of which it was provided, that "any company or corporation authorized by law to issue bonds to be guaranteed by this State, and which have not been issued, may attach coupons thereto, and make the money and interest owing upon such bonds, payable at such place or places in the United States or elsewhere as the company or corporation may select." This section, literally construed, only authorizes coupons for interest to be attached to the bonds guaranteed, and does not authorize the bonds themselves to be made payable to the holder, or transferable by delivery. But this section must be construed with reference to that which immediately precedes it, by which provision is made for the issue of bonds payable to the holder, with coupons for interest transferable by delivery, for money borrowed for the state by the Board of Public Works. This act was the first which provided for the issue of what are now known familiarly as "coupon bonds." Construing the third section in connection with, and with reference to, the second, it authorized bonds which were to be guaranteed by the State to be issued in the

766 form of "coupon bonds," *that is to say, payable to such person as might be the holder, and with coupons for interest

transferable by delivery. And such was the construction put upon his section in practice.

The act of March 20, 1848, did not require that the bonds should be made payable to the Baltimore and Ohio Railroad Company. The subscription of Wheeling was to be paid to the company in bonds of the city, guaranteed by the State, but whether the bonds should be made payable to the company was left to be arranged between the city and the company. But if there could be any doubt on this point under the act of March 20, 1848, there can be none under the act of March 29, 1851, which provided for bonds payable to the holder. I conclude, therefore, that the treasurer was fully authorized to endorse the guaranty of the State on these bonds. And the Legislature, by the act of January 10, 1867, recognized the validity of the guaranty.

The act of March 29, 1851, in terms, makes the coupons "transferable by delivery," but does not, in terms, make the bonds themselves "transferable by delivery." This, however, is implied in the provision that they shall be "payable to the holder," the obvious intent being that they shall be payable to such person as may, from time to time, be the holder. These bonds, therefore, as well as the coupons, pass from hand to hand by delivery. And it has been held, in numerous cases, by the Supreme Court of the United States, and by the highest courts of many of the States, that such bonds and coupons are negotiable instruments, "having all the qualities and incidents of commercial paper." *White v. Verm. & Mass. R. R. Co.*, 21 How. U. S. R. 575; *Mercer County v. Hackett*, 1 Wall. U. S. R. 83; *Gilpcke v. City of Dubuque*, *Ib.* 175; *Meyer v. City of Muscatine*, *Ib.* 384; *Murray v. Lardner*, 2 Wall. U. S. R. 110; *Thomson v. Lee County*, 3 Wall. U. S. R. 327; *Supervisors v. Schenck*, 5 Wall. U. S. R. 772. See the cases in State courts cited, 1 *Smith's L. Cas.* 5th ed. 605; 2 *Am. L. Reg. N. S.* 595; *Beaver County v. Armstrong*, 44 *Penn. R.* 63.

It is also held, that a coupon may be negotiated after it has been separated from the bond, and that the holder of a coupon may recover upon it without producing the bond to which it was attached, and without being interested in it. *Commissioners Knox County v. Aspinwall*, 21 How. U. S. R. 539; *Thomas v. Lee County*, 3 Wall. U. S. R. 327; *Beaver County v. Armstrong*, 44 *Penn. R.* 63.

In considering the title of the plaintiff to the coupons on which this proceeding is founded, we must, therefore, apply the principles which belong to bills of exchange and negotiable notes.

The guaranty of the State was given in order to promote the credit of the bonds. The form of the bonds indicates that they were designed to be put upon the market. They were not only to be sold in the first instance, but to circulate from hand to hand by subsequent sales. The guaranty was intended to promote the credit of the bonds

upon all of these sales, and to enure to the benefit of each holder of a bond and of each holder of a coupon, from time to time, to the extent of his claim.

This is the plain intention of the guaranty, but how the holder of a bond or coupon is to avail himself of it is a question of more difficulty. The right to enforce the guaranty may not pass to each successive holder of a bond or coupon, so as to entitle him to maintain an action at law upon it in his own name. It is even held, that a guaranty endorsed on a negotiable note is not negotiable along with the note, so as to entitle an endorser of the note to sue on it at law in his own name. 1 *Am. L. Ca. ed.* 1861. And perhaps there may be greater difficulty in holding that the guaranty in this case passes, as a negotiable instrument, *along with every bond and coupon, since by the transfer of a bond and of the coupons upon it, to different persons, the contract of guaranty endorsed on the bond may, in effect, be severed into parts, and enure to the benefit of several persons. We need not decide that question, however. For if the contract of guaranty is not negotiable at law along with the bond and coupons, it is assignable in equity, and an interest in it passes in equity to each successive holder of a bond or coupon. And in this petition it is not material whether the title of the plaintiff is such as would commonly be enforced at law or in equity.

In order to give effect to the manifest intention of the parties, the right to enforce the guaranty, unless lost by laches or otherwise, must be held to be co-extensive with the right to enforce payment of a bond or coupon. The guaranty, as an accessory to the bond or coupon, follows it and adheres to it in equity, and the right to enforce the guaranty must be determined by the right to demand payment of the bond or coupon. If, therefore, the plaintiff is the lawful owner of the coupons, and entitled to enforce the payment of them, he is entitled to enforce the guaranty, and cannot be defeated by any equities that do not affect his claim upon the coupons. And if he cannot recover upon the coupons, he cannot enforce the guaranty.

That the ordinary rule applicable to equitable assignments may thus be controlled by the intention of the parties, and in order to carry that intention into full effect, is sustained by the case of the *Agra & Masterman's Bank*, 2 *Law Rep. Ch. Ap.* 397, decided in 1867 by the Court of Appeal in Chancery. The *A. & M. Bank* gave to *Dickson, Tatham & Co.* a letter of credit addressed to them, authorizing them to draw bills upon the bank to a certain amount. *D. T. & Co.* drew bills accordingly, and sold them to the agent of the Asiatic Banking Corporation. 769 *The *A. & M. Bank* having failed, the Asiatic Banking Corporation, which still held the bills, carried in a claim for the amount of them under the winding up of the *A. & M. Bank*. The claim was

opposed on the ground that D. T. & Co. were indebted to the A. & M. Bank in an amount exceeding what was due on the bills. The argument was, that there was no contract except with D. T. & Co., and the Asiatic Banking Corporation could only claim as equitable assignees, and subject to the state of account between the bank and D. T. & Co. But the Lords Justices held, that the intention was, that persons taking bills on the faith of the letter of credit should have the absolute benefit of the undertaking contained in it, without reference to any collateral or cross claims, and allowed the claim of the Asiatic Banking Corporation. Lord Cairns (the present Lord Chancellor) was inclined to think, that upon the offer contained in the letter of credit being accepted and acted on by the Asiatic Banking Corporation, there was created a valid and binding contract at law in favor of said corporation against the A. & M. Bank. This case was approved and followed in *In re Blakely Co.*, 3 Law Rep. Ch. Ap. 154, relating to the transfer of debentures payable to bearer, and held not to be negotiable at law, but only assignable in equity. The result is, that the rights of the holder of a coupon, in respect to the guaranty, are substantially the same in this case, whether we hold the guaranty to be negotiable or not.

The contract of a guarantor is collateral and secondary. It differs in that respect, generally, from the contract of a surety, which is direct. And in general, the guarantor contracts to pay if, by the exercise of due diligence, the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment, and so is responsible at once, if the principal debtor makes default. As was said by the

Supreme Court of Pennsylvania, the
770 *surety "is an insurer of the debt; the guarantor is the insurer of the solvency of the debtor." *Krampt's ex'x v. Hatz's ex'ors*, 52 Penn. R. 525; *Reigart v. White*, *Ib.* 438; *Hoffman v. Bechtel*, *Ib.* 190.

But while this distinction exists, in general, between the contract of a surety and the contract of guarantor, we must, in every case, look to the terms of the guaranty and to the circumstances under which it was made, to ascertain, by the rules of construction, the character and extent of the undertaking. If it thus appears to have been the intention of the guarantor to make himself liable on the default of the principal debtor, without the use of the ordinary means to compel payment by him, or proof of his insolvency, he will be held liable accordingly. His contract, in such a case, is a guaranty of payment, or of punctual payment, by the principal debtor, and not merely a guaranty of solvency, or of ultimate payment, after the usual means of enforcing it are employed.

In this case the State, by the contract endorsed on the bonds, guarantees the "punctual payment of the interest." To fix the liability of the State, therefore, for

the payment of any coupon, it is only necessary to show that the city of Wheeling, the principal debtor, has made default in its "punctual payment," according to the contract. The contract provides for payment by Duncan, Sherman & Co. If they fail to pay any coupon upon demand, after it has become payable, the city has made default in "the punctual payment" of interest, and the State is liable on its guaranty. It is not necessary that payment should be demanded likewise of the city itself.

The contract of a guarantor of a negotiable instrument differs from that of an endorser in respect to the degree of diligence incumbent on the holder. This difference is thus stated in *Story on Prom. Notes*, § 460: "In the case of an endorsement, the endorser contracts to be liable to
771 *pay the note, in case of its dishonor, if it is duly presented for payment to the maker at its maturity, and due notice is given to him of the dishonor, and not otherwise. In the case of a guaranty, the rule is not equally strict; and the guarantor contracts that, upon the dishonor of the note, he will pay the amount upon a presentment being made to the maker, and notice given him of the dishonor within a reasonable time; and this reasonable time is ordinarily measured by the fact, whether by the omission to make due presentment at the maturity of the note, and to give him due notice of the dishonor, he, the guarantor, has sustained any loss or injury. If he has, then he is exonerated pro tanto; if he has not sustained any loss or injury, then he is liable for the whole note. So that punctual presentment for payment and punctual notice to the guarantor are not indispensable to charge him; whereas both are ordinarily indispensable to charge the endorser."

The contract of the city of Wheeling, the performance of which is guaranteed by the State, is contained in the bond to which the guaranty is attached, and to which it refers. It stipulates to pay the principal sum on the 1st day of July, 1872, at the banking house of Duncan, Sherman & Co. of New York, and to pay interest thereon, at the same banking house, on the 1st day of January and 1st day of July of each year, "on presenting to the said banking house the proper coupon hereto affixed." Thus, there arises a liability, under the bond, on the 1st day of January and 1st day of July of each year, to pay a sum equal to six months' interest on the principal. For the sake of convenience, and to facilitate the collection and payment of the interest due on the bond, the coupons are furnished as evidence of these successive liabilities. They are the evidence of title to demand the interest; they may be separated from the bond and negotiated apart from it; and they serve the purpose of vouchers when
772 the money *is paid upon them. But the contract for the payment of interest is in the bond, which ascertains and defines the terms of that contract. It is not material in what terms the coupon is ex-

pressed, so that it answers the purposes I have mentioned. Sometimes they contain words of promise, making them substantially promissory notes in themselves. Thus, in *Thomson v. Lee County*, 3 Wall. U. S. R. 327, the form is "promise to pay to the bearer, at the Continental Bank in the city of New York, forty dollars' interest on bond No. —." Sometimes they are in the form of a mere ticket, or token, or "interest warrant," as it is called. Thus, in *Woods v. Lawrence County*, 1 Black. U. S. R. 360, the coupon is in this form: "County of Lawrence—Warrant No. —, for thirty dollars, being for six months' interest on bond No. —, payable on the — day of — at the Office of the Pennsylvania Railroad Company in the city of Philadelphia." In each of these cases the coupon is furnished as evidence of a sum due on the bond for interest at a particular time and place, and as authority to the holder to receive it. In the former case the coupon contains an express promise to pay to the holder the sum due for interest, and may be declared on as such. In the latter case it contains an acknowledgment of liability to pay the sum to the holder, from which the law will imply a promise to pay it. In either case the holder may maintain an action upon the coupon without the bond; but in both cases he receives a sum due and payable according to the terms of the bond. See *McCoy v. County of Washington*, 7 Am. L. Reg. 193; *Maddox v. Graham & al.*, 2 Met. Ky. R. 56; *Rose v. City of Bridgeport*, 17 Conn. R. 243.

Whether, therefore, the coupon is in the form of a promissory note, expressly promising to pay the sum due on the bond for interest, or in the form of a mere token or ticket, indicating the sum so due, it 773 answers substantially *the same purpose, which is to afford to the holder evidence of his right to demand what is due on the bond, and a convenient mode of collecting it. When the language is indefinite, it should be construed with reference to this object. The terms of the coupon in the present case are as follows: "Coupon, city of Wheeling, guarantied by the State of Virginia. Duncan, Sherman & Co. of New York will pay the bearer thirty dollars, the half-yearly interest on Wheeling bond, [stating the number of the bond,] due — 18—," [being the day on which the interest represented by the coupon is payable by the terms of the bond]. This language will admit of different constructions. It may be construed as a bill of exchange, or as a check drawn upon funds deposited with Duncan, Sherman & Co. as bankers, or as a mere token or ticket, indicating the sum due for interest on the bond at a certain time, and the place at which the holder may obtain it. If we construe the coupon as a bill of exchange, and as affording, in that form, a separate contract for the payment of the sum due for interest, the holder must deal with it according to its nature, and make due presentment and demand, and give due notice, in case of dishonor, ac-

cording to the law applicable to bills of exchange. The contract for interest as expressed in the coupon would, in that case, be different from the contract for interest expressed in the bond, and would give rise to different rights and liabilities, though due and payable at the same time. I think, however, that, for several reasons, these coupons should not be regarded as bills of exchange, though to put that construction upon them would not alter the result of this case. 1. They are not intended for acceptance. 2. They are not entitled to grace. 3. They are drawn on bankers, and against funds deposited with them, if they are drafts at all, and are, therefore, checks, rather than bills, in the strict and 774 proper sense. In *re Brown*, 2 *Story's R. 502. 4. To regard them as bills would make them import a contract varying from that in the bond, and impose a degree of diligence on the holder not in conformity with the general understanding and usage in respect to coupons. A coupon should not be construed so as to produce these results, unless its language manifestly requires such a construction. If we construe these coupons as mere tokens, or tickets, or interest warrants, indicating the times and places when and where certain sums will be due and payable for interest on the bond, we satisfy the language in which they are expressed, and make them consistent with the bond and with the purposes for which coupons are devised. And it is obvious, from the act of March 20, 1848, and the act of March 29, 1851, that the intention of the Legislature was, that the coupons should do nothing more than represent, in a negotiable form, the payments of interest to become due on the bond, and that, consequently, the interest should be due and payable on the coupons at the same times at which it would be due and payable by the terms of the bond.

The degree of diligence required of the holder of one of these coupons, is to be ascertained by reference to the relations of the parties liable for its payment. It must be presented for payment within a reasonable time after it becomes due and payable, so as to save the liability of the State as guarantor in case of any injury resulting from delay. And so in case the city of Wheeling deposits funds with Duncan, Sherman & Co. to meet the coupons, as we may presume it will, a like degree of diligence is probably necessary to save the liability of the city in case delay should occasion injury, as by the failure of Duncan, Sherman & Co. But the indulgence thus allowed to the holder in making presentment and demand of payment, does not prevent the coupons from being regarded as due and payable on the day fixed 775 for the payment of interest, *any more than in the case of a promissory note payable on a day certain; which, as against the maker, or as against a guarantor, where there is no endorser, need not be demanded on the day.

It is obvious, from the nature and purpose

of these coupons, as I have endeavored to explain them, that they are not designed for indefinite circulation, or indeed for any circulation at all, after the time fixed for their payment. This is so upon any construction that can be placed upon the language of the coupons. The State has a right to claim that they shall be presented for payment within a reasonable time after they become payable, so that it may be relieved from its liability as guarantor, and the coupons, on their face, give notice of the guaranty. It cannot be supposed that the State would be willing to incur a responsibility wholly indefinite, in point of time, which would be the case if the coupons were designed to circulate, without any limit, after the day of payment. It is no answer to say that the city of Wheeling has provided by a mortgage for the indemnity of the State. The security may be lost, or its value impaired by delay; and the State, by accepting that security, did not abandon the character of guarantor and assume that of principal debtor. *Watkins v. Crouch & Co.*, 5 Leigh 522; *May v. Boisseau*, 8 Leigh 164.

The coupons will, of course, still pass by delivery after the day of payment as before, just as a bill of exchange or a promissory note will. But, as in the case of a bill or note, the circulation thus allowed after the day of payment was not contemplated as a purpose for which the coupons were made and issued. The case of these coupons is not like that of a bank note. A bank note is issued for the purpose of indefinite circulation. The longer it circulates, the better for the bank.

It is argued, that these coupons must be regarded as payable on demand on or after the day specified, and not *as payable on that day; because the bond provides that the interest shall be paid by *Duncan, Sherman & Co.* "on presenting" to them the proper coupon. Sometimes the form of expression in such bonds is, that the coupons shall be "surrendered" or "delivered." But the meaning is the same, whether the coupon is to be "presented," "surrendered" or "delivered." The coupon passes by delivery, and is evidence of the title of the holder to demand the interest. This evidence of title must be produced before the money it calls for can be demanded, and it must be surrendered when the money is paid. This is just what the law requires of every holder of a negotiable security, and no more. But can it be said that a bill of exchange or promissory note, payable on a specified day, or so many days after date, is not payable on a day certain, because payment cannot be obtained without a presentment and surrender of the bill or note?

I conclude, therefore, that these coupons are negotiable instruments, payable at a day certain, namely, the day mentioned in each, as the day the interest called for by the coupon is payable, though the holder was not bound to present them for payment on that day, so as to save the liability of

the city or of the State. And this view is sustained by numerous cases, which hold, that in an action upon a coupon, the payment of which has been refused, or for the payment of which no provision is shown to have been made, interest may be recovered from the time at which it became due and payable, according to its face. *North Pa. R. R. Co. v. Adams*, 54 Penn. R. 94; *Hollingsworth v. City of Detroit*, 3 McLean R. 472; *Gelpcke v. City of Dubuque*, 1 Wall. U. S. R. 175; *Mills v. Town of Jefferson*, 20 Wisc. R. 50.

The coupons in this case became due and payable at different times from the 1st day of January, 1862, to the 1st day of January,

1864, inclusive. The plaintiff became 777 *the holder of them by a bona fide purchase from the Farmers' Bank in November, 1864. It does not appear by what title the bank held them. They had all been stolen from the Second Auditor of the State under the Richmond government soon after they became payable. The plaintiff insists, that the coupons were not overdue at the time he received them, and that he is, therefore, entitled to enforce the payment of them, notwithstanding the theft. It is contended, on the other hand, that the coupons were overdue when the plaintiff received them, and that the fact of their having been previously stolen is fatal to his claim. The point of the objection as to the theft is simply, that the coupons had been stolen, not that they had been stolen from the State. The objection to the plaintiff's title on this ground would be the same, no matter from whom they were stolen.

What I have said already in explanation of the character and meaning of the coupons is sufficient, perhaps, to dispose of this question. But it will assist in clearing up some of the difficulties that have been raised in the case, and perhaps give a clearer view of its merits, to consider briefly what the rule of law is in respect to the transfer of overdue paper, and what is the precise foundation on which it rests.

No principle is better settled than that a party who takes a negotiable instrument by endorsement or delivery, after it has become due, gets no better title than the party had from whom he received it. This principle is laid down, and the authorities for it cited, in all the books on bills and notes. It is well stated and illustrated in *Ashurst v. Bank of Australia*, 37 Eng. L. & Eq. R. 195, where the action was by an endorsee against the maker of a negotiable promissory note, which had been endorsed to the plaintiff after maturity. The defendant pleaded, that before the transfer of the note to the plaintiff, the person

778 *who made the transfer had become bankrupt, and the note vested in the defendant as his assignee; and the plea was held good. Lord Campbell said: "If the note had been transferred by an uncertificated bankrupt before it was due, the bearer for value would have had a right to sue upon it; but the transfer being after it was

due, he has no such right, because the transferee can take no better title than the transferor had. The bankruptcy goes to the very title of the transferor, and after it had become due, though called a negotiable instrument, it was in truth a chattel, and only transferable like any other chattel."

* * "The plaintiff had no better title than if he had taken it from a person who had stolen it." Coleridge, J., concurred. Erle, J., said: "It seems to me extremely important to draw the line clearly between negotiable instruments, properly so called, and ordinary chattels, which are transferable by delivery, though the transferor can only pass such title as he himself had. As to negotiable instruments during their currency, delivery to a bona fide holder for value gives a title even though the transferor should have acquired the instrument by theft; but after maturity, the instrument becomes in effect a chattel only, and is negotiable only in the sense I have mentioned." Crompton, J., said: "I agree that the plaintiff is not entitled to recover upon this note, but I do not think it correct to say, that after maturity it becomes like a mere chattel, for the negotiability continues in all its strictness. In these cases two things are to be considered. Generally a chose in action is not assignable, but with regard to negotiable instruments, as bills and promissory notes, a different rule obtains, and they are negotiable by delivery; but the question of negotiability is different from the question of title. As to that, the party taking the instrument during the currency of it, may acquire a better title than the transferor had; but

779 when it is overdue, *it comes disgraced into the hands of the transferee, and that principle does not apply." In *Murray v. Lardner*, 2 Wall. U. S. R. 110, a bona fide holder of coupon bonds acquired before their maturity was held entitled to recover, though the bonds had been stolen by a former holder. This is in conformity with numerous cases. And it follows, from the principles above stated, that a person who takes a negotiable instrument after it has become due cannot recover upon it if it has been previously stolen, unless it was stolen before maturity, and passed afterwards into the hands of a bona fide holder, from whom the plaintiff derived his title. If it was stolen after it became due, the title of every subsequent holder is necessarily liable to impeachment on that ground. See *Chitty on Bills*, 277; *Ib.* 296; 2 *Parsons Notes and Bills*, 279; *Ib.* 295; *Davis v. Miller*, 14 Gratt. 1.

At one time it was doubted whether the mere circumstance that a bill or note was overdue at the time of its transfer was sufficient to affect the title of the endorsee; and whether it was not necessary that there should be something on the face of the paper, besides the day of payment, to indicate that it had been actually dishonored, or some other evidence to charge the holder with knowledge of the circumstances affecting the validity of the paper, or the title

of the person from whom he received it. This doubt was expressed by Lord Kenyon in *Brown v. Davies*, 3 T. R. 80, decided in 1789. But the other judges held, that the mere circumstance that the paper is overdue at the time of the transfer is sufficient, of itself, to affect the title of the holder. Ashurst, J., said: "Where the note is overdue, that alone is such a suspicious circumstance as makes it incumbent on the party receiving it to satisfy himself that it is a good one, otherwise much mischief might arise." Buller, J., said: "There is this

distinction between bills endorsed before and after they become due: *If a note endorsed be not due at the time, it carries no suspicion whatever on the face of it, and the party receives it on its own intrinsic credit; but if it is overdue, though I do not say that by law it is not negotiable, yet certainly it is out of the common course of dealing, and does give rise to suspicion. Still stronger ought that suspicion to be when it appears on the face of the note to have been noted for non-payment, which is the case here. But generally, where a note is due, the party receiving it takes it on the credit of the person who gives it to him." Lord Kenyon, in *Boehm v. Sterling*, 7 T. R. 423, gave his assent to this rule, as he had previously done at *Nisi Prius* in the case of *Good v. Coe*, cited in the argument of *Boehm v. Sterling*; and it has never been questioned since. The history of this rule of law is thus accurately stated in the argument of counsel in *Boehm v. Sterling*: "This rule grew by degrees from the necessity of the thing, from principles of public policy and convenience, and to prevent frauds which it was scarcely possible to detect in each particular instance. In the case of *Taylor v. Mather*, it was said by Mr. Justice Buller, that if there were any circumstances of fraud in the transaction, and the instrument came into the plaintiff's hands after it was due, he always left it to the jury, on the slightest circumstance, to presume that the endorser was acquainted with the fraud. But between that case and the case of *Brown v. Davies*, a period of near two years, it was found that so many cases had occurred at *Nisi Prius*, where, although there was much ground for suspicion, it was impossible to procure legal proof of the fraud, that the court considered it better, for the furtherance of justice, to adopt that as a rule of law which before was considered more as a rule of evidence, namely, that when a bill or note was taken after it was due, the party should stand in the situation of the person from whom he received it, and

781 *be taken to have known all that the other knew concerning it." This rule of law was not applied in *Boehm v. Sterling*, because the check to which it was sought to apply it had been issued by the drawers nine months after it bore date. It was held, that the drawers must have intended that the parties to whom they thus passed the check should be at liberty to pass it as they pleased, and that the date of the check

should not throw any difficulty on the holder. Lord Kenyon said, that the defendants had the audacity to insist that payment could not be enforced because it had not been demanded nine months before they had themselves issued the paper. So it is held, that the doctrine applicable to overdue paper does not apply to common bank notes, because they are issued for the purpose of circulation for an indefinite time; nor, for the same reason, to post notes issued by a bank. *Story Prom. Notes*, § 500; *Fulton Bank v. Phoenix Bank*, 1 Hall R. 362; *Key v. Knott & wife*, 9 Gill & John. R. 342.

When a negotiable instrument is payable at a time certain, it is overdue as soon as that time has passed. Parsons says that a paper payable at a time certain is dishonored by mere non-payment at that time. 1 Parsons on Notes and Bills, 270. So in 1 Am. Lead. Cas. 336, it is said, "if a note or bill is payable at a fixed time, it is of course overdue after the last day of grace is expired." These coupons were, therefore, overdue when they came into the hands of the plaintiff, and the transfer to him was subject to the rules applicable to the transfer of overdue paper. It is no answer to say that a demand upon Duncan, Sherman & Co., and a refusal of payment by them, were necessary to make the maker and guarantor liable, or that, in consequence of the war, no such demand could be made, so that there was no ground for a presumption that the coupons had been actually dishonored when the plaintiff received them. These objections no

782 more apply *in this case than they would in the case of a bill of exchange payable at a specified time, or so many days after date, and transferred after the day fixed for payment. As already shown, the question is not whether the coupons had been actually dishonored by demand and refusal. The rule in respect to the transfer of overdue paper is not a mere rule of evidence, to be overcome, in any particular case, by proof that the paper has not been actually dishonored. It is a rule of law, founded upon grounds of policy, and designed to prevent fraud, which declares that, in every case, the fact that the day of payment has passed before the transfer is, of itself, a ground of suspicion, and sufficient to affect the title of the transferee.

If we should regard these coupons as not being due and payable on the day specified, but only as due and payable when demanded, on or after that day, the result will be the same. It is well settled in this country, by numerous decisions, that notes payable when demanded are not designed for indefinite circulation, and that they will become overdue by lapse of time. 1 Parsons Cont. 217, and cases cited; *Merritt v. Todd*, 23 N. Y. R. 28. If we regard the coupons as bills at sight or as checks, the same principle will apply. *Down v. Halling*, 4 Barn. & Cress. 330, (10 Eng. C. L. R. 347); *Serrell v. Derbyshire, &c.*, R. R. Co., 9 C. B. R. 811, (67 Eng. C. L. R.). There

is no certain time at which such paper will be regarded as overdue. But the time which had elapsed between the several periods at which payment of these coupons was demandable, and the time at which they came to the hands of the plaintiff, was amply sufficient to stamp them all as overdue. And it is not admissible, in respect to such instruments, any more than in respect to those payable at a day certain, to exempt them from the rule applicable to overdue paper, by proof that, in point of fact, they have not been dishonored. To allow such

proof, would be to deny altogether 783 the application of the rule. In order to exempt these coupons from the operation of the rule as to overdue paper, they must be likened to common bank notes, and held to be designed, in the same manner, for indefinite circulation, as well after as before the time at which payment of them was demandable.

I have seen no case involving the precise question, whether a coupon is to be considered as overdue after the day on which payment might have been demanded, except the case of *The Bank of Louisiana v. The City of New Orleans*, 5 Am. L. Reg., N. S., 555, in the provisional court of Louisiana. In that case coupons were held to be overdue after the days of payment named in them, and subject to the rule in respect to overdue paper. I do not cite that case, however, as authority.

These views are conclusive of the case, and it is not necessary to consider other questions that have been raised in the argument. This opinion, too, has already been too much prolonged in consequence of the novelty of the questions involved.

I am, therefore, of opinion, that there is no error in the judgment of the Circuit Court, and that the plaintiff take nothing by his bill. The order which follows this judgment, requiring the coupons to be delivered to the Second Auditor for the use of the Commonwealth, is properly no part of the judgment, though apparently incorporated with it. But as the plaintiff is not the lawful owner of the coupons, it is not material to him whether they are delivered to the State or not, and he cannot, therefore, complain of this order. Such an order might have been properly made on motion by the State, after judgment, upon condition of leaving copies. The coupons had been acquired by officers of the Richmond government during the war, which, whether a lawful government or not, was an actual

one, and claimed to represent the State 784 and people of Virginia. *Property acquired by that government with the means and resources of the people of Virginia, and held by them as the property of the State, may properly be claimed as such by the present government.

It is proper to add, that in what I have said as to the liability of the State upon the guaranty, I have had no reference to the question raised in the answer of the Auditor as between this State and the State of West Virginia. What body of

people is bound to respond to the obligation imposed by that guaranty, is a question not before us, and upon which I express no opinion.

I am of opinion that the judgment should be affirmed.

MONCURE, P., concurred in the opinion of Joynes, J.

Judgment affirmed.

785 **Rosenbaums v. Weeden, Johnson & Co.*

April Term, 1868, Richmond.

[98 Am. Dec. 787.]

1. *Executed Contract—Sale of Goods—Default of Buyer—Resale of Goods at Vendee's Risk.*—W, a merchant, sells goods to R. who returns them, and refuses to complete the contract. W informs R that he will hold him to the contract, and that he holds the goods for him. R, still refusing to take the goods and pay for them, M may sell them and sue R for the loss upon them.
2. *Same—Same—Same—Same—Notice of Resale.*—In such a case W is not bound to give R notice of the time and place of sale; and though he gives such notice, he may postpone the sale to another day, if that seems judicious.
3. *Same—Same—Same—Same.*—Though the price of such goods was declining, and W retains them for two months or more before he sells them, he is still entitled to recover.
4. *Instructions—Erroneous.*—If an instruction asked does not correctly expound the law, the court, as a general rule, may refuse to give it, and is not bound to modify it or give any other instruction in its place.

**Executed Contract—Sale of Goods—Default of Buyer—Resale at Vendee's Risk.*—An editorial in 2 Va. Law Reg. 129, cites Hare on Contracts, p. 451, as holding the established rule in the United States to be, that, on the breach of an executed contract by refusal to accept the goods, the vendor may proceed to a resale on the purchaser's account, and, if the sum realized is not enough to pay the contract price, may maintain an action to recover the deficiency. The editorial continues by saying: "And the law as thus stated is fully sustained by the American cases. See *Sands v. Taylor*, 5 Johns. R. (N. Y.) 305, (4 Am. Dec. 374); *Patten's Appeal*, 45 Pa. St. 151, (84 Am. Dec. 479); *Atwood v. Lucas*, 53 Me. 508, (89 Am. Dec. 713); *Rosenbaums v. Weeden*, 18 Gratt. (Va.) 785, (98 Am. Dec. 787)."

See also, *note* to the principal case as reported in 98 Am. Dec. 787, 749.

On the question of the rights and duties of a creditor to whom property is pledged by his debtor, the principal case is referred to in *Richardson v. The Insurance Co.*, 27 Gratt. 754.

†*Instructions—Erroneous.*—As a general rule, if the instruction does not correctly expound the law, the court may refuse to give it and is under no obligation to give any other instruction in its place. *Borland v. Barrett*, 76 Va. 135; *Gas Co. v. Wheeling*, 8 W. Va. 371, both cases citing the principal case.

See also, *Keen v. Monroe*, 75 Va. 429; *Womack v. Circle*, 29 Gratt. 208, where the principal case was cited as holding that the party cannot, by asking for an

5. *Same—Equivocal.*—An instruction asked for may be so equivocal, that to give or refuse it might mislead the jury, and thus it might have all the effect of an erroneous instruction. In such a case it would be proper for the court to modify the instruction, so as to make it plain.

This was an action of assumpsit in the Circuit Court of the city of Richmond, brought in June, 1866, by Weeden, Johnson & Co., merchants in Baltimore, against G. M. & M. Rosenbaum of Richmond, to recover a balance due upon some dry goods which the plaintiffs alleged they had sold to the defendants, and that the defendants had improperly returned to them. The case is fully stated by Moncure, P., in his opinion. There was a verdict and judgment for the plaintiffs for \$1,360.89, with interest from the 18th of April, 1866, till paid; and upon a writ of error to the District Court of Appeals at Williamsburg this judgment was affirmed. The Rosenbaums then obtained a writ of error to this court.

Lyons, for the appellants.

E. Y. Cannon, for the appellees.

MONCURE, P. This is an action of assumpsit brought by the defendants in error, Weeden, Johnson & Co., merchants of Baltimore, against the plaintiffs in error, S. M. & M. Rosenbaum, merchants of Richmond, to recover damages alleged to have been sustained by the former in consequence of the refusal and failure of the latter to accept and receive certain goods bargained and sold, and, according to the contract of sale, tendered to them by the former. The declaration contains three special counts, and also a general count on an account stated. There was a demurrer to the declaration and each count of it, which was afterwards withdrawn, and the general issue was joined and tried, on which a verdict and judgment were rendered in

erroneous instruction, or a general instruction, devolve upon the court the duty of charging the jury on the law of the case.

‡*Same—Equivocal.*—But if the instruction asked for is so equivocal that to give or refuse it might mislead the jury, in such case it would be proper for the court to modify the instruction so as to make it plain. *Keen v. Monroe*, 75 Va. 429; *Ward v. Churn*, 18 Gratt. 816; in both of which cases the principal case is cited as authority. See, in accord, *Baltimore & Ohio Railroad Co. v. Polly*, 14 Gratt. 448; *Peshine v. Shepperson*, 17 Gratt. 472, and *foot-note*.

In *Burke v. Shaver*, 92 Va. 350, 23 S. E. Rep. 749, the court said: "Instructions founded on evidence in the case, and consistent with the law, are proper, and should be given; but otherwise where they have no basis in the evidence. *Moon's Adm'r v. R. & A. R. R. Co.*, 78 Va. 745; *Priest, etc., v. Whitacre, Sheriff*, *Id.* 151; *Blirch v. Linton, etc., Id.* 584; *Rosenbaums v. Weeden, Johnson & Co.*, 18 Gratt. 785." See also, *Bertha, etc., Co. v. Martin*, 93 Va. 805, 22 S. E. Rep. 860.

Same—Misleading.—See *Boswell's Case*, 20 Gratt. 860, and *foot-note*.

See also, monographic *note* on "Instructions" appended to *Womack v. Circle*, 29 Gratt. 192.

favor of the plaintiffs in the court below for \$1,360.89, with interest thereon from the 18th day of April, 1866, till paid. On the trial of the cause, the defendants in the court below moved the court to give three instructions to the jury; the first of which was accordingly given, but the second and third were refused; and a bill of exceptions was taken to the opinion of the court refusing them. The only questions we have to decide in this case are, Whether the court erred in refusing to give the second and third instructions aforesaid respectively?

787 *The evidence introduced on the trial is set out in the bill of exceptions, and tended to prove, in substance, that on the 15th of January, 1866, Mr. Crabbe, one of the firm of the vendors, who resided and did business in Baltimore as jobbers and wholesale dealers in dry goods, being on a trip to the South, called at the store of the vendees in Richmond, and contracted to sell them ten bales of cotton goods called "Lanarks," an article well known to the trade, at a certain price, and to be of a certain width, if they could be procured in Baltimore. Mr. Crabbe immediately communicated the fact of the sale to his partners in Baltimore, who purchased the goods, and on the 17th of the same month shipped them to the vendees in Richmond, and sent them also a letter and an account, which are set out in the bill of exceptions. The goods arrived in Richmond on the 19th of the same month—January, 1866. On the next day, the 20th, the vendees wrote to the vendors in regard to the goods, which had been received by the former. The letter is not in the record, not having been offered in evidence on the trial; but it appears from the reply of the vendors to that letter, that the vendees objected to the goods on the ground that they were not the article they had contracted to purchase; that they had contracted to purchase cotton goods, called "Warrens," whereas the goods sent were "Lanarks." The said reply of the vendors bears date on the 22d of the same month, and is in the record. In it the vendors say that Mr. Crabbe's order was to send "Lanarks," and that it would not do to substitute any other brand; that they could hardly think that Mr. C. intended to sell, or the vendees could have expected to buy, "Warrens" at the prices named; that Mr. C. was in North Carolina, and would be in Richmond in a few days, and they preferred waiting for him to see the vendees, as he was familiar with the terms of sale. On the 29th of the same month, the vendees again 788 *wrote to the vendors; but the letter is not in the record. Its purport, however, appears from the reply to it which is in the record, and bears date on the next day, to wit, the 30th of January, 1866. In that reply the vendors say: "Yours of the 29th to hand, in which you say that Mr. Crabbe has not called to settle the matter of the Lanarks sheetings, and that you wish us to write you by return mail,

whether you should ship them to us or store them at our expense. We beg to say, in reply, that Mr. Crabbe must decide whether or not you ordered the Lanarks. If you did order that make of goods, we shall not take them back to account. If he sold you Warrens, or any other make than Lanarks, we will cheerfully take them back. Mr. C. writes us that he will be in Richmond this week, and we must ask of you to await his decision in the matter." A few days after the date of that reply, to wit, on the 3d of February, Mr. C. returned from North Carolina to Richmond, and had an interview with the vendees, the particulars of which are not stated, but the result was unsatisfactory; as it appears that shortly thereafter eight of the ten bales of the said goods were returned to the vendors; the other two (which, according to the evidence offered by the vendees, had been opened and found to be wet, and not of the description of goods contracted to be purchased by them,) having been retained and paid for by them, without prejudice to their defence in this suit. On the 10th of February, the vendors wrote to the vendees as follows: "The Powhatan Steamboat Company delivered to us to-day eight bales brown cotton, which we presume are from you. We received these goods under protest, and so notified the captain of the steamer that brought the goods. We hereby notify you that we received these goods under protest, and hold them subject to your order. We have paid the freight and charged to you. We hold your letter stating, as one of your excuses for re- 789 turning *these goods, that they were damaged. We do not see that those returned are damaged, and have once more to say to you, that Mr. Crabbe's affidavit that you bought these goods warrants us in stating that we shall hold you to your contract." The goods having, it seems, been contracted to be sold on a credit of thirty days, the vendors, on the 15th of February, 1866, drew on the vendees at sight for \$2,706.88, the price of the eight bales returned, with expenses added, but the draft was protested for non-payment. In the latter part of the same month of February, one of the vendees met one of the vendors in New York, and promised to call at the store of the latter in Baltimore and settle the claim for the price of the cottons. On the 5th of April following, a written notice, signed by the vendors, was addressed to and served on the vendees, to the following effect: "We hereby give you notice, that whereas, there are eight bales of brown muslins now in our warehouse in this city (Baltimore) belonging to you, which you have been notified to remove upon payment of our claims against said goods, amounting to \$2,749.75, as per our account rendered, and which you have failed to do; we shall, unless said claim is paid before the 16th day of this month, April, 1866, proceed to cause the said eight bales of muslins to be sold on that day, at public auction, at the auction house of Rex,

Higgins & Co., in this city, on your account and at your risk and charges, and shall look to you for any deficiency arising from said sale." The goods were not sold on the day named in the notice, because it was not the regular sale day of the auction house, and it was thought better by the vendors, for all parties, to postpone the sale to the regular sale day, which was the 18th, on which day the goods were sold at auction fairly, and brought the net sum of \$1,240.06, which, in the opinion of the witness, was as much as they would have

brought on the 16th. The market for 790 such goods had been continually *falling, from the day of the first sale in January, to the sale at auction on the 18th of April. No notice was given to the vendees of the change of the day of sale from the 16th to the 18th, though the sale was advertised as to each day in the Baltimore Sun, by Rex, Higgins & Co., the auctioneers; but the names of the parties concerned were not mentioned in the advertisements, which described the goods, and stated that they would be sold for cash, on account of whom it might concern.

The 2d and 3d instructions, which were asked for by the vendees and refused by the court, are as follows:

2d. If, from the evidence, the jury shall believe that notice was given by the plaintiffs to the defendants, that the goods would be sold on account of the defendants, on the 16th of the month, and they were not sold on that day, but without further notice to the defendants was sold on the 18th of the month, then the plaintiffs are not entitled to recover.

3d. If the plaintiffs delayed the resale of the goods for an unreasonable time, upon a falling market, and then sold them, they are not entitled to recover.

If a vendee of goods refuse to accept them when tendered according to the contract of sale, the vendor may elect to rescind the contract and keep or dispose of the goods for his own use, or to let it remain in full force and hold the vendee liable for the price of the goods and all damages arising from his breach of the contract. If he elect to let the contract remain in full force, he may either bring his action for the price of the goods when it is due and payable, or he may sell the goods, apply the net proceeds of sale to the credit of the vendee on account of the money due by him, and bring an action against him to recover the balance. That the vendor may resell the goods in such a case is now well settled, though his general right to do so was for a long time doubted. It has

791 *been frequently the case that a condition was annexed to a sale, that the goods should be resold at the risk of the purchaser if he failed to comply with the terms of sale. In every such case, of course, the right of resale, and the liability of the first purchaser to make good the loss, existed. In cases of contracts entered into by the East India Company at their sales, it is usual, we are told, to introduce

an express clause authorizing a resale by the vendor in the event of the purchaser's default, and charging him with the loss, if any, and the expenses; and it appears to have been the opinion of Lord Ellenborough that the law did not impliedly confer this power of reselling. But it has since been established, that where the price is unpaid, such power exists, even in the absence of any express stipulation; and that the purchaser is responsible for any loss which may occur, although he did not consent to the resale. Chitty on Contracts 381, marg. See also the cases cited in note (2). The power, in the absence of contract, seems at first to have been placed upon the ground, that where the goods are perishable, the vendor is not bound to let them perish in his hands, and thus lose his security. But this ground very much restricted the rule, and it has since been made general. The case of Maclean v. Dunn, decided by the Court of Common Pleas in 1828, and reported in 4 Bing. 722, 15 Eng. C. L. R. 129, clearly recognized the general rule. "It is admitted," said Best, C. J., in that case, "that perishable articles may be resold. It is difficult to say what may be esteemed perishable articles, and what not; but if articles are not perishable, price is, and may alter in a few days or a few hours. In that respect there is no difference between one commodity and another. It is a practice, therefore, founded on good sense, to make a resale of a disputed article, and to hold the original contractor responsible for the difference. The practice itself affords some evidence

792 *of the law, and we ought not to oppose it, except on the authority of decided cases." "It is most convenient that when a party refuses to take goods he has purchased, they should be resold, and that he should be liable to the loss, if any, upon the resale. The goods may become worse the longer they are kept; and, at all events, there is the risk of the price becoming lower." The course of the English decisions on this subject, with the exception of the more recent cases, may be seen by referring to Blackburn on the Contract of Sale, from p. 329, to the end, where these decisions, down to the period of the publication of that valuable work, are collected. The work may be found in McKinley & Lescure's Law Library, vol. 10, for a reference to which I am indebted to my brother Joynes. The same doctrine is laid down in our own elementary works on the subject. Chancellor Kent thus states it: "If the buyer unreasonably refuses to accept of the article sold, the seller is not obliged to let it perish on his hands, and run the risk of the solvency of the buyer. The usage on the neglect or refusal of the buyer to come in a reasonable time after notice, and pay for and take the goods, is for the vendor to sell the same at auction, and to hold the buyer responsible for the deficiency in the amount of sales." 2 Kent's Com. 504, marg. Indeed, the doctrine seems to have been settled in this country at a much

earlier period than in England. In *Sands, &c., v. Taylor, &c.*, 5 John. R. 395, decided by the Supreme Court of New York in 1810, which is our leading case on the subject, and has ever since been followed in our American courts, the doctrine was recognized in its fullest extent. It is not strange that the authority of that case should be so great, when it is sustained, not only by the reasons rendered by the court in deciding it, but by the fact that Kent, Ch. J., and Spencer, Thompson, Yates and Van Ness, Judges, composed the court, and were unanimous in making the decision.

793 *If the vendor elect to sell the goods and hold the vendee liable for the loss, he ought, of course, to notify the vendee that such is his election, in order that the vendee may know what the consequence of his continued default may be, and may, if he can and chooses to do so, avert it by performing his contract and receiving the goods; or at least may endeavor to mitigate his loss by paying some attention to the resale of the goods. Considering the contract of sale as still in force, the goods belong to the vendee, subject to the lien of the vendor for the price which is due to him. In selling the goods, therefore, for the payment of the price, he acts as the vendee's agent, and ought to sell them to the best advantage, so as to obtain the best price he can. *Sands, &c., v. Taylor, &c.*, supra. Generally he ought to sell them at auction, because, generally, they will sell to most advantage in that way. But he need not always sell them in that way, and it would be improper for him to do so if it happened that they would sell to greater advantage in some other way. *Crooks v. Moore*, 1 Sandford's Superior Court R. 297, is an important case on this subject, and the reasons assigned by the court are very strong. The resale in that case was of iron, and it was a private one, made through a broker in metals. It was contended that it should have been made at auction. "As to this point," the court said, "we are not aware that there is any rule of law which requires resales to be made at auction, and in no other mode. We believe the more sensible rule to be, that the seller must dispose of the goods in good faith, in the mode best calculated to produce their value. If the usual mode of selling the particular goods in the market where they are offered be at public auction, he ought, unquestionably, to dispose of them in that manner. If, however, large dealers in the article in question never send such goods to auction, and they will sell to more advantage through a broker,

794 it is *equally his duty to offer them in the market through a broker's agency." *Id.* 303. While it is the duty of the vendor to notify the vendee of his intention to resell the goods at the latter's risk, it is not settled that he is bound to notify the vendee of the day and place of sale, even though it be at auction. There are certainly expressions to that effect in some of the recent cases. *McEachron v.*

Randles, 34 Barb. R. 301. But they do not seem to be sustained by authority, and there are decisions the other way. In *Gashell v. Morris*, 7 Watts & Serg. R. 22, which was a case of a resale by a sheriff of property sold under execution, and an action brought by him to recover the loss upon the resale, one of the errors assigned was, that the defendant below received no notice that a second sale of the property was to take place, nor of the time and place thereof. "But the records shows," said the court, "that evidence was given to the court and jury, showing that he was required and notified by the sheriff, the plaintiff below, to pay the purchase money according to the terms of the sale, or otherwise the property would be resold at his risk. This notice, if any of the sort was requisite, was sufficient to put him on the lookout, so as to guard against the consequences of a resale, which could only be done by his paying the purchase money without delay. It was certainly not the duty of the sheriff to notify the defendant below of the time and place at which the resale would be made; it was sufficient, if not more than he was bound to do, to let the defendant know that unless he paid the purchase money after it became payable according to his undertaking, a resale would be made at his risk; and this, as appears by the evidence, was done."

It is, of course, prudent and safe for the vendor to give notice to the vendee of the time and place of sale, if it is to be at auction, because the vendee will then have an opportunity of attending the sale and taking care of his own interest;

795 *and if he neglect to do so, it will be his own fault. He will have less, if he can have any, cause to complain of a sacrifice at such resale, if it be fairly made, and he had due notice of the time and place of making it. But upon principle there can be no necessity for such notice to be given by the vendor, in order that he may maintain an action against the vendee for not complying with the terms of the original sale. He has a right to maintain such action for such non-compliance merely, and is at least entitled to nominal damages. The quantum of damages which he really sustains and is entitled to recover, is the difference between the contract price of the goods and the price which they produced at the resale, supposing such resale to have been fairly made, or if not so made, then the price which they would have produced at such resale if it had been so made, after deducting from such price, in either case, all expenses incurred by the vendor in taking care of the goods and selling them. In none of the elementary books on the subject that I have seen, is it laid down that notice to the vendee of the time and place of sale is necessary. In some of the reported cases it appears that such notice was in fact given; and that, no doubt, is the usual, as it is the more prudent, course. In one of them, *Crooks v. Moore*, supra, such notice was given, but the sale was not

made till several days after the day named in the notice; and yet no objection was made by the vendee on that account, although the change was made without his consent or concurrence. No averment of such notice is made in the declaration in such cases. 4 Rob. Pr. 302. The vendor is not bound to sell the goods at all, but may do so or not at his election. He may, if he chooses, continue to hold them at the risk and as the goods of the vendee, and recover the price of them in an action for goods bargained and sold. If he elect to sell them, he is not bound to make such election immediately after the vendee's default, *but may do so at any time while the default continues. He

796 has a lien on the goods so long as they remain in his possession and the default continues, but he is not bound to enforce that lien. It is for his benefit and not that of the vendee, whose remedy is to perform the terms of sale and take possession of the goods. "He," the vendor, says Parsons, "may consider them as his own, if there has been no delivery; or he may consider them as the vendee's, and sell them, with due precaution, to satisfy his lien on them for the price, and then he may sue and recover only for the unpaid balance of the price; or he may consider them as the property of the vendee, subject to his call or order, and then he recovers the whole of the price which the vendee should pay. As the action, in either case, proceeds upon the breach of the contract by the vendee, it seems reasonable that this election should be given to the vendor, and no part of it to the vendee." 3 Parsons on Contracts 209.

Now let us apply the foregoing principles, or such of them as may be applicable, to the case we have in hand.

The first question arises on the second instruction asked for by the defendants, and refused by the court, which asserts, that if notice was given to them that the goods would be sold on their account on the 16th of the month, and they were not sold on that day; but, without further notice to the defendants, were sold on the 18th of the month, then the plaintiffs are not entitled to recover.

If it be a true principle of law, as before stated, that no notice of the time and place of sale was necessary to maintain the action, then of course the instruction was properly refused. If it had been proved that the defendant sustained any injury from the change of the day, it might have been material matter on the question of damages, and it might have been the duty of the court to instruct the jury to that effect, if such an instruction had

797 *been asked for. And even in that case the plaintiffs would have been entitled to recover something. But no such proof was offered. The defendants seem to have given themselves no concern about the sale, and did not attend, so far as appears from the record, on the day and at the place of sale named in the notice, which was served upon them more than ten days

before the day of sale. The plaintiffs, being thus left to judge for themselves and the defendants, adjourned the sale from the 16th to the 18th of the month, because the latter was the regular auction sale day of the auctioneers who made the sale, and the plaintiffs thought it would be better for all parties that the sale should be made on that day. No notice was given to the defendants of such postponement. The time was probably too short, as they lived in Richmond, and the sale was to be in Baltimore. And as they did not attend at the time and place named in the notice which was given, it may well have been inferred that they did not desire notice of the postponement, and would disregard it if given. Notice of the sale on the latter, as well as the former, day was inserted in the Baltimore Sun. The goods were sold at auction fairly on the 18th, and brought as much, in the opinion of the witness of the plaintiffs, as they would have brought if they had been sold on the 16th. On that question, the defendants offered no testimony on the trial. There can be no doubt, I think, of the propriety of refusing to give the second instruction.

The next and only remaining question arises on the third instruction asked for by the defendants and refused by the court, that is: "If the plaintiffs delayed the re-sale of the goods for an unreasonable time, upon a falling market, and then sold them, they are not entitled to recover."

The plaintiffs, as we have seen, had a right of election to sell these goods or not, and could elect to sell them at any time while they remained in their hands, 798 and the *default of the defendants continued. And this right was not at all affected by the fact that the goods, during all the time they remained in their hands, were falling in their market value. They still had a lien upon the goods which they could enforce or not, at their election. The defendants' plain remedy, as before mentioned, was to comply with the terms of sale, and take away the goods. There could be no room, then, for saying that the plaintiffs delayed the re-sale for an unreasonable time upon a falling market, since they might elect to sell at any time and in any state of the market. The plaintiffs promptly, on the return of the goods by the defendants, gave them notice that they would hold the goods subject to their order, and would hold them to their contract. The plaintiffs continued so to hold the goods until the 5th of April, when they elected to sell them, and gave notice to the defendants to that effect. Their hope was that there would be no necessity for a sale, but that the defendants would pay the purchase money and take their goods. On the 15th of February the plaintiffs drew on the defendants at sight for the amount due, but the draft was returned protested. In the latter part of February, one of the defendants promised one of the plaintiffs to call at the store of the latter and settle their claim for the price of the cottons. Nothing

further having been done by the defendants towards a settlement of the claim, the plaintiffs on the 5th of April elected to re-sell the goods, and look to the defendants for any deficiency arising from such re-sale; and accordingly, on that day, gave them the notice to that effect, which has been before mentioned. Certainly there was no unnecessary delay in making the sale after the plaintiffs elected to make it. Only eleven days' notice was given of the sale, which was not unreasonably long, considering the residence of the respective parties, and especially considering the opportunity which was intended *to be afforded to the defendants to prevent the sale by paying the claim before the sale, which they were admonished by the notice to do, and thus avoid the consequences. But even if it could be said that the plaintiffs delayed the re-sale of the goods for an unreasonable time upon a falling market, and if there were any evidence in the case tending to show such unreasonable delay, still it could not properly be said that they were not entitled to recover. They would certainly be entitled to recover something, and would at least be entitled to recover the difference between the contract price of the goods and the price they would have produced on a re-sale properly made. So that, in any view, the court did not err in refusing to give the instruction.

It is argued, however, that the court should not have refused to give the instructions, even if they were wrong in the form in which they were asked, but should have modified them, so as to make them right according to the court's view of the law, and then given them. A court is bound to give any instruction asked for by either party, which correctly expounds the law upon any evidence before the jury. But if such instruction does not correctly expound the law, the court, as a general rule, may refuse to give it, and is not bound to modify it or give any other instruction in its place. This principle is founded on good reasons and is sustained by much authority. A party cannot, by asking for an erroneous instruction, devolve upon the court the duty of charging the jury on the law of the case. An instruction, as asked for, may be so equivocal, that to give or refuse it might mislead the jury; and thus it might have all the effect of an erroneous instruction. In such a case, it would be proper for the court to modify the instruction so as to make it plain. *Baltimore & Ohio R. R. Co. v. Polly, Woods & Co.*, 14 Gratt. 448, 466. I do not think there is anything 800 in **Peshine v. Shepperson*, 17 Gratt.

472, (the only case cited on this subject by the learned counsel for the plaintiffs in error,) which is in conflict with this principle. On the contrary, the rule laid down in that case substantially accords with that laid down in the case in 14 Gratt. supra. See *McDowell's ex'or v. Crawford*, 11 Gratt. 377, 402-406. But the evidence in this case would not have warranted the court in giving any other instruction to

the jury which could properly have led to a different result.

I am, therefore, for affirming the judgment.

The other judges concurred in the opinion of Moncure, P.

Judgment affirmed.

801

Ward & als. v. Churn.

June Term, 1868, Richmond.

1. **Bonds—Incomplete on Face—Case at Bar.**—A bond is drawn with the names of the principal and four persons as sureties inserted therein. The principal and three of these sureties sign it. Two of these sureties sign and deliver it upon the condition that a certain one of the other two named shall execute it; but he does not; and it is delivered to the obligee without his signature. **Held:**

1. **Same—Same—Conditions—Delivery to Oblige—Effect.**—That whether the bond was delivered to a third person, not a party to the bond, or to the principal or any other co-obligor, the parties so delivering it on condition are not bound by the said bond; and it is not necessary to give effect to said condition, that the same should have been known by the obligee when the bond was delivered to him.

2. **Same—Same—Same—Same—Same.**—The bond being void as to the two who delivered it on condition, it is void as to the third surety, who executed it without any condition.

3. **Same—Conditions—Delivery to Oblige.**—If the bond was delivered to the obligee on the condition stated, and the condition was known to him, he is not entitled to recover on the bond.

4. **Same—Conditional Delivery—Presumption.**—In an action on such a bond, in the absence of all evidence of a conditional delivery by the sureties who signed it, the presumption of law is, that they consented to the delivery of the bond without the signature of the other party, whose name is on the bond.

*For monographic note on Bonds, see end of case.

†**Instruments—Incomplete on Face—Delivery to Oblige—Effect.**—See *foot-note* to *Preston v. Hull*, 23 Gratt. 600. See also, the principal case cited in *Newlin v. Beard*, 6 W. Va. 122, 123.

Same—Complete on Face—Delivery to Oblige—Effect.—See *Miller v. Fletcher*, 27 Gratt. 403, and *foot-note*. The principal case was distinguished in *Miller v. Fletcher*, 27 Gratt. 403, and in *Nash v. Fugate*, 24 Gratt. 802, because in the principal case the instrument indicates its incompleteness on its face.

‡**Same—Conditional Delivery—Presumption.**—In *Kyger v. Sipe*, 89 Va. 510, 16 S. E. Rep. 627, the principal case and *Miller v. Fletcher*, 27 Gratt. 403, were cited as substantiating the proposition that where there is no evidence of a conditional delivery, the presumption is that the deed was duly delivered as a deed of those whose names are signed to it. See also, on this point, the principal case cited in *Turnbull v. Mann* (Va.), 37 S. E. Rep. 229.

In *Catt v. Olivier*, 98 Va. 584, 36 S. E. Rep. 960, the court said: "In *Ward v. Churn*, 18 Gratt. 801, 813, it was said that 'when the instrument is delivered directly to the obligee, the delivery cannot be regarded as conditional in respect to the party who makes it, unless the condition is made known to

2. Instructions—Equivocal.—An instruction asked being equivocal, and being correct upon one construction of it, the court should not refuse to give it, but should give it with such an explanation of its meaning as to ensure its being understood by the jury.

802 *This was an action of debt in the Circuit Court of Northampton county, brought by William Churn against John H. Powell, Jackson B. Powell, George S. Powell and Alexander J. Ward, upon a single bill, of which the following is a copy:

On demand for value received, we, John H. Powell principal, and Jackson B. Powell, Robert W. Powell, George S. Powell and A. J. Ward, his securities, do hereby bind ourselves, our heirs, executors and administrators to pay or cause to be paid unto William Churn, his heirs, executors, administrators or assigns, the just and full sum of one thousand and thirty-seven dollars and six cents, current money of Virginia. As witness our hands and seals this 1st day of January A. D. 1849.

J. H. Powell.	[Seal.]
J. B. Powell.	[Seal.]
— — — — —	[Seal.]
G. S. Powell.	[Seal.]
A. J. Ward.	[Seal.]

There was a judgment by default against J. H. Powell the principal, and J. B. Powell, G. S. Powell and A. J. Ward pleaded jointly three pleas of non est factum; upon each of which issue was taken. These pleas are sufficiently set out in the opinion of Judge Joynes.

Upon the trial, the defendants moved the court for an instruction to the jury, which was refused; and they excepted. The jury found a verdict for the plaintiff for \$1,740.06, with interest on the balance of principal due from the date of the verdict until paid; which the defendants moved the court to set aside, as being contrary to the law and the evidence. But the court overruled the motion, and rendered a judgment upon the verdict; and the defendants again excepted. Both these exceptions are set out in the opinion of Judge Joynes.

The defendants applied for and obtained a writ of error *to the District Court of Appeals at Williamsburg, where the judgment was affirmed; and they then obtained a writ of error to this court.

Fisher, for the appellants.
Scarburg, for the appellee.

the obligee. * * * If the delivery is upon a condition made known to the obligee, his assent to it will be presumed from the acceptance of the instrument, and he will not be allowed to repudiate the condition thus asserted, and treat the delivery as absolute and unconditional.' See also, Solenberger v. Gilbert, 86 Va. 778, 11 S. E. Rep. 789; Humphreys v. Richmond & M. R. R. Co., 88 Va. 431, 18 S. E. Rep. 985."

§ Instructions—Equivocal.—See Rosenbaums v. Weeden, 18 Gratt. 785, and *foot-note*. See also, Carico v. W. Va., etc., R. Co., 35 W. Va. 405, 14 S. E. Rep. 17.

JOYNES, J. This is an action of debt upon a single bill brought by William Churn against John H. Powell, Jackson B. Powell, George S. Powell and A. J. Ward. The bond, as written, purports to be the bond of John H. Powell as principal, and of the other parties and Robert W. Powell as securities. It was not executed by Robert W. Powell, a vacant space and seal being left for his name between those of Jackson B. Powell and George S. Powell. John H. Powell suffered judgment by default. The other defendants craved oyer of the writing in the declaration mentioned, and pleaded jointly three pleas, upon each of which the plaintiffs took issue. The first plea alleges that the said writing was made and signed by the said defendants, and by them delivered as an escrow (not stating to whom it was so delivered) "on the express condition, and none other, that Robert W. Powell, whose name is in the body of the said writing, should sign and seal it as his own act and deed, and should become bound jointly and equally with them, the said J. B. Powell, G. S. Powell and A. J. Ward as securities," &c., for the sum, &c.; "and if the said Robert W. Powell should refuse or fail to sign, seal and deliver the said writing as joint co-obligor of the said defendants, the same was not to bind the said defendants, but was to be held null and void and of no effect." The plea then avers that the said Robert W. Powell did not so sign, seal and deliver the said writing, whereby the same became discharged, annulled and vacated, and so

is not the deed of the defendants; 804 concluding *to the country. The second plea is like the first, substantially, except that it alleges that the said writing was delivered by the said defendants to William Churn, the obligee therein, as an escrow, on condition, &c. The third plea is a general plea of non est factum.

On the trial the defendants moved the court to give an instruction to the jury, which was refused; and the defendants excepted. The bill of exceptions certifies that the defendant Ward wrote the bond in the declaration mentioned, at the request of John H. Powell, the principal; "that at the time of writing the said bond, the said Ward executed it upon condition that all the other securities named therein should also execute it, but the plaintiff Churn was not present at the time, nor was it proved that said Churn was informed when the said paper was handed to him, or at any other time, that the said Ward had executed it upon any condition; and the said Churn proved that he never was so informed. It was also proved that the defendant G. S. Powell executed the said paper at a different time and place, and that at the time he did so, he declared that he executed it upon condition that Robert W. Powell, whose name is mentioned in the body of the bond, should also execute it; but there was no proof that this was ever communicated to the plaintiff Churn, or that he was present when G. S. Powell executed said

paper; and it was proved by said Churn that he was not informed of any such condition." Thereupon the counsel for the defendants moved the court to instruct the jury as follows: "If the jury believe from the evidence, that the defendants A. J. Ward and G. S. Powell executed the bond filed with the declaration in this case, upon condition that Robert W. Powell, whose name is inserted in the body of it, should also execute it as surety for John H. Powell, the principal obligor mentioned in said bond, then and in that case the jury are bound

to find the issues for the defendants." *The court said it would give the instruction with the addition, "provided that the plaintiff was informed that these defendants had executed the bond upon that condition;" to which addition the defendants objected; and the court refused to give the instruction asked otherwise than with that addition; to which refusal to give the instruction as asked the defendants excepted. It does not appear that any instruction was given. The only question, therefore, on this bill of exceptions is, whether the court properly refused to give the instruction asked for.

The law in relation to escrows is thus stated in the *Touchstone*, p. 57: "The delivery of a deed as an escrow is said to be when one doth make and seal a deed and deliver it unto a stranger, until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such delivery is good. But in this case two cautions must be heeded: 1. That the form of words used in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made." The author then proceeds to explain what are the "apt and proper" words for such a delivery. But at the present day, no particular form of words is necessary, nor is it necessary that the condition should be declared in express words at the time of the delivery. It is only necessary that it should distinctly appear, from all the facts and circumstances attending the execution and delivery, that the instrument was not to take effect as a deed until a certain condition should be performed. *Murray v. Earl of Stair*, 2 Barn. & Cres. 82 (9 Eng. C. L. R. 33); *Parke, B.*, in *Bowker v. Burdakin*, 11 Mees. & Welsb. R. 127; 2 Washb. Real Prop. 585.

In reference to the second "caution," the author adds: "For if I seal my deed and deliver it to the party himself to whom it is made, as an escrow, upon certain conditions, &c., in this case, let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and the party is not bound to perform the conditions; for in *traditionibus chartarum*, non quod dictum est, sed quod factum est inspicitur." The same law is laid down by Lord Coke in his first Institute, 36a, and more

at large in *Thorowgood's Case*, 9 Rep. 137, where the contrary decision in *Hawksland v. Gatchel*, Cro. Eliz. 835, is said to have been made *ex improviso*. And it has been often held in this country that a deed cannot be delivered as an escrow to the party to whom it is made, and that such a delivery will enure as an absolute delivery, whatever may have been the intention. *Fireman's Ins. Co. v. McMillan*, 29 Alab. R. 147, and cases there cited.

A doctrine which thus overrules and disregards the intention of the parties is strict and technical to the last degree. *Preston* does not appear to have considered it as the law at his day. For, in his edition of the *Touchstone*, immediately after the passage just quoted from that work, he adds the following: "At this day, the jury would be directed to draw their conclusion from all the circumstances." The obvious meaning is, that the jury would be directed to ascertain from all the circumstances—words as well as acts—whether it was the real intention that the delivery should be absolute or conditional. In *Hudson v. Revett*, 5 Bingh. R. 368, (15 Eng. C. L. R. 467,) Chief Justice Best, after quoting from *Comyn Dig. Faits*, A 3, the doctrine which I have quoted from the *Touchstone*, makes these remarks: "The authorities referred to in the text in support of this position are at least conflicting; but in the next division (A 4) it appears that this position about delivery as an escrow is merely a technical subtlety; for the learned author says: 'If it be delivered to the

*party as an escrow, to be his deed on the performance of a condition, it is not his deed till the condition is performed, though the party happens to have it before the condition is performed.' This he lays down on his own authority, without referring to any case; and I am warranted in saying, that we cannot have a better authority than that learned writer."

The doctrine laid down in the *Touchstone* and by Lord Coke has been said to apply only to deeds conveying title, and not to bonds, (*Campbell, J.*, in *People v. Bostwick*, 32 N. Y. R. 445,) though I do not remember to have seen it stated elsewhere with that limitation. In *Hicks v. Goode*, 12 Leigh 479, Judge Cabell made some comments on this doctrine and on the reasons assigned for it, and expressed the opinion that it rests on technical and unsatisfactory grounds. He did not controvert its existence, however, as a rule of law; nor is it necessary for me to do so in the present case. I mean to express no opinion on the subject.

But the court held, in *Hicks v. Goode*, that this doctrine is applicable only to the case of deeds which are, on their face, complete contracts, requiring nothing but delivery to make them perfect according to the intention of the parties; and that it is not applicable to deeds which, on their face, import that something more is to be done besides delivery to make them complete and perfect contracts according to the in-

tention of the parties. And accordingly it was held, in that case, that this doctrine was not applicable to a bond which was drawn as the joint bond of two parties named in it, with two seals affixed, but which was executed by only one of them. It does not distinctly appear whether Judge Allen did or did not concur with the other judges on this point. But even if he did not concur, the point was decided by a majority of the whole court, and the decision is, therefore, a binding authority.

808 *And this decision is sustained by numerous cases, which either decide or concede, that where an instrument indicates on its face that others were to execute it besides those who did execute it, it may be shown by evidence that the delivery, though made to the grantee or obligee, was conditional upon the execution of the instrument by the other parties, and not absolute. *Cutter v. Whittemore*, 10 Mass. R. 442; *Chandler v. Temple*, 4 Cush. R. 285; *Parker v. Bradley*, 2 Hill R. N. Y. 584; *Brackett v. Barney*, 28 N. Y. R. 333; *Grim v. School Directors, &c.*, 51 Penn. R. 219; *Fletcher v. Austin*, 11 Verm. R. 447. See also *Bowker v. Burdekin*, supra; *Cumberlege v. Lawson*, 1 Com. Bench N. S. 709 (87 Eng. C. L. R.); *Evans v. Bremridge*, 35 Eng. L. & Eq. R. 397.

The question then arises, whether the fact that a deed or bond in the hands of the grantee or obligee indicates, on its face, that it was intended that others should execute it besides those who did execute it, is sufficient of itself to raise a presumption that it was delivered upon a condition that the parties who executed it should not be bound until it should be executed by the other parties named in it. Judge Cabell, in the case of *Hicks v. Goode*, intimates an opinion that the face of the paper in such a case would be evidence of a conditional delivery, and that the defendants might perhaps avail themselves of the objection by demurrer to the declaration. He waived a decision of the question, however, because it did not arise in the case. I do not think that the opinion thus intimated is well founded. The face of the paper in such a case affords evidence of the most satisfactory character, of an original intention or expectation that it was to be executed by all the parties named in it. The original intention, however, may not have been adhered to. A party who has executed the paper may waive its execution by some or all of the other parties. He

may do this, although the instrument
809 was *drawn as the joint bond of the parties named in it, and not as their joint and several bond. Where the instrument, fully executed as to one or more of the parties, is found in the hands of the obligee, I think it should be presumed, in the absence of all other evidence on the subject, that it was duly delivered as the deed of those who have executed it. It is a well-settled principle, that where a deed is found in the possession of the party to whom it is made, it will be presumed to

have been duly delivered to him. *Vanhook v. Barnett*, 4 Dev. R. 268; *Fireman's Ins. Co. v. McMillan*, supra; and cases cited. Such a presumption is consistent with the face of the paper, even where it imports an original intention that others should execute it. To make this presumption in such a case does no injustice to those who have executed the paper. They may still show how the fact really is. They may also protect themselves against any inconvenience that may arise from such a presumption, in the first instance, by taking care to keep the instrument out of the hands of the grantee or obligee until it is fully consummated according to their intention. The obligee or grantee, on the other hand, has full notice from the face of the paper of the original intention of those who signed it, and he can not complain if they are allowed to prove that this original intention was not relinquished in the delivery. He should either refuse to accept the paper in its existing shape, or be prepared to repel the defence of a conditional delivery. It has accordingly been held, in numerous cases, that where an instrument which shows on its face that it was to be executed by other persons besides those who have executed it, is found in the hands of the party to whom it is made, it will be presumed, in the absence of evidence, to have been duly delivered as the deed of those whose names are signed to it. *Cox v. Thomas' adm'r*,

9 Gratt. 312; *Bowker v. Burdekin*, 810 supra; the cases above cited from *10 Mass. R. 442; 4 Cush. R. 285; 2 Hill R. 584, and 51 Penn. R. 219; *Williams v. Springs*, 7 Iredell Law R. 384; *Governor v. Kellett*, 11 Georgia R. 286; in which last case the subject is fully discussed.

It appears, from the bill of exceptions, that the defendants Ward and G. S. Powell, when they respectively signed the bond, declared that they did so upon the condition that they should not be bound unless Robert W. Powell should also sign it. Nothing is said in the bill of exceptions about delivery, but it is fair to infer that each of them, at the time he signed the bond, delivered it upon the condition stated. But it does not appear, nor is there anything from which it can be inferred, to whom either of them delivered the bond, or how it came to the possession of the obligee.

When a bond is delivered as an escrow to a person who is no party to it, to take effect as a bond upon the happening of some event or the performance of some condition, it cannot possibly take effect until such event happens, or such condition is performed. The party to whom the bond is entrusted by such conditional delivery has no authority to make a delivery of it to the obligee, except the event happens or the condition is performed; and when the obligee accepts a delivery from him he must see to it that he pursues his authority. If, therefore, the person to whom a bond is thus entrusted delivers it to the obligee before the event happens or the condition is performed on which he was to deliver it, it

will not take effect. And it matters not that the obligee had no knowledge of the condition which the party attached to the delivery of the escrow. The condition is valid, whether known to the obligee or not. It is a question of power in the person who delivers the bond to the obligee, and not a question of good faith in the obligee in accepting the delivery. The condition

imposes a limit upon the authority of 811 the person *to whom the bond is entrusted, and a delivery by him to the obligee, in violation of the condition, is a delivery without authority, and has no effect. 2 Wash. Real Prop. 585, § 44; Berry v. Anderson, 22 Indiana R. 36; Black v. Shreve, 2 Beasley R. 455; Smith & ux. v. South Royalton Bank, 32 Verm. R. 341. In the last of these cases the subject is fully discussed, on principle and authority.

But suppose a bond, instead of being delivered by a party who signs it to one who is a stranger to it, as in the case just supposed, is delivered by him to one of his co-obligors—for example, to the principal—upon condition that he shall not be bound except in a certain event, or upon a certain condition, are the same principles to be applied to such a case as to a case in which a conditional delivery is made to a third person, who is an entire stranger to the instrument; in other words, can a bond be delivered as an escrow or upon a condition to the principal or any other co-obligor? Upon this subject different views have been entertained. In some cases it has been held, that delivery upon a condition may be made to a co-obligor, and that the instrument, though delivered by him, will not take effect until the condition was performed. Pawling v. United States, 4 Cranch R. 218; Lovett v. Adams, 3 Wend. R. 380; Reid v. Bibb, 5 Alab. R. 281; State Bank v. Evans, 3 Green R. 155; Fletcher v. Austin, 11 Verm. R. 447; People v. Bostwick, 32 New York R. 445.

In other cases it has been held, that a paper cannot be delivered upon a condition to one of the co-obligors, and that if a party delivers an instrument to one of his co-obligors to become his bond upon a condition, and the person to whom it is so entrusted delivers it to the obligee before the condition is performed, the party will be bound, unless the obligor had notice of the condition, and that the delivery was unauthorized. Millett v. Parker, 2 812 Met. *Ky. R. 608; State v. Peck, 53 Maine R. 284; Deardorff v. Foreman, 24 Ind. R. 481.

It is not necessary to consider this question in respect to instruments which are apparently, on their face, complete and perfect, according to the intention of the parties. It is only necessary to consider it in reference to instruments such as that in the present case, which indicate on their face that they are not complete, and that it was intended that other signatures should be affixed. The cases cited from 53 Maine and 24 Indiana confine the principle which they maintain to instruments which, on

their face, are apparently complete and perfect, according to the intention of the parties. If the principle of those cases is a sound one in respect to such instruments, as to which I am not called upon to express an opinion, I am of opinion that it cannot be applied to an instrument which, upon its face, indicates that it is not complete, according to the intention of the parties, and that other persons were intended to execute it. Such was the case in Pawling v. United States. The face of such a paper puts the obligee on his guard. He ought to enquire when such a paper is offered to him, and to satisfy himself that the original intention of the parties, as indicated on the face of it, has been relinquished. If he fails to make such enquiry, and accepts the paper from the principal obligor, or from any one of the co-obligors, he has no right to complain if he is met by a plea, from another of the obligors, that he signed and delivered the paper upon the condition indicated on its face. There is all the more reason for such enquiry when the paper is presented by the principal obligor, for he has a manifest interest to deliver the paper without the other names, which he may not be able to obtain. A contrary rule would put it in the power of a principal obligor, or of one of the obligors who may be disposed to favor him, to commit the grossest frauds upon

813 *the other obligors. It would make it necessary, in every case, to employ a third person to obtain the signatures, or for all the obligors to execute the paper at one and the same time. The principle which is often stated, that when one of two innocent persons must suffer by the act of a third, the one who has put it in the power of such third person to occasion the loss, ought to bear it, has no just application to such a case, because, if there be no other reason, the obligee is put upon his guard by the face of the paper.

When the instrument is delivered directly to the obligee, the delivery cannot be regarded as conditional in respect to the party who makes it, unless the condition is made known to the obligee. Although the face of the paper indicates that it was intended originally that other persons should sign it, the obligee has a right to infer from the unconditional delivery, that the original intention has been relinquished by the party who makes the delivery. If the delivery is upon a condition made known to the obligee, his assent to it will be presumed from the acceptance of the instrument, and he will not be allowed to repudiate the condition thus assented to, and to treat the delivery as absolute and unconditional. In Millett v. Parker, above cited, it was held that the same principle must be applied where the delivery is made by any one of the obligors, because all the obligors together constitute one party, and the obligee the other. But the rights of the obligors are several and distinct, and neither is bound except so far as he has consented to be. Neither is bound without a delivery of the instrument, and

one obligor has no right to deliver it for another without his authority. And besides, if an obligee who receives an instrument from one of the obligors, which is apparently complete and perfect, has a right to presume that all the obligors have authorized its delivery, he has not the same right to make that presumption
814 *when the instrument, on its face, is incomplete and imperfect.

It was further said in *Millett v. Parker*, that a bond cannot be delivered to a co-obligor as an escrow, because, while it remains in the hands of the obligors, or any one of them, it imposes no obligation whatever, whereas an escrow is so far binding on the party who has delivered it as such, that he cannot revoke it, and the obligee is entitled to it when the condition is complied with. But this assumes, as a ground of decision, that a bond, while it remains in the hands of either of the obligors, can have no operation whatever; which is the very point of controversy. While the bond remains in the hands of the obligors, or any of them, without any delivery, it has and can have no effect. But a bond may be valid though the obligor has never parted with the possession of it, if such be his intention, and he has done that which, in law, amounts to a delivery. *Smith on Contracts* (Rawle's Ed.) 11 and cases cited. And the question is, whether one obligor may not deliver a bond to another obligor, on a condition that it shall take effect only in a certain event.

It follows from these principles, that if the court had instructed the jury that if they believed, from the evidence, that the defendants, G. S. Powell and A. J. Ward, delivered the bond to a third person not a party to it, or to one of the other obligors, on condition that it should not take effect as their bond unless executed by Robert W. Powell, such condition would not affect the rights of the plaintiff unless it was known to him when he received the bond, the instruction would have been erroneous. And it would have been equally erroneous to instruct the jury that such a condition would not affect the rights of the plaintiff unless known to him, in case the jury should believe, from the evidence, that the bond was delivered by the said G. S. Powell and

A. J. Ward, upon the condition
815 *mentioned, without saying to whom delivered. For an instruction in that general form would have been applicable to the case of a conditional delivery to a stranger or to one of the co-obligors.

Such being the principles applicable to the case, I come now to consider the instruction asked by the defendants. It will be observed that the language used is "executed on condition," and not "delivered on condition." If the latter expression had been employed, the instruction, so far, at least, as relates to the defendants, Geo. S. Powell and A. J. Ward, would have been in strict conformity to the principles which govern the case. In what sense, then, were the words, "executed on condition," em-

ployed in the instruction? In one sense a bond may be said to be executed when it is signed, while in another sense the execution embraces both signing and delivery. The pleas, as we have seen, allege that the bond was "delivered on condition." Construing the instruction with reference to the issues made up on these pleas, and to which the instruction was intended to apply, the language of the instruction ought probably to be understood as referring not only to the signing of the paper, but to the delivery, which was a part of the execution. And so it seems to have been understood by the court below, which only proposed to modify the instruction, by adding that the condition, in order to affect the rights of the plaintiff, must have been known to him. But if this was not the obvious meaning of the instruction, the jury, bearing in mind the issues which they were trying, might well have placed that construction upon it, and the refusal to give it was calculated to mislead the jury. And especially was the refusal to give the instruction calculated to mislead the jury, from the explanation which the court gave of the grounds of the refusal, which showed that the court did not consider it objectionable, because it referred only to the
816 signing of *the paper, and not to its delivery. If, therefore, the language

of the instruction was equivocal, the court should not have refused it, but should have given it with such an explanation of its meaning as to ensure its being understood by the jury in the proper sense, unless it was liable to objection on the other ground to be hereafter considered. *Balt. & Ohio R. R. Co. v. Polly Woods & Co.*, 14 Gratt. 447; *Peshine v. Shepperson*, 17 Gratt. 472; *Rosenbaums v. Weeden & Co.*, supra, 785.

But it is contended, that the instruction was properly refused, on the ground that it proposed to say to the jury that, in the case supposed, they must find for "the defendants," meaning all the defendants, whereas, there was no evidence of a conditional delivery by Jackson B. Powell; and, under the statute, the verdict and judgment might be against him, though in favor of the other defendants. This objection cannot be sustained. The bond purports to be the joint bond of all the parties. The presumption from the face of it is, that Jackson B. Powell intended to be bound along with the other parties by whom it was executed, and not severally. There was no evidence, as far as this bill of exceptions shows, to counteract this presumption. In this state of the case, there was no ground on which the jury would have been justified in finding a separate verdict against Jackson B. Powell. It is, therefore, unnecessary to consider the construction and effect of the provisions of the Code (ch. 172, § 49, and ch. 177, § 19,) referred to by the counsel for the defendant in error. Besides, if it was necessary to take that view, we might be justified in construing the words, "the defendants," as referring only to the defendants mentioned in the instruction

and in the bill of exceptions, namely, George S. Powell and A. J. Ward.

I am of opinion to reverse the judgment of the District Court.

817 *The other judges concurred in the opinion of Joynes, J.

The following is the judgment:

The court is of opinion for reasons stated in writing &c., that if the bond in the declaration mentioned was delivered by the plaintiffs in error George S. Powell and A. J. Ward, either to a third person, not a party to the said bond, or to the principal, or any other obligor, upon condition that the same should not take effect as their bond unless the same should be executed by Robert W. Powell, whose name is recited therein as a co-obligor, then the said plaintiffs in error are not bound by the said bond, the said condition not having been complied with; and that it is not necessary to give effect to the said condition that the same should have been known to the defendant in error when the said bond was delivered to him.

And the court is further of opinion, that if the said bond was delivered to the defendant in error on a condition that it should not be binding on the said plaintiffs in error unless the same should be signed by said Robert W. Powell, and the said condition was known to the said defendant in error, then the said plaintiffs in error are entitled to insist upon the benefit of said condition, and the said defendant in error is not entitled to recover on the said bond.

The court is further of opinion, that if the word "executed" in the instruction asked for by the said plaintiffs in error on the trial, was used and understood in the sense of "delivered," as seems to the court to be probable, then the said instruction should have been given to the jury as asked, and without the addition proposed by the court. But if the meaning of the said instruction in this respect was equivocal, the jury might well have understood that the word "executed" was used in the said instruction in the sense of "delivered,"

and the court erred in refusing 818 *the instruction, because such refusal was calculated to mislead the jury, and the court, instead of refusing the said instruction, should have amended it so as to ensure its being understood by the jury in the proper sense, and to have given it to the jury as so amended.

Therefore erroneous and reversed with costs, &c., remanded for new trial in conformity with the principles above declared.

Judgment reversed.

BONDS.

A. Seals.

1. Form.
2. Recognition in the Body of the Instrument.
3. Instruments Sealed by Only Part of the Obligor—Effect.
4. Seal—Presumption of Authority.

5. When No Seal Necessary—Effect of Seal.

6. Seals—Judicial Notice.

B. Validity.

1. Bonds—Authority to Execute.
2. Estoppel.
3. Bonds—Signed, Sealed and Delivered.
4. Formal Defects.
5. Material Defects.
6. Consideration.
7. In General.

C. Endorsements.

1. Endorsements of Equal Date with the Bond.
2. Subsequent Endorsements.

D. Escrow.

1. Delivery to Stranger—Deed Perfect.
2. Delivery to Oblige—Deed Perfect.
3. Delivery to Co-obligor—Deed Perfect.
4. Delivery to Oblige—Deed Imperfect.

E. Liability on Bond.

1. In General.
2. Confederate Contracts.

F. Ownership.

1. How Acquired.
2. Evidence of Ownership.
3. Larceny of Bond.

G. Pleading and Practice.

1. Form of Remedy.
2. Who May Maintain Action.
3. Parties.
4. Notice.
5. Allegations.
6. Variance.

H. Pleas.

1. In General.
2. Kinds of Pleas.
 - a. Fraud.
 - b. Failure of Consideration.
 - c. Illegality.
 - d. Mistake.
 - e. Alteration.
 - f. Usury.
 - g. Statute of Limitations.
 - h. Payment.
 - i. Novation.
 - j. Release and Discharge.
 - k. Set-Off.

I. Practice.

J. Burden of Proof.

K. Evidence.

1. Competency of Witness.
2. Evidence—Admissibility.
3. Writing Obligatory—Variation by Parol.
4. Evidence—Judges of.
5. Evidence—Failure of.

L. Judgment.

1. Joint Obligation—Joint Judgment.
2. Judgment—Damages.
3. Judgment—Interest.
4. Penal Bond—Recovery in Excess of Penalty.
5. Judgment—Clerical Errors.
6. Judgment—Certainty.
7. Judgment—In General.

M. Relief in Equity.

1. Jurisdiction.
2. Grounds of Equitable Relief.
3. Extent of Equitable Relief.
4. When Equitable Relief Refused.
5. Form of Remedy.

N. Appellate Court.

1. Jurisdiction of Appellate Court.
2. Presumptions in Appellate Court.
3. Proceedings in Appellate Court.

Cross References.

In connection with this subject, see monographic notes on the following subjects:

- Bankruptcy, appended to Dillard v. Collins, 26 Gratt. 343.
- Bills of Exception, appended to Stoneman v. Com., 25 Gratt. 887.
- Consideration.
- Costs, appended to Jones v. Tatum, 19 Gratt. 720.
- Estoppel, appended to Bower v. McCormick, 23 Gratt. 810.
- Executions, appended to Paine v. Tutwiler, 27 Gratt. 440.
- Homestead Exemptions, appended to Hatorff v. Wellford, 27 Gratt. 366.
- Insurance, appended to Mutual, etc., Soc. v. Holt, 29 Gratt. 612.
- Interest, appended to Fred v. Dixon, 27 Gratt. 541.
- Issue Out of Chancery, appended to Lavell v. Gold, 25 Gratt. 478.
- Larceny, appended to Johnson v. Com., 24 Gratt. 555.
- Usury, appended to Coffman v. Bruffy, 26 Gratt. 698.
- Official Bonds, appended to Sangster v. Com., 17 Gratt. 124.
- Depositions, appended to Field v. Brown, 24 Gratt. 74.

A. SEALS.

1. FORM.—A scroll is of equal validity to constitute a deed, as an impression made by a seal on wax. Jones v. Logwood, 1 Wash. 56 [48].

2. RECOGNITION IN THE BODY OF THE INSTRUMENT.—To constitute a sealed instrument in Virginia the seal, whether a mere scroll or an actual seal, must be recognized in the body of the instrument. Bradley Salt Co. v. Norfolk Imp., etc., Co., 95 Va. 461, 28 S. E. Rep. 567, 8 Va. Law Reg. 722; 5 Va. Law Reg. 331.

In Bradley Salt Co. v. Norfolk, etc., Co., 95 Va. 461, citing Dinwiddie County v. Stuart, 28 Gratt. 526, it was held that under the Virginia statute in order to constitute a sealed instrument, the seal (even if an actual seal and not a scroll) must be acknowledged in the body of the instrument.

A writing having a scroll attached to the signature, which does not mention "seal" in the body of the instrument, is not a writing obligatory, but only a simple contract. Gover v. Chamberlain, 83 Va. 286, 5 S. E. Rep. 174.

A scroll annexed to a signature is not sufficient to make a sealed instrument, unless it appear, from some expression in the body of the instrument that it was intended as such. Austin v. Whitlock, 1 Munf. 487; Gover v. Chamberlain, 83 Va. 286, 5 S. E. Rep. 174.

A contract in writing has a scroll annexed, opposite the signature, and the word seal is written in the scroll, but in the body of the instrument there is no recognition of the scroll as a seal. Held, the instrument is no deed, but a simple contract only. Cromwell v. Tate, 7 Leigh 301.

An instrument concluding "witness our hands," with a scroll annexed to the signature, and the word "seal" written therein, is only a simple contract. Jenkins v. Hurt, 2 Rand. 446.

A writing, by which the party binds himself, his heirs, etc., to pay a sum of money, for value received, as witness his hand (saying nothing of his seal), is not an obligation under seal, but a promissory note; notwithstanding a scroll, purporting to be a seal, be annexed to the signature; and it be proved that

the writing in question was "executed" by the plaintiff; it not appearing, explicitly, that he sealed, as well as signed it. See Austin v. Whitlock, 1 Munf. 487; Anderson v. Bullock, 4 Munf. 442.

In an action of debt on an instrument which is in form a promissory note for money, concluding "witness the hands" of the parties; and in which scrolls by way of seals are set to the signatures of the parties the instrument is rightly described in the declaration as a promissory note. Peasley v. Boatwright, 2 Leigh 212 [196].

A writing for the payment of money or other purpose, which is not required to be by deed, having a scroll at the foot thereof with the word "seal" written therein, but which is not recognized in the body of the instrument as a seal, is not a sealed instrument. Evidence *aliunde* is not admissible to prove that a scroll at the foot of a writing was intended as a seal. Clegg v. Lemessurier, 15 Gratt. 108.

A paper which in the body of it says, "as witness my hand and seal," has the word "seal" affixed to the signature of the maker. It is a sealed instrument within the meaning of the statute. Lewis v. Overby, 28 Gratt. 627; Dinwiddie County v. Stuart, Buchanan & Co., 28 Gratt. 526, and note; Barton's Law Pr. (2d Ed.) 95; Va. Code 1849, ch. 143, § 2, p. 580; Va. Code 1887, § 2841.

Stamps or Scrolls Used as Seals.—Recognition.—To a printed form of a bond, there are put printed stamps or scrolls by way of seals; the blanks are filled up; and the instrument executed by the obligors, by signing their names to the printed stamps or scrolls, which are recognized as their seals in the body of the instrument; this is a sealed instrument within the statute. 1 Rev. Code, ch. 128, § 94; Buckner v. Mackay, 2 Leigh 530 [489]; Va. Code 1887, § 2841.

An instrument which stated that "after my death, for value received, I bind my heirs, executors, etc., to pay to my daughter, Frances E. Hood, the just and full sum of five thousand dollars of my Virginia registered state bonds. As witness my hand and seal this 16th day of September, 1871. E. C. Haden. [Seal]," is not a testamentary act but a common-law obligation. Hood v. Haden, 82 Va. 588.

When Recognition in the Instrument Unnecessary.—Though a party may not have originally put his name to the bond, yet if he afterwards acknowledge the signature to be his hand and seal, he is bound at law; or, if he is not so bound at law, it is a legal defence of which he should avail himself upon the motion for judgment on the bond, and not resort for relief, on that ground, to a court of equity. Maupin v. Whiting, 1 Call 195 [224]; Meredith v. Johns, 1 H. & M. 585; Turpin v. Thomas, 2 H. & M. 145.

An instrument purporting to convey land, with a scroll attached to the grantor's name, though the scroll is not recognized in the body of the instrument, will be held to be a deed, where the instrument has been acknowledged in court by the grantor as his deed for the purpose of having it recorded. Ashwell v. Ayres, 4 Gratt. 283.

Where it is stated at the foot of an instrument of emancipation that it was signed, sealed and acknowledged in the presence of two attesting witnesses, and the instrument is afterwards duly proved by the witnesses in the county or corporation court, it sufficiently appears that the person making the instrument affixed the scroll by way of seal. Parks v. Hewlett, 9 Leigh 511.

3. INSTRUMENTS SEALED BY ONLY PART OF THE OBLIGORS.—EFFECT.—A writing which recites that

"On demand I promise to pay to David Keller the just and full sum of two hundred dollars for value received of him, as witness my hand and seal, the 1st day of March, 1862. Thomas McHuffman, [Seal]. Security—David M. Riffe." is a promissory note as to the said Riffe and a single bill obligatory as to the said McHuffman; and in such case an action of debt will lie upon the instrument against them jointly. *Keller v. McHuffman*, 15 W. Va. 64.

An instrument binding the parties thereto to pay a sum of money, purports to be under their hand and seals; but it is signed by one of the parties without a seal, and by the other parties with seals, to their names. *Held*, upon demurrer, that one action of debt may be brought against all the parties. *Rankin v. Roler*, 8 Gratt. 63.

4. **SEAL—PRESUMPTION OF AUTHORITY.**—Where the contract of a corporation purports to be sealed with its corporate seal, and it is proven to be signed by the proper agents of the corporation, the presumption is that the seal was affixed by the proper authority, and such contract will be held valid until the contrary is shown. *Fidelity Ins., etc., Co. v. Shenandoah Val. R. Co.*, 33 W. Va. 244, 9 S. E. Rep. 180.

5. **WHEN NO SEAL NECESSARY—EFFECT OF SEAL.**—A marriage settlement gives the power to a wife to dispose of the settled estate by gift, or devise, under her hand and seal, attested by two or more witnesses. *Held*, that a testamentary paper signed by the wife with the scroll annexed to her name, and attested by the requisite number of witnesses, though the scroll is not recognized in the body of the instrument, is a valid will under the power. In a testamentary paper no seal is necessary, and a seal affixed has no bearing upon the legal character or operation of the instrument; no solemnity of sealing could make it a specialty; and the act of sealing can amount to nothing more than the performance of a condition. *Pollock v. Glassell*, 2 Gratt. 439.

It has been expressly decided in this state that a power of attorney to confess judgment need not be under seal. *Coker v. Wynne*, 2 Va. L. J. 377. And in the absence of proof of non-assent on the part of some of the members of the firm, the power of attorney in the firm name must be held valid when assailed collaterally; and this is true though the power be under seal. The presence of the seal does not invalidate the instrument. *Alexander v. Alexander*, 85 Va. 365, 7 S. E. Rep. 335; *Lancaster v. Wilson*, 27 Gratt. 624; *Brockenbrough v. Brockenbrough*, 31 Gratt. 581; *Shadrack v. Woolfork*, 32 Gratt. 709; *Neale v. Utz*, 75 Va. 484, and cases cited.

6. **SEALS—JUDICIAL NOTICE.**—It is a rule of evidence universally recognized, that the courts of a state take judicial notice of its seals and of the signatures of the heads of departments; nor will it be supposed, without proof, that any particular seal is counterfeit or irregularly impressed. The law assumes that the seal of the state is known to all her judicial officers; and there is nothing in the statute requiring the production of the bonds, in a proceeding like the present, which affects this rule of the common law. *Com. v. Dunlop*, 89 Va. 431, 16 S. E. Rep. 273.

The seal of a court of a foreign country must be proved; the seal of a foreign state or nation proves itself. *Ex parte Povall*, 3 Leigh 884 [816].

B. VALIDITY.

1. **BONDS—AUTHORITY TO EXECUTE.**—Where in a

case of conviction for gross misdemeanor a surety is required by the court for good behavior, the bond should be a general bond for good behavior, there being no authority to take a special recognizance against the commission of a specific act, not in itself a gross misdemeanor. *State v. Gillilan (W. Va.)*, 28 S. E. Rep. 516.

Bonds in Judicial Proceedings—Collateral Attack.—Bonds taken in judicial proceedings bind obligors if the court have jurisdiction, though its action be erroneous, but not void. The action of the court cannot be incidentally questioned by impeaching the bonds. *Findley v. Findley*, 43 W. Va. 372, 26 S. E. Rep. 433.

Removal of Cause—Bond.—Bond and security, for complying with the requirements of the act of congress, on removing the cause from a state court, to the circuit court of the United States, may be given though the defendant be not personally present. *Brown v. Crippin*, 4 H. & M. 173.

Bond by Authority of Act of Legislature.—When pursuant to an act of the legislature, approved March 6, 1882, the board of directors of the Central Lunatic Asylum made an agreement for the erection of the building for the accommodation of the insane, and this agreement was spread upon the minutes of the board, and the bonds of the contractor, given for the proper performance of his contract, were accepted and approved by the board, this constitutes a valid contract for the breach of which any party aggrieved may have an action for damages. *Central Lunatic Asylum v. Flanagan*, 80 Va. 110.

The provision in section 57, ch. 54, Code 1891, that if a railroad corporation fail to construct its road according to its charter public subscriptions to aid construction shall be void, does not make the completion of such road a condition precedent to the delivery of bonds under such subscriptions. *Neale v. County Court*, 43 W. Va. 90, 37 S. E. Rep. 370.

Bonds under Void Ordinance—Validity.—The mere fact that a bond has been taken by an officer who was not authorized by law to take such bond does not render it invalid at common law. Such bonds though taken under a void ordinance may still be good as common-law bonds. *Porter v. Daniels*, 11 W. Va. 250.

Bond—Authority to Execute—Power of Attorney.—Under a power of attorney, authorizing a person to execute an administration bond for the person giving the power, the attorney may be allowed to execute the bond accordingly. *McCandlish v. Hopkins*, 6 Call 208.

A special agent with power of attorney to execute a bond for the sum of twenty-five thousand dollars, has no authority to execute a bond for forty thousand dollars; and such bond, if executed, is void and not binding on the principal. *Stovall v. Com.*, 84 Va. 246, 4 S. E. Rep. 379.

Bond—Blank for Obligor—Filled in by Agent under Power of Attorney.—A paper perfect as a bond, except that there is a blank for the name of the obligee, is signed by P and M, and put into the hands of M for the purpose of borrowing money upon it. It is expected that F will lend the money, but if he does not it may be gotten from some other person. M obtains the money from H, and files the blank in the paper with the name of H and delivers it to him. This is done in the absence of P and without his knowledge. It is not the bond of P. *Preston v. Hull*, 23 Gratt. 600; *Rhea v. Preston*, 75 Va. 757; *Nash v. Fugate*, 24 Gratt. 202, and *foot-note*; *Penn v. Hamlett*, 27 Gratt. 337, 342; *Keen v. Monroe*, 75 Va. 423;

Lyttle v. Cozad, 21 W. Va. 200; Ward v. Churn, 18 Gratt. 801.

Bond—Blank for Amount—Filled in without Authority.—A paper intended to be a bond is signed in blank as to the sum by a person as surety; and the blank is afterwards filled up in his absence, and without his knowledge and without authority from him. It is not his bond. *Rhea v. Gibson*, 10 Gratt. 215.

2. ESTOPPEL.—There seems no exception to the rule that the fair and voluntary execution of a sealed instrument is conclusive against all who seal it of everything admitted in it. *Hoke v. Hokes*, 3 W. Va. 563; *Shaw v. McCullough*, 3 W. Va. 260; *Cox v. Thomas*, 9 Gratt. 312; *Cordle v. Burch*, 10 Gratt. 480; *Cecil v. Early*, 10 Gratt. 198.

A bond executed pursuant to an order made in a chancery suit requiring its execution, as a condition precedent to the enjoyment of certain rights, does not derive its efficacy from the order. The liability of the obligors is determined by the bond alone, and not by the order. The obligors are estopped to deny the recitals of the bond, even if they were in conflict with record, and a plea of *nullius in record* is inapplicable. *Blankenship v. Ely*, 96 Va. 359, 36 S. E. Rep. 484.

If a bond recite a fact, though the fact recited be a matter, which ought regularly to appear of record, the parties, obligors in the bond, will be estopped from denying the truth of such recital. Thus if the bond recites, that a certain person was sheriff and a certain other person his deputy, though these facts appear of record, yet they need not be proven in a suit on such bond otherwise than by the production of the bond; for the obligors in it are estopped from denying the truth of the recital. *Bank v. Flesherman*, 22 W. Va. 317; *Cox v. Thomas*, 9 Gratt. 320.

Where a bond is executed to the obligee "as executor," the obligor is estopped to deny that the obligee is such executor. *Hoke v. Hokes*, 3 W. Va. 561.

Bond—Authority to Execute—Estoppel.—One who makes a naked power of attorney to sign his name as surety to a treasurer's bond containing six sureties is not estopped to deny the validity of a subsequent exercise of the power, when the first bond proves defective, by which his name was attached to a second bond, containing only four sureties. *Stuart v. Com.*, 91 Va. 152, 21 S. E. Rep. 246.

Bond—Consideration—Estoppel.—A recital in a bond that it was given to secure a loan of money does not estop the obligor from pleading and proving that the consideration was confederate treasury notes. *Calfee v. Burgess*, 3 W. Va. 274.

3. BONDS—SIGNED, SEALED AND DELIVERED.—A person who signs, seals, and delivers an instrument as his deed, will never be heard to question its validity, upon the ground that it was not acknowledged by him, nor proved at the time of the delivery. It is the sealing and delivery that gives efficacy to the deed; not proof of its execution. And this principle applies to all bonds, whether executed by public officers or private persons, unless there is a statute making the acknowledgment, or proof in court essential to the validity of the instrument. *Board of Supervisors v. Dunn*, 27 Gratt. 608; *State v. Proudfoot*, 38 W. Va. 745, 18 S. E. Rep. 952.

In the case of an ordinary bond delivery is absolutely essential to give it any effect either in a court of law or equity. Without such delivery such a

bond is an absolute nullity. *Van Winkle v. Blackford*, 28 W. Va. 693; *Bank v. Goddin*, 76 Va. 503.

To constitute a valid bond of the party, the intention to bind himself must appear on the face of the instrument; that the signature and seal form a part thereof, and furnish *prima facie* evidence that the person so signing and sealing the bond intended to make himself a party thereto, and to be bound by the stipulation thereof; although the name of the party so signing, sealing and delivering the bond, may not be inserted in the penalty or recited in the condition. *Beery v. Homan*, 8 Gratt. 51; *Bell v. Allen*, 3 Munf. 118; *Bartley v. Yates*, 2 H. & M. 396; *Beale v. Wilson*, 4 Munf. 380; *Raynolds v. Gore*, 4 Leigh 276; *Crawford v. Jarrett*, 2 Leigh 630; *Luster v. Middlecoff*, 8 Gratt. 54; *Cox v. Thomas*, 9 Gratt. 312.

4. FORMAL DEFECTS.

a. Conditions, Covenants, etc.—Although the condition of the bond is not so extensive, as the statute requires, yet if it contains a material part of the conditions required, the bond is not void, but binds the obligors to the extent of such condition or conditions, and when the bond contains some conditions or provisions, not required by the statute, and some of those which are required, it is valid and binding to the extent of the latter. *Holliday v. Myers*, 11 W. Va. 276, 294; *Gillespie v. Thompson*, 5 Gratt. 133; *White v. Clay*, 7 Leigh 68; *Fox & Vowles v. Mountjoy*, 6 Munf. 36; *Pratt v. Wright*, 18 Gratt. 175; *Gibson v. Beckham*, 16 Gratt. 321; *Porter v. Daniels*, 11 W. Va. 250, and cases there cited.

There is no solid distinction between bonds and other deeds containing conditions, covenants and grants not *malum in se* but illegal at the common law, and those containing conditions, covenants or grants illegal by the express prohibition of statutes. In each case the bonds or other deeds are void as to the conditions, covenants or grants that are illegal, and are good as to all others which are legal and unexceptionable in their purport. The only exception is where the statute has avoided the whole instrument to all intents and purposes. *Pratt v. Wright*, 18 Gratt. 175, 67 Am. Dec. 707; *Reed v. Hedges*, 16 W. Va. 167.

Where a court or officer has authority or capacity to take a bond, and makes a mistake by omitting some condition prescribed, or inserting a condition not authorized or illegal, unless the statute by express words, or necessary implication, makes it wholly void, the bond is not void; the good shall not be vitiated by the bad; and the bond may be sued on, so far as the conditions are good, as a statutory bond. *Gibson v. Beckham*, 16 Gratt. 321; *Reed v. Hedges*, 16 W. Va. 167.

b. Parties to Obligation.—A firm being the plaintiffs in the executions, the bond executed by one of the firm, in the partnership name, is a good bond of the person so executing it. *Davis v. Davis*, 3 Gratt. 363.

Though there be a total blank for the name of the surety in the obligatory part of a bond, yet his name being mentioned in the recital of the condition, and he having signed and sealed it, it was held sufficient to charge him. *Bartley v. Yates*, 2 H. & M. 396.

A blank paper is signed and sealed by a principal and three others who intended to be his sureties, and it is left with the principal to be filled up and delivered by him. He does fill it up and deliver it to the obligee named therein. It is not the bond of the three, and does not bind them. But the principal having filled it up, and delivered it when thus com-

plete, it is his bond, and binds him. *Penn v. Hamlett*, 37 Gratt. 337.

c. Form of Instrument.—Under circumstances, a written instrument was declared to be a good bond, with collateral condition, though the obligor's name was not signed opposite to the seal, but between the penal part and the condition, and the name of the obligee was signed at the foot of the condition, with the seal annexed; both signatures being attested by the same witnesses. *Argenbright v. Campbell*, 8 H. & M. 144.

Two Executions—One Bond—Effect.—The fact that one bond was taken on two executions will not render it void especially when it appears that no disadvantage could result to defendant from so making it. *Winston v. Com.*, 2 Call 246 [291]; *Davis v. Davis*, 2 Gratt. 363.

5. MATERIAL DEFECTS.

Bond—Excess of Penalty—Effect.—If an act of assembly directs, that a bond shall be payable to the justices, and that the penalty shall be 1,000£ if the bond be taken payable to the governor and the penalty be 10,000£ and a suit thereon is brought by a succeeding governor for the benefit of the party injured, it cannot be sustained. *Stuart v. Lee*, 3 Call 864 [422].

Removal Bond—Failure to Comply with Statute—Effect.—In a case of removal from the state to the federal court if the bond of party making the motion provides "for his entering in such court—copies of said process against him," but omits the succeeding clause of the statute "and also for his there appearing," the bond is fatally defective and insufficient. *Bell v. Bell*, 3 W. Va. 183.

6. CONSIDERATION.—A bond given in October, 1863, for the price of slaves purchased at a judicial sale, is valid and binding; and may be enforced after the war, and after the adoption of the 13th amendment to the constitution. *Henderlite v. Thurman*, 23 Gratt. 466; *Rives v. Farish*, 24 Gratt. 125.

The sale and delivery of slaves prior to 1861 passed the property in them to the purchaser, and was a valid consideration for a bond given for the price. The subsequent action of the government which liberated the slaves could not affect the validity of such bond nor bar a suit for the debt evidenced thereby. *Matthews v. Dunbar*, 3 W. Va. 138.

Bond—Want of Consideration—Effect.—A bond executed without consideration, for the purpose of being sold by the obligee for the benefit of the obligor, is of no obligatory force until it passes into the hands of a holder for value. *Harnsberger v. Geiger*, 3 Gratt. 144.

7. IN GENERAL.

Bond—Monomania—Effect.—Monomania, in no way connected with the subject of a contract, will not invalidate it. *Boyce v. Smith*, 9 Gratt. 704.

Pretensed Title—Conveyance—Bonds—Validity.—A conveyance of a pretended title to land is not void; and the bonds given for the purchase money for the same are valid. *Middleton v. Arnolds*, 13 Gratt. 489.

Bond for Sale of Office—Effect.—A bond for the sale of an office is void. *Noel v. Fisher*, 3 Call 185 [215]; *Morgan v. Hale*, 12 W. Va. 713.

Bond of Married Woman—Want of Consideration—Effect.—The debts of a married woman, for which her separate estate is liable, are such as arise out of any transaction, out of which a debt would have arisen, if she were a *feme sole*, except that her separate estate is not bound by a bond or covenant based on no consideration, such bond or covenant being void at law, and she not being estopped in a court

of equity from showing that it was based on no consideration. *Hughes v. Hamilton*, 19 W. Va. 364.

C. ENDORSEMENTS.

1. ENDORSEMENTS OF EQUAL DATE WITH THE BOND.

—Whatever is endorsed upon a bond or contract, bearing equal date therewith, must be taken as part of it, until the contrary be proved. *Smith v. Nicholas*, 8 Leigh 330, 356; *Gordon v. Frazier*, 2 Wash. 130.

W H S executes his bond to F S for four thousand dollars, payable four years after date. At the same time and immediately after W H S signs the bond, F S endorses on the back thereof as follows: "Memorandum. If I do not collect the money due on the within note of my nephew W H S during my life, then it is never to be collected; and I give it to him. F S." The endorsement being equivocal in its character, all the circumstances attending the transaction, the contemporaneous conduct and declarations of the parties, evidence of their purposes and motives, may be looked to as showing what kind of instrument was within their contemplation and design. And held this endorsement a part of the bond and irrevocable without destroying the bond. *Smith v. Spiller*, 10 Gratt. 318.

P executes his bond to H for \$5,500 payable with interest one year after date. On the bond there is an endorsement, that one twenty-fifth of the principal of the bond with the interest due at the end of the year, and so on from year to year, the credit not exceeding twenty-five years in all. H brings debt upon the bond against P, and declares upon the bond omitting the endorsement. P craves oyer of the bond and endorsement, and demurs. *Held*, the words "to be paid" have been obviously omitted from the endorsement by mistake, and they will be supplied. *Peyton v. Harman*, 22 Gratt. 643.

The clerk having entered up a judgment by *nil dicti*, in the district court, in debt on a bond for the payment of tobacco, without noticing a memorandum indorsed on the bond, this court considered the mistake to be merely clerical and amendable upon motion, at a subsequent term. But the injured party may if he please, proceed by writ of error *coram nobis*; although in the latter case, he is not entitled to costs. *Gordon v. Frazier*, 2 Wash. 130.

2. SUBSEQUENT ENDORSEMENTS.—To make a subsequent agreement, respecting a bond, a part of the bond, so as to necessitate its recognition as such in declaring on the bond, it must be so engrafted upon the bond that the original stock and the matter engrafted shall together constitute inseparable parts of an entire instrument; such is not the case if the indorsement can be regarded as a distinct and separate promise, covenant, or condition that may be pleaded in defense of the action, or made the ground of a separate action. *Carter v. Noland*, 86 Va. 530, 10 S. E. Rep. 605.

An endorsement on a bond, made after its execution, and before it passes to a holder for value, is part and parcel of the bond in the hands of such holder; and is supported by the same valuable consideration, on which every other part of the bond rests. *Harnsberger v. Geiger*, 3 Gratt. 144.

Upon a bond of submission was endorsed an agreement signed by the parties bearing date subsequent to that of the bond which agreement authorized the arbitrators by endorsement upon the bond to appoint an umpire to assist in making up the award. The indorsement is to be considered as incorporated with, and as part of the condition of the bond so as

to constitute one entire agreement bearing date by relation with that of the bond. *Shermer v. Beale*, 1 Wash. 15; *Price v. Kyle*, 9 Gratt. 247.

In an action of debt on a single bill, the plaintiff declared on the bond, taking no notice of the endorsement thereon in the words and figures following: "March 27, 1875. By amount paid for me by the Lucketts, in purchase of farm, at five hundred dollars; by B. P. Noland's due-bill of this date for five hundred dollars; and it is agreed that no more of this note shall be demanded of the said Noland until the marble quarry is in successful operation and he receives therefrom enough to pay the balance of this note, or he can sell his stock for enough to pay such note, as per receipt given him. B. F. Carter." *Held*, this indorsement did not become an integral part of the original instrument, making it a new and different bond from what it was at first, and that bond, therefore, as it appeared on *oyer*, did not vary materially from that described in the declaration. *Carter v. Noland*, 86 Va. 568, 10 S. E. Rep. 605.

Penal Bill.—E. by single bill under seal promises to pay P. 207 dollars, and afterwards a writing was indorsed on the bill, signed by obligor and obligee, but not sealed, stating that the parties had settled their accounts, and that there was due on the bill 152 dollars; in debt by E. against P. upon the bill, in which the declaration makes no mention of the writing indorsed. P. craves *oyer* of the writing obligatory in the declaration mentioned. *Held*, he did not thereby ask *oyer* of the indorsement, nor could he have demanded *oyer* thereof. *Elb v. Pindall*, 5 Leigh 115 [109].

A writing obligatory is executed by three obligors, whereby they bind themselves to pay to the obligee a sum of money, nine months after date. One of the obligors is in fact a principal, and the other two are sureties. After the obligation is executed, the principal, on the same day, without the knowledge of the sureties, makes a memorandum at the foot thereof, under his hand and seal, stating that the obligation is to bear interest from its date. *Held*, this memorandum has not the effect of discharging either principal or sureties from their obligation. *Tremper v. Hemphill*, 8 Leigh 623, 31 Am. Dec. 673.

D. ESCROW.

1. DELIVERY TO STRANGER—DEED PERFECT.—If a bond is delivered to a third person, not a party to it, to take effect as a bond only upon the happening of some event, or the performance of some condition, and that person delivers it to the obligee before the event happens or the condition is performed on which he was to deliver it, it will not take effect. And it matters not that the obligee had no knowledge of the condition which the party attached to the delivery of the escrow. The condition is valid, whether known to the obligee or not. *Newlin v. Beard*, 6 W. Va. 110; *Ward v. Churn*, 18 Gratt. 810.

P. agrees to join H. W. as his surety in a forthcoming bond, and executes and delivers the bond, as an escrow, upon condition that K. shall also join in and execute the bond as co-surety; and K. agrees to join as surety in the bond, and executes and delivers the same, as an escrow, upon condition that O. W. also join in and execute the bond as co-surety; but O. W. never unites in the bond. *Held*, that upon this state of facts, neither P. nor K. are liable for any part of the debt in equity, any more than they would be liable for any part of it at law,

where the facts would amount to proof of *non est factum*. *King v. Smith*, 2 Leigh 171 [157].

2. DELIVERY TO THE OBLIGEE—DEED PERFECT.—A deed, perfect on its face, cannot be delivered as an escrow to the grantee or obligee, upon a condition upon which it is to be a valid deed. In all such cases the condition is void, and the deed is at once operative. *Miller v. Fletcher*, 27 Gratt. 403; *Kyger v. Sipe*, 89 Va. 511, 16 S. E. Rep. 637; *Lyttle v. Cozad*, 21 W. Va. 200; *Wendlinger v. Smith*, 75 Va. 317; *Ward v. Churn*, 18 Gratt. 801; *Hicks v. Goode*, 12 Leigh 479; *Preston v. Hull*, 23 Gratt. 600; *Nash v. Fugate*, 24 Gratt. 202; 2 Min. Inst. (4th Ed.) 784; *Barton's Law Pr.* (2d Ed.) 630, 6 Am. & Eng. Enc. Law 858; *Humphreys v. Richmond, etc., R. Co.*, 88 Va. 431, 13 S. E. Rep. 985.

Parol evidence is inadmissible, to prove that a deed, perfect on its face, was delivered to the grantee on a condition. *Miller v. Fletcher*, 27 Gratt. 403; *Watson v. Hurt*, 6 Gratt. 633; *Towner v. Lucas*, 13 Gratt. 705; *Woodward v. Foster*, 18 Gratt. 200; *Sangston v. Gordon*, 22 Gratt. 755; *Colhoun v. Wilson*, 27 Gratt. 646; *Southern Mutual Insurance Co. v. Yates*, 28 Gratt. 593; *Barnett v. Barnett*, 83 Va. 509, 2 S. E. Rep. 733; *Tait v. Central Lunatic Asylum*, 84 Va. 279, 4 S. E. Rep. 697; *Shenandoah Val. R. Co. v. Dunlop*, 86 Va. 353, 10 S. E. Rep. 239; *Peyton v. Stuart*, 88 Va. 76, 16 S. E. Rep. 160; *Barton's Law Pr.* (2d Ed.) 630; *Nash v. Fugate*, 24 Gratt. 595; *Hukill v. Guffey*, 37 W. Va. 425, 16 S. E. Rep. 544; *Owens v. Boyd Land Co.*, 95 Va. 562, 28 S. E. Rep. 950.

3. DELIVERY TO CO-OBLIGOR—DEED PERFECT.—A bond which is a complete and perfect instrument on its face at the time of its delivery to the obligee, was executed by persons as sureties, upon the condition that it should not be delivered until executed by other persons, and it was placed in the hands of the principal obligor, and without being so executed it was delivered by the obligor to the obligee, who was not informed of the condition. The bond is the valid bond of the sureties, and they cannot set up the condition against the obligee. *Nash v. Fugate*, 24 Gratt. 202. See *Lyttle v. Cozad*, 21 W. Va. 199, and *Long v. Campbell*, 37 W. Va. 665, 17 S. E. Rep. 197.

A bond signed by a principal obligor and sureties, apparently perfect and complete, may be avoided by parol proof that the obligee, at the time he received it from the principal obligor, had notice that other persons were to sign it, in order to make the instrument effectual as to those who did sign it. But in such a case the evidence ought to be very clear and satisfactory. *Nash v. Fugate*, 24 Gratt. 595; *Newlin v. Beard*, 6 W. Va. 110; *Solenberger v. Gilbert*, 86 Va. 789, 11 S. E. Rep. 789; *Ward v. Churn*, 18 Gratt. 801; *Lyttle v. Cozad*, 21 W. Va. 200.

In an action of debt on a bond purporting to be the bond of three obligors, two of the obligors under a plea of *non est factum* offer evidence of an understanding between themselves and the other obligor that the bond should not be binding on them until signed by two other designated parties, of which understanding the obligee in the bond had notice at the time of its delivery. *Held*, the evidence was admissible under the general plea of *non est factum*, and the court erred in excluding it. *Stuart v. Livesay*, 4 W. Va. 45.

In the absence of other evidence, the presumption is that all the obligors delivered the bond, and not that it was delivered by the others to one, to be by him delivered when fully completed. If it was delivered by all, it is the binding obligation of all, unless at the time of delivery the condition was

made known to the obligee. The presumption from an unconditional delivery is that the intention which appears from the unfinished condition of the instrument is waived. *Turnbull v. Mann* (Va.), 37 S. E. Rep. 238.

4. DELIVERY TO OBLIGEE—DEED IMPERFECT.—A deed perfect on its face cannot be delivered to the obligee, as an escrow, to be the deed of the obligor only upon condition; but the rule does not apply to deeds which upon their face import that something more is to be done besides delivering to make them complete and perfect contracts according to the intention of the parties. *Wendlinger v. Smith*, 75 Va. 309.

The rule of law, that a deed cannot be delivered to a party to whom it is made as an escrow, to be the deed of the obligor only on condition, and that in such case the delivery is absolute and the condition nugatory, is applicable only to the case of deeds which are upon their face complete contracts requiring nothing but delivery to make them perfect according to the intention of the parties; not to deeds which upon their face import that something more is to be done besides delivery to make them complete and perfect contracts according to the intention of the parties. *Hicks v. Goode*, 12 Leigh 479.

E. LIABILITY ON BOND.

1. IN GENERAL.

a. Parties Liable.

Liability of Heirs.—The heir of an heir is responsible upon an obligation in which the heirs are bound; provided he have assets by descent from the obligor. *Waller v. Ellis*, 3 Munf. 88.

In the obligation of a bond, the obligors acknowledge themselves (not naming their heirs) to be held and firmly bound to the obligee, his heirs, executors, etc., in a penal sum: the condition provides, that if the obligors or either, or any of their heirs, executors or administrators, shall pay a less sum specified, on or before a given day, then the obligation is to be void. *Held*, the heirs of the obligors are not bound by the instrument. *Huston v. Cantrell*, 11 Leigh 136.

Guarantors.—Though in general the contract of a guarantor is to pay, if after due diligence the debt cannot be made out of the principal, yet the intention of the parties must govern, and if it was guarantor's intention to make himself liable on the default of the principal debtor, without the use of the ordinary means to compel payment by him, or proof of his insolvency, he will be held liable accordingly. *Arents v. Com.*, 18 Gratt. 750.

A son gave a bond secured by a deed of trust, which bond his father indorsed as guarantor. The father as a gift to his son during his lifetime paid the greater part of the bond. After his death his executrix paid the balance and took an assignment of the bond. In a suit by the executrix to enforce the deed of trust it was held that she was entitled to enforce the deed only to the extent of the balance paid by her as executrix. *Scott v. Scott*, 38 Va. 251, 2 S. E. Rep. 431.

Principal and Surety.—G, B and K were principal obligors in a bond. B and K put money in the hands of G to pay the bond; and he bound himself to pay it, but failed to do so, and became insolvent. A judgment was recovered on the bond against the three, and B paid it. After the judgment G conveyed land to S to secure a debt due to him and another debt due to C. Upon a bill by B and K

against S and C to subject the land conveyed in the deed to S to satisfy the debt B had paid, S stated in his answer that prior to the judgment he held the bond of G, B and K, and that he had delivered it up upon receiving the bond of G with the deed to secure it; but there was no proof of this. C in his answer, stated that he had before the judgment bought one-half the land from G, and made payments upon it; and had afterwards given it up and taken the bond of G for the amount, and taken the deed of trust to secure it. *Held*, it was competent for G, B and K to contract that as between themselves, G should be the principal and B and K his sureties; and that this had been done. *Buchanan v. Clark*, 10 Gratt. 164.

b. Conditions.—The rules and regulations of a corporation made for the government of the conduct of its officers, do not become terms and conditions of the bond of its officers, unless such an intention is expressed on the face of the bond. *R. & P. E. Co. v. Kasey*, 30 Gratt. 218.

The true function of an ordinary hire bond is not to stipulate for the mode in which the slave is to be employed, but to bind the bailor for the payment of the hire; and in such bond the words, "to work at boat business" attaches no condition to the payment of the money. *Howell v. Cowles*, 6 Gratt. 393; *Harvey v. Skipwith*, 16 Gratt. 410; *Broughton v. Coffey*, 18 Gratt. 191.

W executed a deed of trust to secure a bond debt to S; the deed provided that upon prompt annual payment of the interest upon the bond W should keep quiet possession of the property for two years. W did not pay the interest. *Held*, the parties were left in the same situation, and with the same rights and obligations as if the agreement in the deed had not been made. *Adams v. Logan*, 27 Gratt. 201.

A bond being given, conditioned to be void upon the obligor's paying all costs and damages, which shall be awarded in consequence of the obligee's delivering to him a negro slave, a judgment obtained by a third person against the obligee for the same slave is sufficient to warrant an action on the bond, without proof of satisfaction of the judgment. *Murrell v. Johnson*, 1 H. & M. 449.

A bond with condition to convey land of which the obligor had neither title nor possession, passes nothing. *Cales v. Miller*, 8 Gratt. 6.

The vendor of a slave gave a bond to the buyer, with a condition, reciting that, whereas he had sold him a slave for a certain sum of money, if therefore the buyer should pay the said sum, and another sum annually for hire of the said slave until he should pay the said purchase money, which he might do at any time (when the said hire should cease), then the vendor should convey to him a lawful right and title to the said slave; which title in the meantime should remain in the vendor. The buyer was not entitled, under this bond, to the possession and property of the slave; but the vendor could recover in detinue. *Ervine v. Dotson*, 6 Munf. 231.

Quare, whether the proviso in the 24th section of the district court law extends to suits upon joint and several bonds, with collateral conditions to be performed by the principal obligor only, as well as to bonds with collateral conditions to be performed by the obligors jointly or severally? *Monroe v. Redman*, 2 Munf. 240.

c. Extent of Liability.—A mortgage is executed by a railroad company on its property to secure bonds to be issued thereunder, which provides that upon the

full payment of all said bonds at maturity the trustee shall release the same. Before the maturity of the bonds, they are surrendered to the trustee, upon an agreement that other bonds to be issued under a subsequent mortgage are to be substituted for them. The trustee, without substituting such other bonds, executed a release of the mortgage, stating therein that all the bonds "had been surrendered." The railroad was not in a condition to anticipate the payment of its bonds, and had executed several other mortgages to take up bonds issued under former mortgage. *Held*, these facts and circumstances were sufficient to charge a subsequent mortgagee with notice of the terms and conditions upon which the bonds undersaid released mortgage had been surrendered, and he takes subject to the rights of those entitled to the bonds under said agreement. *Fidelity Ins., etc., Co. v. Shenandoah Val. R. Co.*, 32 W. Va. 244, 9 S. E. Rep. 180.

The C. I. Co. holds first mortgage bonds under a mortgage, dated in 1872, given by the S. V. R. R. Co.; and the two companies make an executory agreement providing that the bonds held by the C. I. Co. shall be cancelled, and in place of them the S. V. R. R. Co. shall issue and deliver to the C. I. Co. second mortgage bonds, which are to be subject to certain first mortgage bonds, specified in the agreement to be issued by the S. V. R. R. Co. to go to other parties, to complete the railroad of the S. V. R. R. Co. Under the agreement, the bonds under the mortgage of 1872 are cancelled, and a release of that mortgage is made by the trustee therein. Then the S. V. R. R. Co., executes three mortgages on its property; the trustee therein having notice of the right of the C. I. Co. under said agreement. It never delivered to the C. I. Co. the second mortgage bonds called for by said agreement. The C. I. Co. is held entitled to equitable compensation under such agreement for the failure of the S. V. R. R. Co. to deliver such second mortgage bonds. *Held*, that by force of such agreement, notwithstanding the failure to deliver such second mortgage bonds, the equitable compensation for such failure decreed to the C. I. Co. must be subject to the first mortgage bonds to which such agreement made the second mortgage bonds subject; and it cannot be accorded priority over such bonds by reason of the mortgage of 1872. *Fidelity, etc., Co. v. Shenandoah Val. R. Co.*, 33 W. Va. 761, 11 S. E. Rep. 58.

Railroads — Insolvency — Receivers — Preferential Claims.—Where a railroad has been taken possession of by a court of equity, and a receiver to manage the road has been appointed, if at the time the receiver was appointed the railroad company was indebted for services rendered or materials furnished them, these creditors are entitled to be paid out of the net revenues of the road in preference to the mortgage bondholders; and if said net revenues have been applied to pay interest to these bondholders, or to the repair, improvement, or the extending of the road, upon a sale of the road, the proceeds of the sale of the road to the extent of the said net revenues are to be applied to the payment of these creditors. *Williamson v. Washington, etc., R. Co.*, 33 Gratt. 624; *Addison v. Lewis*, 75 Va. 701; *Gilbert v. Washington, etc., R. Co.*, 33 Gratt. 646.

A bond given to obtain license to sell liquors under section 22, ch. 32, Code 1891, conditioned as therein directed, binds its obligors to pay fines and costs recovered by the state on indictment for acts violating its condition. Such bond is good to answer for

any act violating its condition. *State v. Nutter*, 44 W. Va. 386, 30 S. E. Rep. 67.

If a bond be given, without any consideration, but to be used as an article of traffic to raise money, the *bona fide* purchaser (though at a large discount) of such bond, without notice of the purpose for which it was executed, is entitled to recover the full amount. *Hansbrough v. Baylor*, 2 Munf. 36.

A defendant in an action for seduction, anticipating a judgment against him, transfers two bonds which he holds on S and G and also his interest in the real estate of his deceased father, to a brother, for the purpose of evading the payment of the anticipated judgment. A judgment is recovered against him; and he takes the oath of an insolvent debtor, and surrenders nothing. The plaintiff then files a bill against his debtor and his brother, and S and the high sheriff, to set aside said transfers, and to subject the property to satisfy said judgment. *Held*, the said transfers will be set aside, and the property will be subjected to satisfy the judgment. *Greer v. Wright*, 6 Gratt. 154.

W being largely indebted in proportion to his property, made a gift of slaves to his married daughter; and her husband remained in possession of them for eight years. Judgment having been recovered on some of these debts, and also on other debts contracted since the gift, B became the surety of W in the forthcoming bonds; and was compelled to pay the money. He then recovered judgment against W for the amount so paid by him, and all the property of W having then been sold, by the directions of B his executions were levied on the slaves given by W to his daughter and their increase. *Held*, the slaves were liable to satisfy the debt of B. *Wilson v. Buchanan*, 7 Gratt. 334.

Two partners having given their joint and several bond to a creditor of the firm, for a partnership debt, the creditor is entitled to share with the separate creditors the separate estate of the deceased partner. *Ashby v. Porter*, 26 Gratt. 455; *Morris v. Morris*, 4 Gratt. 298.

Lands devised (without any specific charge by will or deed) ought not to be charged in equity to satisfy a bond debt of the devisior, until the personal estate is exhausted, including a remainder in slaves, expectant upon an estate for the life of the testator's widow. *Foster v. Crenshaw*, 3 Munf. 514.

2. CONFEDERATE CONTRACTS.

NATURE OF CONTRACT.

Bond—Payment—Kind of Currency—Evidence.—V executes to C a bond, for the purchase of property, dated March 30th, 1864, to be paid, with interest, three years from the date, "in the currency used in the common business of the country at the date of the maturity." Parol evidence is admissible to show what was the true understanding of the parties in respect to the kind of currency in which the same was to be performed, or with reference to which, as a standard of value, it was made and entered into. *Calbreath v. Va. Porcelain, etc., Co.*, 23 Gratt. 697; *Wrightsmen v. Bowyer*, 24 Gratt. 436. See also, *foot-note* to *Hilb v. Peyton*, 22 Gratt. 550.

M sues the adm'r of W upon a bond dated July 18th, 1863, and payable with interest two years after date, "in current funds." The bond states on its face it was given in part of the price of land. Parol evidence is admissible to show that the parties had reference to confederate currency. *Sexton v. Windell*, 23 Gratt. 534, and *foot-note*; *Tams v. Brannan*, 23 Gratt. 809, and *foot-note*. See also, *Hilb v. Peyton*, 22 Gratt. 550, and *note*.

Though a bond provides on its face, that it "is to be paid in current funds," S may prove, by parol evidence, that by agreement with F at the time the bonds were executed, he had a right to pay them at any time before they were due in confederate currency; and that he had so paid the other four bonds to the holders thereof, and in January 1865, offered to pay this bond. *Meredith v. Salmon*, 21 Gratt. 762.

By bond dated July 7th, 1863, B promises to pay to W. three years after date, \$2,000 without interest, in funds current in the state of Virginia, being money borrowed. *Held*, parol evidence is admissible to prove the consideration of the bond and the character of the contract. *Wrightsmen v. Bowyer*, 24 Gratt. 433.

Though upon the face of the paper the court might correctly hold that the contract was a confederate contract, and should be scaled, the facts connected with the transaction may, and do show that it should not be so treated; and these facts may be received in evidence and the bond construed by the light of them. *Omohundro v. Omohundro*, 27 Gratt. 824; *Wrightsmen v. Bowyer*, 24 Gratt. 433; *Dearing v. Rucker*, 18 Gratt. 426.

M sues the administrator of W upon a bond dated July 18th, 1863, and payable with interest two years after date, "in current funds." The bond states on its face it was given in part of the price of land. Parol evidence is admissible to show that the parties had reference to confederate currency. *Sexton v. Windell*, 23 Gratt. 534.

Parol evidence is admissible to show that the money in which a bond is payable in confederate currency; and this is true of a bond given as a mere renewal of the old bond, without any additional consideration. *Jarrett v. Nickell*, 9 W. Va. 345; *Caldwell v. Craig*, 23 Gratt. 340; *Bowman v. McChesney*, 22 Gratt. 609; *Omohundro v. Omohundro*, 21 Gratt. 626.

A bond given in the paper money times is not subject to the scale of depreciation, if it can be shown by circumstances, though not appearing on its face, that the debt out of which it grew was originally payable in specie. *Nicholas v. Tyler*, 1 H. & M. 331.

P executes his bond to H for \$5,000, dated June 9th, 1863, and payable two years after date, without interest, "in such funds as the banks receive and pay out." Parol evidence is not admissible under § 2 of the adjustment act, of March 1866, to prove the kind of currency in which the bond was to be paid, or with reference to which, as a standard of value, it was made and entered into. *Hilb v. Peyton*, 21 Gratt. 385.

On the 23d of June, 1865, R C sells to N C a tract of land, for which N C was to give him another tract and \$6,500; \$1,000 to be paid in six months from date, \$2,500 in one year, \$2,000 in two years, and \$2,000 in three years; the interest on \$2,000 for one year to be remitted. On the same day N C executes his bonds to R C for said sums of money, payable at the times specified in the agreement; thus—Twelve months after date, I bind myself, heirs, etc., to pay R C twenty-five hundred dollars in currency at its specie value, with interest from date. Two judges hold the word "dollars" is to be construed specie dollars; two that the contract is to pay currency at its then specie value; and one judge holds that it is a contract to pay currency at its specie value at the time of payment. *Caldwell v. Craig*, 22 Gratt. 340; *Caldwell v. Craig*, 21 Gratt. 132.

On the 15th of November, 1862, H executed his bond

to S, for \$600, payable on demand, it being for money borrowed, upon a condition, inserted at the instance of H, that no interest will be required until the money is demanded, and then a reasonable time to be given to pay; interest to run from the demand. The loan was in Confederate money. *Held*, it was a debt payable in Confederate currency, and therefore not usurious. *Stover v. Hamilton*, 21 Gratt. 273.

Bonds—Payment—Kind of Money—Presumption.—Where a bond for purchase of land was executed March 30th, 1863, payable in two years, in the absence of any thing on the face of the bond to indicate the kind of money in which it was to be paid, under the statute there is no presumption of law on the question. The only presumption is a presumption of fact, from the circumstances proved; and is a question for the jury. *Effinger v. Kenney*, 24 Gratt. 116; *Walker v. Pierce*, 21 Gratt. 722; *Jarrett v. Nickell*, 9 W. Va. 353; *Bierne v. Brown*, 10 W. Va. 749; *Moss v. Moorman*, 24 Gratt. 97, and *note*.

Bonds—Currency—Presumption.—In an action on a bond given in September, 1863, for \$1,000, payable in two years, the court instructed the jury, that Confederate States treasury notes were the prevailing currency in circulation at the date of the bond, and that a presumption of fact would arise from that circumstance alone, that the said bond was intended to be payable in such notes; but such presumption may be rebutted by evidence; and the burden of proof rests on the plaintiff to show that the said bond was entered into in reference to Confederate money as a standard of value. *Held*, the instruction is erroneous. A presumption of fact does not arise that a bond executed when Confederate notes was the prevailing currency, payable at a distant day, is payable in such notes. Whatever presumption there is, if any, was a matter exclusively for the jury. *Dyerle v. Stair*, 23 Gratt. 800.

Wherever an obligation is given for the payment of so many dollars payable before the 20th October, 1863, the presumption is (in the absence of all proof as to the kind of currency in which it is to be paid) in favor of payment in a sound currency. Inquiry, of course, may be made as to the intentions of the parties, and very slight proof may change this presumption, but in the absence of all proof, the presumption, when the obligation is payable before the 20th of October, 1863, is in favor of a sound currency. *Hansbrough v. Utz*, 75 Va. 959.

Where a bond is given which bears interest from a day anterior to its date, it is a fair inference that the bond was executed for a debt existing at the date from which it bears interest; and as that date is January 1st, 1861, though the bond bears date in 1865, the presumption that it was a Confederate debt to be paid in Confederate currency, is repelled by the face of the bond itself. *Walker v. Pierce*, 21 Gratt. 722.

The words of the bond that is "to be paid in current funds," do not necessarily raise the presumption, that it is to be paid in another and more valuable medium; but their proper interpretation depends upon the time when and the circumstances under which they are used. *Meredith v. Salmon*, 21 Gratt. 762.

SCALING.

Bonds—Confederate Currency—Scaling.—Where a bond bears date on the 14th of May, 1863, and is payable on demand, and the balance found due to the administrator at that date is almost wholly made up of his commissions on receipts and disbursements prior to the 15th of November, 1862, the bond

having been given with reference to Confederate States treasury notes as a standard of value, is to be scaled as of its date. *James v. Johnston*, 22 Gratt. 461.

R executes to M his bond for \$3,000 bearing date the 11th of July, 1862, and payable on demand. In a deed of trust given at the same time by R, to secure the debt, it is provided that if R will pay punctually the interest on the debt semiannually, the debt shall not be collected for five years. S pays the interest until July 1864. *Held*, the bond being payable on demand, the provision in the deed for time does not change its character in that respect, and it must be scaled as of its date. *Moon v. Richardson*, 24 Gratt. 219; *Smyth v. Sutton*, 24 Gratt. 191, and *note*; *Jarrett v. Nickell*, 9 W. Va. 353.

In December, 1862, H sold to W two hundred and sixty acres of land, more or less, known as Knob Fork, purchased by H of B, and bounded by the deed of B, for \$3,250, of which W paid \$2,000, and gave his bond for \$1,250. On a survey of the land by W, it was found there was but one hundred and ninety-nine acres, and twenty-seven acres of this was recovered by V upon a superior title. *Held*, the contract having been a Confederate contract, the amount of the bond is, under the circumstances of this case, to be scaled according to the value of the Confederate money at the time of the contract. *Walsh v. Hale*, 25 Gratt. 314.

An agreement is entered into on the 1st of June, 1863, for the purchase by M of E of one hundred head of cattle, for which M was to pay E \$75 per head in current funds, to be paid to E when he demands the same; but the same is not to draw interest until after ratification of peace between the United States and Confederate States governments. The proof is that Confederate States treasury notes was intended by both parties to be the medium of payment, whether the payment was made before or after the peace. Nothing was said as to the mode of payment if there was no such currency. This was a contract to pay *in presentii*, and the debt should be scaled, and the amount fixed as of that date. *McClung v. Ervin*, 22 Gratt. 519. See *Bailey v. Stroud*, 26 W. Va. 614, and *Bierne v. Brown*, 10 W. Va. 748.

In June, 1863, P borrows of H \$5,000 of Confederate treasury notes, for which P gives his bond payable two years after date without interest, in such funds as the banks receive and pay out. In action by H against P on this bond, the jury scale the debt as of the date of the bond, and render a verdict for that amount with interest from that day; and this verdict is approved by the court. The appellate court will not disturb it. *Hlib v. Peyton*, 22 Gratt. 550.

In March, 1862, K sold personal property at auction, on nine months' credit, amounting to about \$3,000. F purchased some of it, and gave his bond for \$501.57, with R as his surety. On the 10th of April, 1863, K sold all the bonds to R, including that of F, for Confederate money. After the bond of F fell due, he tendered payment in this money. *Held*, R can only recover the value of the Confederate money he paid K for the bond, with interest from the date of the purchase. *Kendrick v. Forney*, 22 Gratt. 748.

A bond is dated 1st of February, 1780, payable on or before the 17th of December, 1781, and to carry interest from the 16th of February, 1779. These latter words, with other circumstances, will fix the period, at which the scale of depreciation ought to be applied, to February, 1779. *Pleasants v. Bibb*, 1 Wash. 10 [8]; *Dearing v. Rucker*, 18 Gratt. 469.

In the case of *Bennett v. Claiborne*, 23 Gratt. 366, it was held that B a guardian having received the amount of the ante-war bond, and paid the ante-war expenses of C as awarded, incurred during the guardianship of D, that these payments to the amount of the said bond should not be scaled; but all other disbursements of B should be scaled.

M held the bond of G for \$700 executed before the war. In September, 1862, G proposed to pay M in Confederate money which she refused to receive, saying she would receive the interest, but not the principal of the money. His brother C said he wanted money, and G said if she would let C have the money, and give up his bond, he would go C's security. M then let C have \$100 of Confederate money, and C and G executed their bond to M for \$600, and she gave up G's bond. Nothing was said about the bond being paid in Confederate money; and G paid to C \$700 in that currency. *Held*, this was not a novation of the debt, but it retained its original character; and as to \$700 it was to be paid in full, and as to \$100 it was to be scaled. *Barnetts v. Miller*, 23 Gratt. 551.

J lent to G \$5,000, and took his bond for the amount, dated April 17, 1862, payable five years after date, with interest, and a deed of trust on land to secure the debt. The money loaned had been deposited in bank in January 1861, to J's credit, and she gave G a check upon the bank for the amount in the usual form. This was not a Confederate contract, and is not liable to be scaled. *Michie v. Jeffries*, 21 Gratt. 334.

Judicial Sale of Land—Bonds—Payable in United States Currency.—In May 1863 there is a decree for the sale of land, and in August 1863 there is a sale by the commissioners, who announce publicly the terms of sale to be, on a credit of one, two and four years; the purchase money to be paid in the currency which may be in use when the respective payments fall due; but with the privilege to the purchaser to pay one-half of the purchase money upon the confirmation of the sale by the court. The land, which was worth in gold eight dollars per acre, sold for one hundred and forty-two dollars per acre; and the sale being confirmed, the purchasers paid one-half of the purchase money with Confederate currency, executing their bonds for the other half, which fell due in August 1865 and 1867. They must pay off these bonds in the currency of the United States; that being the currency in use when they fell due. *Teel v. Yancey*, 23 Gratt. 691.

Ante-War Bond—Scaling—Intention of Parties.—If it appear that the bond sued on was given for a bond due before the war, and was intended both by the obligee and the principal obligor, to be paid in legal money, and was in fact taken for the accommodation of the principal obligor, the sureties will be bound to pay it in legal money, though they may not have known what was the consideration of it. *Walker v. Pierce*, 21 Gratt. 722.

N gives his bond to B, dated January 29th, 1863, by which, on demand, three months after notice to pay, he promises to pay to B five thousand dollars, without interest, in current funds; the money to be punctually paid at the end of three months after demand, and if not, to bear interest from demand; B not to be required to receive the money except at his pleasure. The bond is given for five thousand dollars Confederate notes, then delivered by B to N, which were then in gold but one-third of the amount. *Held*, the contract is valid, and B is entitled to recover five thousand dollars in the

currency of the day when the money is demanded. *Boulware v. Newton*, 18 Gratt. 708.

Bonds—Confederate Currency—Time of the Essence of the Contract.—In September 1863, B sold to S one-half of the Virginia hotel, in Staunton, part in cash, and the balance in six, twelve, and eighteen months, for which S gave his bonds, payable in such funds as should be current or receivable in payment of Virginia State taxes when they fell due; with the privilege of S to pay them at any time before they fell due. *Held*, where payment is to be made in Confederate currency for land purchased, time is of the essence of the contract; though it is not generally, unless injustice is thereby done to the vendor. *Booten v. Scheffer*, 21 Gratt. 474.

Payment—Authority of Agent to Receive.—The authority of an agent to collect debts evidenced by bonds is not suspended because it is illegal to remit the amount so received to his principal; in such case it is the duty of the agent to receive payment and the duty of the obligor to pay. *Hale v. Wall*, 22 Gratt. 424.

Receipt of Confederate Currency—Duress.—An obligee, who was induced to accept Confederate money in payment of a bond by a statement made to him by the obligor, that he would be liable for refusing to take Confederate money, to be considered disloyal, and to be put in prison, and kept there during the war, is not acting under such duress as will invalidate the payment. *Simmons v. Trumbo*, 9 W. Va. 388.

Confederate Bonds—Agreement to Receive.—S has a judgment docketed for an ante-war debt, against C, the principal, and E and P his sureties, well secured by the judgment lien upon the lands of the debtors. If S, to enable C to sell his land for Confederate money, and make a good title to the purchaser, agrees, in May 1863, to accept payment of the judgment in Confederate notes or bonds, and if, in pursuance of this agreement, C immediately advertises and sells his land and receives payment of the purchaser in such money or bonds and conveys to him the land, S cannot afterwards revoke his agreement to accept such payment, but his promise is binding upon S, not only in behalf of C, but of his sureties also, and the purchaser. *Poague v. Spriggs*, 21 Gratt. 220.

Sale—Investment in Confederate Bonds—Purchasers.—An ante-war creditor refuses to receive from a purchaser of property sold for payment of debts in 1863, Confederate currency in payment, and the purchaser obtains an order of the court to invest the amount in Confederate bonds. It is the purchaser's money which is invested, and he must bear the loss. *Crockett v. Sexton*, 20 Gratt. 46.

A bill was filed during the late war for a partition of real estate among co-parceners, some of whom were nonresidents. A decree for sale was made and the sale made under it at which the commissioner was the real purchaser. The sale was confirmed, and the shares of the nonresident parties were by direction of the court invested in their names in bonds of Floyd county issued during the war. On a bill filed by the nonresidents impeaching the original sale and asking a resale it was held that the investment in the bonds of Floyd county were at the risk of the purchaser and that the bonds should be surrendered to him as his property, the obligees being required, if desired, to assign them to him without recourse. *Howery v. Helms*, 20 Gratt. 1.

Sale of Land—Confederate Money—Purchaser—Measure of Liability.—Where a sale of land is made with reference to Confederate securities as the standard of value and part of the purchase money has been paid, the purchaser should be allowed his option to take the land at its value in good money, to be credited with the true value of the money he has paid; or to surrender the land and account for the rents and profits, and be credited for the value of the money paid. *Poague v. Greenlee*, 22 Gratt. 734; *Sexton v. Windell*, 23 Gratt. 539.

In October 1863, R sold and conveyed to C land, and took his bonds payable in one, two, three and four years, secured by deed of trust on the land. It was a Confederate contract, and in October 1863, C paid R \$1,000 upon the first bond; and he paid no more. In 1867 the trustee advertised the land for sale, and C enjoined the sale, and asked that his bonds should be paid on such terms as to the court might seem proper. *Held*, C may have his election to give up the land, and receive back the value of the \$1,000 of Confederate notes he paid, as at the time of payment, and account for the rents and profits; or retain the land and pay a reasonable price therefor, to be ascertained by a commissioner; subject to a credit of the proportion which the amount he has paid bears to the amount he agreed to pay; with interest on the balance from the date of the contract. *Carter v. Ragland*, 21 Gratt. 574.

Sale of Land—Bonds—Payable in "Bankable Currency."—In October 1862, B sold to T land, for \$2,500, about what he had given for it in 1854: cash \$1,000 and the balance in one, two and three years. The article of agreement says nothing of the kind of money to be paid, but the bonds, which were written by T and sent to B, are made payable "in bankable currency." B expecting to use the \$1,000 in another purchase, at his instance, T gives him his bond for it, payable on demand, and holds the money ready to pay it at any time; but no demand is made until after the war, and in 1865 and 1866, T makes two payments to B, each of \$300. T says his understanding of the contract was that he was to pay in Confederate money. B says his understanding was it was to be paid in good money. B was a plain farmer. *Held*, there is no evidence to show that this was a contract according to the true understanding and agreement of the parties, to be performed in Confederate money or with reference to Confederate money as the standard of value, and as the price was not more than the land was worth in good money, it was not a Confederate contract. If it is a Confederate contract, the value of the land at the time of the contract is the most just measure of recovery. *Tams v. Brannaman*, 23 Gratt. 809.

F. OWNERSHIP.

1. HOW ACQUIRED.

a. Gift.—The owner of a bond which was in suit and for which the owner held an attorney's receipt, told the plaintiff that he might have the bond, and delivered to him the attorney's receipt for it instead of delivering the bond itself, which was then filed in the suit in court; no consideration was given by the plaintiff for the bond. *Held*, this was a valid gift of the bond to the plaintiff, and he is entitled to recover the money collected upon it. *Elam v. Keen*, 4 Leigh 358 [334]. See monographic note on "Gifts."

b. Gift Mortis Causa.—A bond may be the subject of a *donatio mortis causa*, whether it be the bond of a stranger or the donee; and in this case the donation

was held valid. *Lee v. Boak*, 11 Gratt. 182; *Yancey v. Field*, 35 Va. 756, 8 S. E. Rep. 721.

c. Marriage.—C advances money, arising from the sale of his wife's interest in real estate, to T P, and takes T P's bond therefor, payable to C C, his wife. *Held*, the bond is a chose in action belonging to the wife, and subject to be reduced into possession by the husband in his lifetime. *Perkins v. Clements*, 1 P. & H. 141.

A guardian and administratrix, who has executed official bonds, makes a settlement with the husband of her ward and the distributee, and executes her bond to the husband for the amount found due on the settlement. The husband afterwards dies, his wife surviving him, and the bond remaining unpaid. *Quære*: If this is a reduction of the chose in action of the wife into possession by the husband, so that his administrator will be entitled to the debt; or whether it survives to the wife. The court, consisting of four judges, is equally divided upon the question. *Yerby v. Lynch*, 3 Gratt. 460.

2. EVIDENCE OF OWNERSHIP.

a. Presumptions.—In a contest between the creditors of a husband and the wife all presumptions are in favor of the creditors. In such case the mere holding of a bond is not sufficient evidence that at the time the bond purports to have been given it was recognized as a debt, and that both husband and wife intended to occupy the relation to each other of debtor and creditor. The burden is upon the wife to show that the original transaction represented a loan by her to the husband, and a contemporaneous promise on his part to pay the debt. *Spence v. Repass*, 94 Va. 716, 27 S. E. Rep. 588; *Darden v. Ferguson (Va.)*, 27 S. E. Rep. 436; *Flynn v. Jackson*, 93 Va. 341, 25 S. E. Rep. 1.

b. Possession as Evidence.—The mere possession of a bond is not such evidence of property as will justify a payment to the holder, without authority express or implied, for the owner to collect the same. *Lloyd v. Erwin*, 29 Gratt. 598; *Thornton v. Fairfax*, 29 Gratt. 682; *Donahue v. Fackler*, 21 W. Va. 130; *Flesher v. Hassler*, 29 W. Va. 405, 1 S. E. Rep. 581.

The mere possession of a bond is not such an evidence of property as will justify a payment to the holder, without authority, express or implied, from the owner to collect the same. *Brown v. Taylor*, 32 Gratt. 135; *Tate v. Tate*, 35 Va. 205, 7 S. E. Rep. 352; *Hodnett v. Pace*, 84 Va. 873, 6 S. E. Rep. 217.

When the interest of two obligees is shown by the face of the bond to be *joint*, the possession of the bond by one of them could not mislead a purchaser from him; and though each might sell his own interest, neither could dispose of the interest of the other without his consent. *Brown v. Dickenson*, 27 Gratt. 690.

3. LARCENY OF BOND.—The obligor in a bond may be guilty of the larceny thereof. *Vaughn v. Com.*, 10 Gratt. 758. See monographic note on "Larceny" appended to *Johnson v. Com.*, 24 Gratt. 555.

G. PLEADING AND PRACTICE.

1. FORM OF REMEDY.

a. Assumpsit.—Neither at common law nor under the 10th section of the Code of 1860, will an action of assumpsit lie on a writing obligatory which is not a money bond. *State v. Harmon*, 15 W. Va. 115; *Beirne v. Dunlap*, 8 Leigh 514.

b. Action of Debt.—Whether the bond be declared on as the single bill without noticing the condition or, as allowed by statute, the condition be set out and the declaration and breaches be assigned

therein, the form of action in either case is debt; and save in the case of official bonds, the defendant must demand the penalty of the bond and allege its non-payment as in all other cases of actions of debt. *Reynolds v. Hurst*, 18 W. Va. 643; *Allison v. Bank*, 6 Rand. 237; *Ward v. Fairfax Justices*, 4 Munf. 494; *Nadenbush v. Lane*, 4 Rand. 413; *Green v. Bailey*, 5 Munf. 246; *Braxton v. Lipscomb*, 2 Munf. 282; *Green v. Dulany*, 2 Munf. 518; *Norvell v. Hudgins*, 4 Munf. 496; *Hill v. Harvey*, 3 Munf. 525; *Buckner v. Blair*, 2 Munf. 336; *Nicholson v. Dixon*, 5 Munf. 198; *Cobbs v. Fountaine*, 3 Rand. 484; *Strange v. Floyd*, 9 Gratt. 474; *Douglass v. Central Land Co.*, 13 W. Va. 510, 511; *State v. McClane*, 2 Blackf. 192; *State v. Phares*, 24 W. Va. 657, 4 Rob. (New) Pr. 109; 1 Rev. Code 1819, p. 509, sec. 82; Va. Code 1849, ch. 172; Va. Code 1860, ch. 172; Va. Code 1887, ch. 160; W. Va. Code 1899, ch. 126. The case of *Vandiver v. Hyre*, 5 W. Va. 414, is overruled. *Rigg v. Parsons*, 29 W. Va. 522, 2 S. E. Rep. 81.

On the 14th September, 1862, H binds himself by bond to pay to D, twelve months after date, \$800 for the purchase money of land, describing it, "payable in the currency of Virginia and North Carolina money." This is a promise to pay this sum in the currency named; and an action of debt cannot be maintained upon it. *Dungan v. Henderlite*, 21 Gratt. 149.

By a writing obligatory, the obligors promise, on or before a specified day, to pay the obligee \$613.79 in notes of the United States, bank or either of the Virginia banks, and debt is brought on this writing. *Held*, the action cannot be maintained. *Beirne v. Dunlap*, 8 Leigh 514.

By a bond dated the 27th of March, 1840, the obligor bound himself to pay to the obligee or order, on or before the 25th of March, 1842, a certain sum of money, with interest; "which sum may be discharged in notes or bonds due on good solvent men residing in the county of R." This is a bond for the payment of money, for which debt will lie; and it is not necessary to notice the provision as to the mode of payment in the declaration. *Butcher v. Carille*, 12 Gratt. 520; *Aaron Burr v. Brown*, 5 W. Va. 241; *Minnick v. Williams*, 77 Va. 758; *Crawford v. Daigh*, 2 Va. Cas. 521.

T executes his bond to S by which on demand he promises to pay to S in gold and silver or the equivalent thereof, \$2,400. This is a promise to pay \$2,400 in gold or silver coin or the equivalent thereof; and debt may be maintained upon it. *Turpin v. Siedd*, 23 Gratt. 238.

The heir may maintain an action of debt on a bond to his ancestor, conditioned for quiet enjoyment of lands, where the breach has happened since the death of the ancestor. *Eppes v. Demoville*, 2 Call 23.

A statute gives a penalty, to be recovered by bill, plaint or information. *Held*, the penalty may be recovered by action of debt. *Sims v. Alderson*, 8 Leigh 479.

c. Motion.—Under the statute concerning sheriffs, 1 Rev. Code, ch. 78, § 37, giving remedy to sureties of sheriffs against their principals, a summary motion does not lie for such sureties against their principals to recover judgment for the money paid; but only to obtain execution against the lands. *Bacchus v. Gee*, 2 Leigh 78 (68).

d. Rule to Show Cause.—A judicial sale of land is partly on a credit, and the purchaser pays the cash payment, and executes his bonds with security for the deferred payments; and the sale is confirmed

by the court. When the bonds become due the purchaser fails to pay them. He may be proceeded against by a rule made upon him to show cause why the land shall not be sold for the payment of the purchase money; and upon that proceeding a decree may be made for a sale of the land. *Clarkson v. Read*, 15 Gratt. 288.

a. Mandamus—To President of County Court—Exercise of Discretion.—By an order of the county court, duly authorized by a popular vote, a county subscribes \$250,000 in its bonds to the capital stock of a railroad company, to be expended on that portion of the road located within the county, and appoints three citizens of the county a committee to take charge of the bonds, and deliver the same to the company in such amounts as in their judgment will be at the time a fair compensation to the company for the work then done in the construction of that part of the road located within the county. The company completes the road through the county, and during its construction all the bonds except \$8,100 are delivered to it; but before the completion of the road the county court makes another order, requiring the bonds still undelivered to be countersigned by the president of the county court, and his concurrence and approval before the bonds are delivered. In response to a demand made by the company upon the committee for the residue of the bonds, they report that they are satisfied the company is entitled to the said bonds, and that they will be delivered upon the signing of their report by the president of the county court; and the latter refuses to sign the report, because, in his judgment, the company has not done the amount of work in the county to entitle it to the bonds. *Held*, mandamus will not lie in such case to compel the president of the county court to countersign and deliver said bonds either to the committee or the company. *Satterlee v. Strider*, 31 W. Va. 781, 8 S. E. Rep. 552.

2. WHO MAY MAINTAIN ACTION.

Commissioner.—Commissioners appointed by a court of equity to sell lands, make the sale and take bonds for the purchase money, made payable to themselves; and before the money is paid the commissioners are removed and others are appointed. The last commissioners are entitled to sue at law on the bonds, in the names of the first to whom the bonds were made payable. *Clarkson v. Doddridge*, 14 Gratt. 42; *Lewis v. Glenn*, 84 Va. 977, 6 S. E. Rep. 866; *Triplett v. Goff*, 83 Va. 785, 3 S. E. Rep. 525; *Sangston v. Gordon*, 22 Gratt. 764.

Executor.—If one of two executors take a bond to himself as executor of the testator (without mentioning the other), his executor may sue upon it, notwithstanding the other executor survived him, and acted as such, and gave no assent to the institution of the suit. *Pulliam v. Johnson*, 4 Munf. 71.

An administrator may declare in the *debet* and *detinet* on a bond executed to himself as such, and his executor, or administrator, has a right to bring an action upon it. *Bowden v. Taggart*, 3 Munf. 513.

Corporation—Corporate Name.—A bond executed to the "President and Managers of the Culpeper Agricultural and Manufacturing Society," may be sued upon by the "Culpeper Agricultural and Manufacturing Society," that being the legal style of the corporation. *Culpeper Agricultural & Mfg. Soc. v. Digges*, 6 Rand. 164.

Joint Bond—Action Must Be Joint.—All the obligees in a joint bond must join in an action thereon, or some sufficient excuse for not joining them must be

stated in the declaration, or the objection is fatal on general demurrer. *Strange v. Floyd*, 9 Gratt. 474.

Joint and Several Bond.—When a bond is joint and several, and the obligee is one of the obligors, he may maintain an action at law in his own name against one of the other obligors, but such suit could not be maintained at law, if the bond was a joint bond and not a joint and several bond. *Booth v. Kinsey*, 8 Gratt. 563; *VanWinkle v. Blackford*, 28 W. Va. 671.

Assignee.—A bond dated the 4th June 1774, and signed the 17th November 1791, will be governed by the act of October 1786, ch. 20, and if such bond be one with a collateral condition and not for the payment of money or tobacco, no action can be maintained thereon under the statute in the name of the assignee. *Henderson v. Hepburn*, 3 Call 195 [233].

Presumption as to Character of Obligation.—Neither the *scire facias* nor any other part of the record, showing what was the character of the obligation or other liability upon which the original judgment was rendered, and the defendant's plea not averring that it was such a statutory bond as required that there should be a relator in any action brought upon it, and that the relator should be the party, having the legal right to sue, it must be regarded as a common-law bond or liability subject to be sued on in the names of the payees without a relator, or for the benefit of the holder or any party entitled to the benefit of it. *Richardson v. Prince*, 11 Gratt. 190.

3. PARTIES.

Joint Obligations—Joint Suit.—In debt on a bond against the heirs of the obligor, if the writ (being made part of the record by oyer) be against four persons as heirs of said obligor, but, by the declaration, three only be charged as such, the declaration is too defective for a judgment to be entered thereupon for the plaintiff; and such defect is not cured by verdict. *Watson v. Lynch*, 4 Munf. 94.

Debt upon a bond—defendant, without taking oyer, pleads payment, with leave to give special matter in evidence. The bond given in evidence had the name and seal of another obligor. It not appearing in the appellate court by a bill of exceptions, or otherwise, that the obligor not sued was the survivor, and the jury having found a verdict for the plaintiff, that court cannot say that the judgment rendered upon the verdict was erroneous. *Bently v. Harmanson*, 1 Wash. 352 [273].

In an action of debt against one obligor only, if the declaration describe the bond as joint, and do not state the other obligor to be dead, it is a fatal error, though not pleaded in abatement, and is not cured by verdict. *Newman v. Graham*, 3 Munf. 187.

Where a joint bond was given before the act of 1786, and after that act went into operation one of the obligors died, living the other, the obligation survived, and the executors of the deceased were exonerated. *Elliott v. Lyell*, 3 Call 234 [269]; *Watkins v. Tate*, 3 Call 451 [531]; *Richardson v. Johnson*, 2 Call 445 [528]; *Chandler v. Hill*, 2 H. & M. 124; *Stevens v. Tallaferro*, 1 Wash. 194 [155].

Of Writing Binding Persons Jointly.—The representative of one bound with another, either jointly or as a partner, by judgment, bond, note, or otherwise, for the payment of a debt, or the performance or forbearance of an act, or for any other thing, and dying in the lifetime of the latter, may be charged in the same manner as such representative might have been charged, if those bound jointly or as partners, had been bound severally as well as jointly.

otherwise than as partners. Va. Code 1887, sec. 2555, p. 684.

In a joint bond all the subscribers thereto are presumptively principals except those which have the word "security" before their names. *Harper v. McVeigh*, 82 Va. 751, 1 S. E. Rep. 193.

A sealed instrument in the singular number, but signed and sealed by two persons, is joint and several. *Holman v. Gilliam*, 6 Rand. 88.

The executors of two deceased obligors cannot be joined in the same action. *Watkins v. Tate*, 3 Call 451 [521].

A single bill, under seal, is not a note, but a specialty; and therefore, the drawer and endorser of such a note, made negotiable and payable at the farmers' bank, cannot be sued jointly. *Mann v. Sutton*, 4 Rand. 253.

Assignee.—In a suit to declare void a bond alleged to have been executed with fraudulent intent, it appeared that the bond had been assigned to the wife of the obligor. *Held*, the assignee should have been made party to the suit and the failure to do so may be taken advantage of in the appellate court. *Thornton v. Gaar*, 87 Va. 315, 12 S. E. Rep. 753; *Jamesson v. Deshields*, 3 Gratt. 4; *Lynchburg Iron Co. v. Taylor*, 79 Va. 671; *Welch v. Solenberger*, 85 Va. 441, 8 S. E. Rep. 91; *James Riv. & Kanawha Co. v. Littlejohn*, 18 Gratt. 82.

Derivative Purchaser.—If a derivative purchaser, by assignment of a title bond, file his bill against the vendor for a specific conveyance, the first purchaser or his representatives ought to be made parties. *Hoover v. Donally*, 3 H. & M. 316.

Devisees and Legatees.—In a suit upon a bond against a principal and his sureties, if one of the sureties die, his personal representative and his widow who is his sole devisee and legatee, should be made parties to the suit. *Wytheville, etc., Co. v. Frick Co.*, 96 Va. 141, 30 S. E. Rep. 491.

Personal Representatives of Plaintiff.—The principal and surety to a bond obtain an injunction to a judgment against them. The surety dies pending the suit in chancery. After referring the cause to a commissioner, exceptions to the report on account of set-offs disallowed (some of which were claimed by the surety himself), and the court rejecting them, because not filed in time, the injunction is in part dissolved, and in part perpetuated, without making the representatives of the deceased plaintiff, a party. This proceeding is erroneous. A rule should have been given him, at the instance of the defendant, that unless he revived the suit by an appointed time, the injunction should stand dissolved. *Jackson v. Arnold*, 4 Rand. 195.

Personal Representatives of Obligor.—Where two of three obligors in a bond are dead and insolvent, and there is no personal representative of either of them, the obligee coming into equity to enforce the payment of the debt against the personal representative of the other obligor, is not bound to have personal representatives of the deceased insolvent obligors appointed, and make them parties. And this especially where the defendant has not, by his answer or in other mode of pleading, objected to the failure to make them parties. *Montague v. Turpin*, 8 Gratt. 453.

Foreign Insurance Company—Recovery of Premiums—Parties.—A foreign insurance company has deposited bonds with the treasurer of the state in pursuance of the statute and fails. A policy holder may sue the company in the circuit court of the city of Richmond, and make the treasurer a party

defendant to subject the bonds in his possession to satisfy the premiums he has paid upon the policy. See act of April 4, 1877, amending § 82, ch. 36, Code of 1873, p. 368; *Universal Life Ins. Co. v. Cogbill*, 30 Gratt. 72.

4. NOTICE.—If, in a motion on a bond, the notice apprise the defendant of the grounds of the motion, it is sufficient. The security is entitled to judgment against the principal, for the same specific thing which he has been adjudged to pay himself. *Graves v. Webb*, 1 Call 385 [448].

In a motion on a bond the rule governing notices is that they are presumed to be the act of the parties, and not of lawyers, and are viewed with great indulgence by the court. If the notice be such that the defendant cannot mistake its object, it will be sufficient. *Board of Supervisors v. Dunn*, 27 Gratt. 608; *Blanton v. Com.*, 91 Va. 11, 20 S. E. Rep. 884; *Monteith v. Com.*, 15 Gratt. 172; *Drew v. Anderson*, 1 Call 51; *Graves v. Webb*, 1 Call [448] 385; *Segouine v. Auditor*, 4 Munf. 398; *Lemoigne v. Montgomery*, 5 Call 528; *Booth v. Kinsey*, 8 Gratt. 560; *Hendricks v. Shoemaker*, 3 Gratt. 197; *White v. Sydenstricker*, 6 W. Va. 46; *Board v. Parsons*, 22 W. Va. 311; *Shepherd v. Brown*, 30 W. Va. 13, 8 S. E. Rep. 190; *County Ct. v. Miller*, 24 W. Va. 791, 12 S. E. Rep. 1078; *Carr v. Meade*, 77 Va. 142.

5. ALLEGATIONS.

Suit by Commissioner—Allegation of Authority.—When the commissioner sues on bonds given for the purchaser money of land sold by him he must aver in his bill his authority to sue, or at least, to collect the money, and exhibit therewith the decree conferring the authority. *Blair v. Core*, 20 W. Va. 265.

A special commissioner appointed to make sale of land by a decree, who makes the sale and takes bonds payable to himself as commissioner, has no authority to collect or sue on said bonds unless specially appointed, or directed, by the court to do so. And when he is so authorized and brings a suit to enforce the payment of such bonds he must aver in his bill that he has been so appointed and authorized to sue and collect said bonds. If he fails to make such averment and show such right to sue, his bill will be dismissed. *Blair v. Core*, 20 W. Va. 265; *Clarke v. Shanklin*, 24 W. Va. 32; *Whitehead v. Whitehead*, 23 Gratt. 376, and monographic note appended thereto.

Bond of Partners—Execution by One—Allegation of Authority.—A declaration in debt against two partners in trade, charging that one of them executed the bond for himself and another (without any other averment), is too defective to support a judgment against such other partner, though he pleaded payment, and a verdict was found against him. *Garland v. Davidson*, 3 Munf. 189.

Declaration against Remote Heir—Descent Traced.—In declaring against a remote heir, he should be charged as heir of the heir of the obligor, or as heir of the obligor, with a videlicet, setting forth the intervening descent; but it is not necessary to state how he is heir. *Waller v. Ellis*, 2 Munf. 88.

Declaration against Partners—Allegation of Authority.—A declaration in debt against two partners in trade, charging that one of them executed the bond for himself and another (without any other averment), is too defective to support a judgment against such other partner, though he pleaded payment, and a verdict was found against him. *Garland v. Davidson*, 3 Munf. 189.

In an action of debt, the declaration being against A. and B. merchants and partners, and charging

that A. for himself, and B. by his certain bill penal bound himself and his heirs, etc. (the bill penal being in that form), without containing any further averments, was adjudged to be insufficient in law to maintain the action. *Shelton v. Pollock*, 1 H. & M. 422.

Form of Declaration—Common Law.—It is never necessary by the common law for the plaintiff in his declaration to state, or in any manner to take notice of, any condition subsequent annexed to the right which he asserts; for the office of such a condition is not to create the right on which the plaintiff founds his demand, but to qualify or defeat it. The condition, therefore, if performed or complied with, furnishes matter of defense which is for the defendant to plead. *Carter v. Noland*, 86 Va. 508, 10 S. E. Rep. 605.

In a debt on a bond with collateral condition, if the condition be not set out in the declaration, nor made part thereof by oyer, it should be distinctly stated in a replication. *Graham v. Graham*, 4 Munf. 205.

In a debt on a bond, with condition to perform an award to be made by certain arbitrators, the condition being made a part of the record by oyer, and the defendant having pleaded "Conditions performed," the plaintiff may set forth the award and aver a breach of the condition, by a special replication, not having done so in his declaration; but if he neglect to do this, and reply generally, judgment ought to be arrested, after a verdict in his favor. *Green v. Bailey*, 5 Munf. 246.

The rule at common law was for the plaintiff to count upon the bond, and for the obligor in the bond, if the condition amounted to a defeasance or a covenant not to put the bond in force, at any time to plead the covenant to the action on the bond as a release or in bar; but if the covenant was not to put the bond in force for a limited time, the obligor was compelled to resort to an action on the covenant. *Carter v. Noland*, 86 Va. 508, 10 S. E. Rep. 605.

Form of Declaration—Statute.—Under the statute of 8 & 9 W. III., ch. 11, § 8; 1 R. C. 1819, p. 509, § 82; Va. Code 1860, ch. 177, § 17; W. Va. Code ch. 181, § 17, p. 627, there are two ways of declaring on a bond with collateral conditions. One is simply to declare on the obligation without setting forth the conditions. If this is done, the declaration will be good, till the defendant takes oyer of the obligation and thereby makes the conditions a part of the declaration. If after such oyer the defendant pleads conditions performed, as in this case, the plaintiff ought not to reply generally. But to sustain his declaration, the plaintiff must in such case by a replication allege a breach of the conditions. The better mode however of pleading in such a case is to set out in the declaration the conditions of the obligation, and assign the breaches of it. *Allison v. Bank*, 6 Rand. 227; *B. & O. R. Co. v. Bitner*, 15 W. Va. 455; *Green v. Bailey*, 5 Munf. 246.

Whether the bond be declared on as the single bill without noticing the condition, or, as allowed by statute, the condition be set out and the declaration and breaches be assigned therein, the form of action in either case is debt; and save in the case of official bonds, the defendant must demand the penalty of the bond and allege its non-payment as in all other cases of action of debt. *Reynolds v. Hurst*, 18 W. Va. 648; *Allison v. Bank*, 6 Rand. 227; *Ward v. Fairfax Justices*, 4 Munf. 404; *Nadenbush v. Lane*, 4 Rand. 418; *Green v. Bailey*, 5 Munf. 246; *Braxton v. Lipscomb*, 2 Munf. 282; *Green v. Dulany*,

2 Munf. 518; *Norvell v. Hudgins*, 4 Munf. 406; *Hill v. Harvey*, 2 Munf. 525; *Buckner v. Blair*, 3 Munf. 336; *Nicholson v. Dixon*, 5 Munf. 198; *Cobbs v. Fountaine*, 3 Rand. 484; *Strange v. Floyd*, 9 Gratt. 474; *Douglass v. Central Land Co.*, 12 W. Va. 510, 511; *State v. McClane*, 2 Blackf. 192; *State v. Phares*, 24 W. Va. 657, 4 Rob. (New) Pr. 109; 1 Rev. Code 1819, p. 509, sec. 82; Va. Code 1849, ch. 172; Va. Code 1860, ch. 172; Va. Code 1887, ch. 160; W. Va. Code 1899, ch. 126. The case of *Vandiver v. Hyre*, 5 W. Va. 414, is overruled. *Rigg v. Parsons*, 29 W. Va. 522, 2 S. E. Rep. 81.

Assignment of Breach—Form.—In debt on a bond with collateral condition, if the breach be assigned in the very words of the condition, it is sufficient. *Craghill v. Page*, 2 Hen. & M. 446.

In an action on a bond with collateral condition, if the breach be assigned in as *general* terms as those of the condition, it is sufficient. *Winslow v. Com.*, 3 Hen. & M. 459.

Where the condition of the bond provides for a single act to be done, the breach is well assigned if it be in the words of the condition, or words which import the same thing. But where the condition of the bond requires many things, the omission of any one of which would constitute a breach, a particular breach should be specified in the assignment. *Com. v. Fry*, 4 W. Va. 721.

In debt on bond with collateral condition, an assignment of a breach commencing "and whereas," etc., and continuing by way of recital, to the end, without any direct averment, is not sufficient and such error is fatal on general demurrer. *Syme v. Griffin*, 4 Hen. & M. 277.

In an action on a bond it is not necessary for the declaration, after the assignment of breaches, to allege that the plaintiffs have been injured by the breaches; but it is sufficient if it is stated that an action has accrued to the plaintiffs to demand and have the penalty of the bond. *Allison v. Bank*, 6 Rand. 208.

A. T. executes his bond as follows: March 12th, 1863. I hereby bind myself, my heirs, etc., to pay—the amount of principal and interest due from W. A. J. on the tract of land purchased by him of G. W. J. and wife. Witness my hand and seal the day and date above. And he delivers it to W. A. J. *Held*, W. A. J. may recover upon the bond against A. T. if A. T. has not paid the debt, though it is not averred or proved that W. A. J. has paid it, or has been otherwise injured by the failure of A. T. to pay it. *Jones v. Thomas*, 21 Gratt. 96.

Breach—What Constitutes.—In an action of covenant, on a covenant whereby defendant acknowledges that he has received from plaintiff two bonds for collection, which when collected are to be credited on a bond of a third person held by defendant, one count in the declaration assigns the breach, that though defendant collected the two debts, he did not give credit for the amount—another count assigns the breach, that defendant did not and would not collect the debts, or make any endeavor to collect them, and failed in any manner to account for the same—and a third count alleges, that by the covenant defendant promised to endeavor to collect the debts, and assigns for breach that he did not endeavor to collect them; defendant takes oyer of the covenant, and demurs generally to the declaration. *Held*, each and all of the counts are good. *Jarrett v. Jarrett*, 7 Leigh 93.

Covenant (as well as debt) lies on a bond with collateral condition. If there be no stipulation, by

articles, or in the condition itself, that it shall be performed, the breach assigned should be the failing to pay the penalty: but, where such stipulation is either expressed or implied, the failing to perform the condition may be assigned as the breach. *Ward v. Johnston*, 1 Munf. 45.

Assignments of Breach—Number.—In a declaration on a bond with collateral condition, if there be two assignments of breaches, and either assignment be good, and the whole declaration is demurred to, the demurrer ought to be overruled. *Martin v. Sturm*, 5 Rand. 693.

When a declaration on a bond, although it contains but a single count, assigns several breaches, as was done in this case, it is proper to demur to the entire declaration and to each assignment of breaches; for, if the demurrer is merely to the declaration and it contains matter sufficient to maintain the action, the demurrer must be overruled, even when the breaches assigned are defective or insufficient, and this will be so notwithstanding the general demurrer states as special causes therefor such defects and insufficiencies of the breaches assigned. *Henderson v. Stringer*, 6 Gratt. 180; *Wright v. Michie*, 6 Gratt. 354; *Wheeling v. Black*, 25 W. Va. 273.

DEMAND OF PENALTY.

Penal Bond—Amount Demanded in Declaration.—In debt on a judgment for the penalty of a bond, "to be discharged by a smaller sum with interest," the declaration ought not to demand the smaller sum with interest till paid, but, "the penalty to be discharged thereby." And error in this respect is fatal, even after verdict. *Anderson v. Price*, 4 Munf. 307.

Allegation of Nonpayment.—In an action on a bond to more than one obligee nonpayment of the debt to all of the obligees must be averred in substance in the declaration; or the objection will be fatal on general demurrer. *Strange v. Floyd*, 9 Gratt. 474.

In an action on a bond over was prayed and granted and demurrer was entered. It appearing that the declaration failed to aver the nonpayment of the debt by the co-obligors, it was held that the declaration was fatally defective and the demurrer should have been sustained. *Vandiver v. Hyre*, 5 W. Va. 414.

Formal Defects in Declaration.—In an action on a bond the declaration does not, in its commencement, aver that A. T. covenanted with the plaintiff to pay the debt; but it does so in a subsequent part of it. This is substantially sufficient. *Jones v. Thomas*, 21 Gratt. 96.

In an action by the administrator of a special commissioner on bonds taken for the price of lands sold by him, it is no ground for demurrer that the declaration states that the suit is for the use of the successor of such commissioner. *Triplet v. Goff*, 83 Va. 784, 3 S. E. Rep. 525.

In considering a demurrer to a declaration, where over is craved of the bond sued upon, the court can only look at the declaration and bond, and if words in the bond without the addition of extraneous facts, are insensible, they will be treated as surplusage. *Smith v. Lloyd*, 16 Gratt. 296.

6. VARIANCE.

Material Variance.—Where there is a plain variance between a declaration and the bond offered in evidence thereunder, the bond should be rejected. *Harris v. Lewis*, 5 W. Va. 575.

Variance between the declaration and the evidence, and between the judgment and the declaration, is error. *Cook v. Berkley*, 3 Call 328 [379].

In debt on a bond, if the declaration describe it as a writing obligatory for a sum of money; and the defendant, without praying over of the bond, plead payment, and also several other pleas, alleging performance of a condition, according to which the bond was to be discharged, by the delivery of a certain quantity of iron; and, issue being joined thereupon, the parties go to trial; and it appears, by bills of exceptions, that the evidence before the jury did not apply to the plea of payment, but to the other pleas only; a verdict for the defendant ought to be set aside, and a new trial awarded, with leave to him to take over of the condition of the bond, and plead *de novo*; all his pleas, except that of payment, being irrelevant to the claim set out in the declaration, and, therefore, the issues joined upon them being immaterial. And this is the case, notwithstanding a copy of a bond, corresponding with that described in the pleas, be inserted in the transcript of the record, and certified by the clerk to be the bond on which the declaration was filed. *Beatty v. Smith*, 5 Munf. 39.

Plaintiff counts on a bond dated in 1811; upon overcraved, a bond is shown dated in 1810; and afterwards plaintiff demurs to a plea of defendant. Held, the variance between the bond alleged in the declaration, and the bond shown on over, is fatal. *Bennett v. Giles*, 6 Leigh 116.

It is fatal variance to offer in evidence a bond executed to A. surviving partner of A. B. & Co., on a declaration making profert of a bond to A. *Moore v. Fenwick*, Gilmer 214.

A writing beginning, "Know all men, etc., that I, H. R., of the County, etc., am held and firmly bound," etc., and running throughout in the name of H. R. alone, is not to be received as evidence in support of a declaration against H. R. and H. B., charging that they both acknowledged themselves to be indebted, etc., notwithstanding the name of H. B. was signed under that of H. R. and issue was not joined on the plea of *non est factum* or *nil debet*, but of "payment by H. B." *Bell v. Allen*, 3 Munf. 118.

Immaterial Variance.—It is not a material variance to omit to state in the declaration the words "Of the County of Essex," the place of the obligor's residence, which is stated in the bond. *Evans v. Smith*, 1 Wash. 94 [78].

Declaration upon a bond given to the plaintiff of the county of S., on account of Messrs. P. & G., merchants in Glasgow. The omission in the declaration to state the county, or for whose use the debt was contracted, is not a material variance. *Peter v. Samuel*, 1 Wash. 831 [267].

Variance between the date of the bond declared on, and that recited in the award, is not fatal, if they agree in every other particular; that is to say, if the bond declared on, have the month blank, and the award recites the month, it will not be fatal if the bonds agree in other respects. *Ross v. Overton*, 3 Call 268 [309].

If the bond be described in the declaration as bearing date on the 4th of January, 1773, and the date of the bond produced to the jury be the 4th of January, 1775, a general verdict for the defendant ought to be sustained. *Gordon v. Browne*, 3 H. & M. 219.

If a bond be payable to James Whitlow, jun. and the declaration describe it as payable to the plaintiff, after naming him as "James Whitlow, jun. alias James Whitlock;" this is not such a variance as should prevent it from being received as evidence,

in support of the declaration, on the plea of payment. *Whitlock v. Ramsey*, 2 Munf. 510.

When a bill to enforce the lien of a judgment, the bill sets out only the judgment, and not the bond as evidence of the debt, if defendants by their answer extend their defense to the debt itself, as if no judgment existed, and the court can see that full defense was allowed and made as if there had been no judgment, it will treat the case as if the bond instead of judgment, had been set out as evidence of the debt and will render judgment accordingly. *Brewis v. Lawson*, 76 Va. 86.

Declaration—Defects—Waiver of Objection.—In debt upon a bond payable at a future day, if the declaration describes the penalty as payable on that day, and the defendant pleads payment, he cannot object to the variance at the trial of the cause. *Browne v. Ross*, 4 Call 221.

In covenant, defendant takes oyer of the covenant, and afterwards pleads "covenants performed." *Held*, that defendant by oyer has made the covenant itself a part of the record, and cannot at trial of the issue, object to the covenant as evidence, on the ground of variance between it and the covenant set forth in the declaration. *Armstrong v. Armstrongs*, 1 Leigh 491 [599].

In debt on a bond, if the defendant craves oyer, and then plead "conditions performed," he cannot take advantage of a variance between the declaration and bond; and though the plaintiff declare against one of several obligors, without stating that they were severally bound, yet, if the bond appear to be joint and several, it is sufficient. *Meredith v. Duval*, 1 Munf. 76.

Bond, with condition, that the defendant would faithfully collect certain debts due to the obligee, and would pay the amount so collected, and return an account of his collection, and surrender all bonds not fully paid, when required, except such as might be lodged with clerks, or lawyers, to bring suit on, the obligor agreeing to perform the duty of a collector, and, in all things relative to the business, to act for the benefit of the obligee, to the best of his skill. The declaration on this bond lays the breach on the defendant's neglecting to bring suits for the recovery of the debts, etc. The variance is not material, particularly after verdict—if it was material, the defendant might have demurred. *Hawkins v. Berkley*, 1 Wash. 200.

H. PLEAS.

1. IN GENERAL.

Demurrer—Oyer.—To take advantage by demurrer of a variance between the declaration and the bond declared on, the defendant must crave oyer of the bond. *Sterrett v. Teaford*, 4 Gratt. 84.

In an action of debt upon a bond, plaintiff to excuse the nonproduction of the bond, in answer to oyer craved by the defendant, says the bond is filed in another court; that he applied to that court for it, that his application was opposed by the defendant, and was refused by the court. This is a sufficient excuse for not producing the original bond. *Smith v. Lloyd*, 16 Gratt. 295.

Failure to Insert Penalty—Objection by Plea.—Debt on a bill penal for \$100, conditioned to pay \$47. The defendant moved the court to stay proceedings, because the penalty was inserted for the purpose of giving the court a jurisdiction which the law withheld. Decided, that the superior court ought not to sustain the motion, but declined deciding whether the fact alleged would avail, if pleaded. *Heath v. Blaker*, 2 Va. Cas. 215.

Plea in Abatement—When Filed.—The plea setting up the fact that the plaintiffs, commissioners of the court appointed in a chancery suit, and in a proceeding at law to recover on a bond executed to them as such commissioners, had not executed the bond required by statute, and were therefore not entitled to maintain such action, is a plea in abatement, and, under the statute, must be filed at rules, and cannot be received in court. *Flesher v. Hassler*, 20 W. Va. 404, 1 S. E. Rep. 580.

Special Pleas Provable under General Issue.—Where the general issue has been pleaded, special pleas that set up matter of defence which can be proved under the general issue should be rejected. *Blankenship v. Ely*, 98 Va. 359, 36 S. E. Rep. 484; *Campbell Co. v. Angus*, 91 Va. 498, 22 S. E. Rep. 167; *Richmond R. Co. v. N. Y.*, etc., R. Co., 95 Va. 386, 28 S. E. Rep. 573.

Sufficiency of Plea.—The condition of a bond being "whereas the obligor did lend to J. W. \$2,500 of the obligee's money, and the said J. W. having failed, but before he failed paid \$500, and whereas the said obligor hath instituted a suit against said J. W. for the recovery of said money; now, if the said obligor shall pay the whole sum so lent, if it can be recovered from the said J. W. or, in case it cannot be wholly recovered, will lose the one-half of that sum which cannot be recovered, then the above obligation shall be void, otherwise to remain in full force and virtue;"—a plea stating "that he, the said obligor could not recover of J. W. or his endorser, the sum of money in the said condition mentioned, or any part thereof, and that he paid to the obligee one-half of the sum which could not be so recovered, and the further sum of five hundred dollars," is a good and sufficient plea in bar to an action upon the bond; without any further averment that the said obligor had used due diligence in prosecuting the suit against J. W.; and without stating what measures he had taken to recover the money, or who the endorser was. *Cooke v. Graham*, 5 Munf. 173.

If there be two bonds, one payable at the death of the intestate, and the other not, the administrator may delay the creditor in the first with dilatory pleas until the second becomes payable; and then confess judgment upon the latter pending the prior suit upon the first, and plead it in bar of the first action. For among creditors of equal dignity, the administrator may prefer either; and the second bond was *debitum in presentia*, though payable at a future day. *Mayo v. Bentley*, 4 Call 528.

In a contest between the creditors of a husband and the wife to set aside a conveyance as fraudulent it is immaterial that the bond which furnished a consideration of the conveyance was not given in for taxation. That question can only be raised by the government; as to the creditor, it is none of his business. *Spence v. Repass*, 94 Va. 716, 27 S. E. Rep. 588.

"Conditions Performed."—A plea of "conditions performed" in an action on a bond with collateral condition controverts and calls for proof by the plaintiff of all the facts alleged by him essential to sustain his action, except that it admits the bond. *Altizer v. Buskirk*, 44 W. Va. 256, 28 S. E. Rep. 789.

The plea of conditions performed, to an action of debt for money, is equivalent to the plea of payment. *Hammitt v. Bullett*, 1 Call 492 [567].

Where, in an action of debt on a bond, with collateral condition, the only plea filed was "conditions performed," the defendant is not under these

pleadings, entitled to prove a set-off. *Botetourt County v. Burger*, 86 Va. 530, 10 S. E. Rep. 264.

In debt on a bond conditioned that the obligor shall make a title to a part of land, when thereunto lawfully required; if the defendant plead covenant performed, and issue be joined thereupon, the plaintiff is not bound to prove on his part any demand of a deed. *Pate v. Spotts*, 6 Munf. 394.

Title bond executed by S. W. with condition that S. should convey good title to W., not to him and his assigns, in 200 acres of land; this bond is assigned by W. to M. and by M. to B. and while the bond is held by M. the first assignee, S. and his wife make a conveyance of the title to M. who refuses to accept the same: in action by W. for benefit of B. the last assignee, and upon pleas of conditions performed, and of conveyance to M., *Adid*, that the condition of the bond requires that the title shall be made to W. and, if there was proof of a conveyance of title to M. that would not sustain the plea of conditions performed, and the second plea of a conveyance to M. is nought. *Wallace v. Shaffer*, 13 Leigh 640 [623].

"*Non Damniificatus*."—The plea of "*non damniificatus*" is a good plea, only where the condition is to indemnify and save harmless. The plea should go to the right of action, not to the question of damages. *Archer v. Archer*, 8 Gratt. 539.

Wherever the plea of "*non damniificatus*" is a good plea, it is equivalent to the plea of "*conditions performed*." And if this last-mentioned plea has been filed in a cause, it is no error to refuse the application at a subsequent term, to file the former. *Archer v. Archer*, 8 Gratt. 539; *Elam v. Bank*, 86 Va. 92, 9 S. E. Rep. 498.

"*Non Est Factum*."—In an action of debt founded on a bond or other deed, the defendant may put in issue the execution of the instrument by pleading *non est factum* generally and in the common form. But if he wishes to separate the law from the facts, so that the court may pass upon the sufficiency of any special ground why it is not his deed, then he must allege such facts specially, concluding with an "*et sic non est factum*," "and so is not his act." *American, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. Rep. 319.

A plea of *non est factum* ought in general to be received by the court, notwithstanding the defendant has previously pleaded payment; especially, if it be offered under circumstances showing it is not intended for the purpose of delay. *Jackson v. Webster*, 6 Munf. 462.

A special plea of *non est factum* which admits the execution and delivery of the bonds sued on, but avers that they were to be redelivered to defendant when he should request it, is not a good plea. *Harris v. Harris*, 23 Gratt. 739.

Where there are two defendants in a suit on a joint obligation and one appears and answers and disproves the plaintiff's case, the plaintiff cannot have a decree against the other who has made default and against whom the bill has been taken *pro confesso*. *Ashby v. Bell*, 80 Va. 811; 2 Barton's Ch. Pr. (2d Ed.) sec. 240.

Though a bond or covenant executed by one partner of a mercantile house, in the name of the firm, for a debt of the partnership, is not binding on his co-partner who did not seal the instrument, yet if the debt be originally a debt of the concern, both partners are liable for it to the creditor. *Sale v. Dishman*, 3 Leigh 593 [548]; *Weaver v. Tapscott*, 9 Leigh 424; *Brooke v. Washington*, 8 Gratt. 248; *Ward v. Motter*, 2 Rob. 536; *Galt v. Calland*, 7 Leigh 594;

Parker v. Cousins, 2 Gratt. 372; *Williams v. Donaghe*, 1 Rand. 300; *Jordan v. Miller*, 75 Va. 442; *Niday v. Harvey*, 9 Gratt. 454; *Morris v. Morris*, 4 Gratt. 327.

2. KINDS OF PLEAS.

a. *Fraud*.—In a court of common law, fraud may be given in evidence to vacate a deed on the plea of *non est factum*, if such fraud relates to the execution of the instrument, as, for example, the essential element of delivery. *American, etc., Co. v. Burlack*, 35 W. Va. 647, 14 S. E. Rep. 319. See Va. Code 1887, § 3299.

A bond may be sold for much less than its nominal amount, and such sale will be enforced in a court of equity, as well as in a court of law, if no fraud or usury appear in the transaction. *Kenner v. Hord*, 2 Hen. & M. 14.

If a bond be made joint, without fraud or mistake, equity will not charge the executor of the surety, who was discharged, at law, by his death, in the lifetime of the principal. *Aliter*, if the lending had been to both. *Harrison v. Field*, 2 Wash. 175 [186].

In a debt on a bond, a plea, that the bond was obtained by fraud, covin, etc., without saying whether the fraud was in the consideration of the bond, or in its execution, is immaterial. *Tomlinson v. Mason*, 6 Rand. 169; *Wyche v. Macklin*, 2 Rand. 436.

Plaintiff brings action of debt on a bond for \$100. Defendant pleads generally breach of warranty of soundness of the chattel sold. *Held*, evidence of fraud in the procurement of the warranty was properly admitted on behalf of the plaintiff. *Morrow v. Bailey*, 2 W. Va. 326; Code of 1860, ch. 173, sec. 5 and 9.

A bond executed by a debtor in fraud of his creditors, though void as to them, is nevertheless valid between the parties; the debtor will not be permitted to set up his own fraud in avoidance of the bond. *Burners v. Keran*, 24 Gratt. 70; *Harris v. Harris*, 23 Gratt. 737; *Martin v. Lewis*, 30 Gratt. 687.

b. Failure of Consideration.

Bond—Action—Failure of Consideration.—It was not permitted at common law, in an action upon contracts under seal, to prove a failure in the consideration of the contract, or fraud in its procurement, and breach of warranty of the title or soundness of personal property, but defendant had to revert to his independent action for relief. These defences are allowed only by virtue of statute. *Tyson v. Williamson*, 96 Va. 686, 32 S. E. Rep. 42; *Wyche v. Macklin*, 2 Rand. 426; *Association v. Rockey*, 98 Va. 678, 25 S. E. Rep. 1009; 4 Min. Inst. (3d Ed.) 792; Va. Code 1887, § 3299.

Since the statute allowing the defence or failure of consideration to be made in an action on a sealed instrument, defendant may set up this defence either at law or in equity; and it is not necessary in order to give the court of equity jurisdiction in such case that defendant should offer any excuse for not making such defence in a court of law. *Ludington v. Tiffany*, 6 W. Va. 11.

Illegality of consideration in a sealed document may be shown at law, but not want of consideration, or failure of consideration, according to common-law principles. The statute (§ 5, ch. 126, Code), changes the rule by allowing failure of consideration to be pleaded at law, but not mentioning want of consideration, leaves that as at common law; so neither at common law nor under § 5, ch. 126, Code, can want of consideration be pleaded or shown at law. *Williamson v. Cline*, 40 W. Va. 205, 20 S. E. Rep. 921; *Harris v. Harris*, 23 Gratt. 737.

A. and B. execute a joint bond to C. part of the

consideration of which is the price of a parcel of corn sold by C. to A. deliverable at a day subsequent to the date of the bond; the corn is not delivered according to contract; in debt on the bond by C. against A. and B. the defendants cannot set-off the value or price of the corn. *Christian v. Miller*, 3 Leigh 78.

In an action on a bond for five hundred dollars, given for the last payment of the purchase money of land, a plea that the plaintiff was to make defendant a good title to the land upon the payment of the bond, and that defendant had offered to pay it upon the making of the title, and the plaintiff had failed and refused to make the title, by reason whereof the consideration had failed to the extent of two hundred and fifty dollars, is not a good plea in substance. *Watkins v. Hopkins*, 18 Gratt. 743.

In an action of debt upon a bond, defendant pleads that the bond was given for the price of goods which he bought of plaintiff, who represented that they were sound and marketable, when in fact they were unsound and damaged, and by means thereof unsaleable; but the plea does not aver a warranty of the quality of the goods; or that the plaintiff knew that the said representations made by him were untrue; or that he used any fraud or art to disguise or conceal their true condition or quality. The plea is defective; and properly rejected when tendered. *Cunningham v. Smith*, 10 Gratt. 255, 60 Am. Dec. 833.

Where the purchaser of land gives bonds for the purchase money, payable at different times; and the agreement is, that if the title to any part of the land prove defective a deduction from the purchase money shall be made, in proportion to the value of the land lost; a court of equity will not protect the purchaser, against an assignee of one of the bonds, on the ground of a defect in the title to part of the land; if it appear that the bonds not assigned, and remaining unsatisfied, are sufficient to indemnify him against such loss. *Foreman v. Newkirk*, 8 Munf. 276.

c. Illegality.—In an action of debt on a bond a plea that the obligors of the bond and the obligee, being all parties to the paper, were officers in the service of the so called Confederate States of America, engaged in unlawful war against the United States of America, and that the sole consideration of said writing obligatory was certain notes which were issued to maintain said unlawful war, constitutes no valid defence to the action. *Payne v. Bowlin*, 6 W. Va. 278.

d. Mistake.—In an action of debt on a bond when defendant sets up equitable plea in defence, an instruction that, "no ignorance or mistake of law can be considered as a defence in this case, because the suit is in a court of law," is erroneous. *Brown v. Rice*, 76 Va. 629.

e. Alteration.—A material alteration of a bond after its execution, when intentionally made by one having an interest in it, and without the consent of the party bound by it, invalidates the instrument as to such party, such alteration destroys the identity of the contract; and, therefore, if a party to the contract who has not consented to the alteration were to be held bound thereby, it would be, in effect, imposing upon him against his will a new contract, to whose terms he never agreed. *Dobyns v. Rawley*, 76 Va. 537; *Newell v. Mayberry*, 3 Leigh 260; *Yeager v. Musgrave*, 28 W. Va. 90, 111.

A material alteration of a bond or note after its execution, when intentionally made by one having

an interest in it, and without the consent of the party bound by it, invalidates the instrument as to such party. *Batchelder v. White*, 80 Va. 103.

Alteration by Stranger.—If bond, deed or other agreement be altered in an immaterial part by a stranger without the privity or knowledge of the obligor it will not avoid the instrument. *Yeager v. Musgrave*, 28 W. Va. 90.

Consent.—A consent given by an obligor to the alteration of a bond, given after the alteration is made, will not repel the plea *non est factum*; but a consent given before, or at the time of, the alteration, will be considered as a re-execution. *Cleaton v. Chambliss*, 6 Rand. 86.

Question of Alteration—Court—Jury.—Whether alterations were made or not, after the signing, sealing and delivery of the instrument, without the knowledge or consent of the obligor, is a question of fact, which may properly be submitted to the jury; but whether such alterations were material or not, is a question of law to be decided by the court. *Keen v. Monroe*, 75 Va. 424.

Upon the question of an alteration in the bond sued on, if the case agreed does not state the alteration was made after the execution of the bond, the court, in pronouncing the conclusion of law upon the facts, cannot assume that such was the fact. *Ramsey v. McCue*, 31 Gratt. 349.

Alteration by Clerk.—When the court has designated certain persons, and approved them as sureties no alteration can be made by leaving off a name or substituting another therefor. The bond must be prepared and executed, in conformity to the judgment of approval, else it is not the bond approved and accepted by the court, and every alteration by the clerk, either in omitting a designated party or substituting another is wholly unauthorized, and his attestation to such a bond is not valid. *Blanton v. Com.*, 91 Va. 1, 20 S. E. Rep. 884.

Memorandum Added—When Not Material.—A writing obligatory is executed by three obligors, whereby they bind themselves to pay to the obligee a sum of money, nine months after date. One of the obligors is in fact a principal, and the other two are sureties. After the obligation is executed, the principal, on the same day, without the knowledge of the sureties, makes a memorandum at the foot thereof, under his hand and seal, stating that the obligation is to bear interest from its date. *Held*, this memorandum has not the effect of discharging either principal or sureties from their obligation. *Tremper v. Hemphill*, 8 Leigh 622.

Same—Obligor Added.—A joint and several bond is executed by several persons, and delivered to the obligee; and afterwards, with the consent of the obligee, but without the knowledge of the obligors, another person executes it. As to those who first signed it, it is joint as between themselves, and several as to the person last executing it. *Nash v. Fugate*, 24 Gratt. 202. See *Tremper v. Hemphill*, 8 Leigh 622; *Harrison v. Lane*, 5 Leigh 414. But see *Baber v. Cook*, 11 Leigh 606; *Stephoe v. Read*, 19 Gratt. 9; *Beazley v. Sims*, 81 Va. 647; *Bush v. Campbell*, 25 Gratt. 403, and *note*; *Moffett v. Bickle*, 31 Gratt. 228.

Burden of Proof.—If, on production of the instrument, it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance. Every alteration on the face of a written instrument detracts from its credit, and renders it suspicious; and this suspicion the party claiming under it is ordinarily held bound to remove. But if the instrument in question was not produced

by the plaintiff, but by another witness, upon the demand of the defendants, and if the plaintiff was not party to and was not claiming under such instrument, it is not incumbent on him to explain any appearance of alteration on its face. *Priest v. Whitacre*, 78 Va. 151; *Hodnett v. Pace*, 84 Va. 373, 6 S. E. Rep. 217.

Evidence.—It is not error to permit a mutilated instrument to be read to the jury, as evidence, without first requiring the plaintiff to explain the alteration apparent on its face. The question as to whether the instrument has been mutilated, is for the jury, and not for the court. *Connor v. Fleshman*, 4 W. Va. 603.

f. Usury.

Contracts—Usury—What Law Governs.—A contract by writing obligatory entered into in another state, in violation of the usury law of that state, cannot be considered as made with reference to the law of the place of contract, but the rights of the contracting parties, if litigated in this state, must be determined by our own law. *Turpin v. Povall*, 8 Leigh 93.

Where a bond dated in Texas, signed by the principal obligor, a resident of Texas, and by two sureties, residents of Virginia, payable to a resident of Virginia, where the drafts, which were the consideration of the bond, were sent to and received in Texas and the money borrowed used in Texas by the principal obligor, *held*, to be a contract governed by the laws of Texas, and not affected by the laws of usury in Virginia. *Backhouse v. Selden*, 29 Gratt. 581.

Change in Statute—Where Higher Rate Lawfully Contracted for.—Where a person entered into a contract, which was legal at the time, to pay a certain rate of interest on a bond, he must pay such interest not only up to the maturity of the bond but after maturity till paid, notwithstanding a subsequent law providing for a lower rate. *Cecil v. Hicks*, 29 Gratt. 1, 26 Am. Rep. 391. The court will compel the payment of interest at such agreed rate, though the debtor's lands are placed in a receiver's hands at the creditor's instance. *Strayer v. Long*, 83 Va. 715, 3 S. E. Rep. 373. The same rule holds where the contract for a higher rate is lawful because not within the terms of the statute which declares what transactions shall be deemed usurious. *Evans v. Rice*, 96 Va. 50, 30 S. E. Rep. 463. A debt to be usurious must be so in the beginning. It cannot be made so, by subsequent events. *Ward v. Cornett*, 91 Va. 678, 22 S. E. Rep. 494.

Such higher or conventional rate continues, therefore, after maturity till payment, where the excess over the legal rate is in the nature of a penalty from which the debtor may relieve himself by punctual payment of the debt. *Pollard v. Baylors*, 6 Munf. 433; *Campbell v. Shields*, 6 Leigh 517; *Ward v. Cornett*, 91 Va. 676, 22 S. E. Rep. 494. So where the excess constitutes part of the contract price or purchase money, or for any other reason does not fall within the statute of usury, see *Kraker v. Shields*, 20 Gratt. 377; *Græme v. Adams*, 23 Gratt. 225, 14 Am. Rep. 130; *Evans v. Rice*, 96 Va. 50, 30 S. E. Rep. 463.

Bona Fide Sales.—"An actual sale of stocks, goods, bonds, notes, bills, or any other property, at more or less than its value, or its face amount, is not usurious." 2 Min. Inst. (4th Ed.) 347.

Where the transaction is a fair sale and not a device to cover a usurious loan of money, it is well settled that stock and bonds may be sold on credit at par where the market price is as much as twenty per cent. below par. *Greenhow v. Harris*, 6 Munf.

472, 8 Am. Dec. 751; *Selby v. Morgan*, 3 Leigh 577; *Brockenbrough v. Spindle*, 17 Gratt. 21; *Town of Danville v. Sutherland*, 20 Gratt. 571.

Penal Bond—When Not Usurious.—A bond was given in 1782, in the penalty of £20,000 conditioned for the payment of £1,000 "or such further sum as shall be equal to the said £1,000 in 1774, that is to say, to purchase as much land and as many negroes, as it might have done at that time." This was held not to be an usurious contract. *Faulcon v. Harriss*, 2 H. & M. 550.

Confederate Currency—Usury.—On the 15th of November, 1862, H executed his bond to S, for \$600, payable on demand, it being for money borrowed, upon a condition, inserted at the instance of H, that no interest will be required until the money is demanded, and then a reasonable time to be given to pay; interest to run from the demand. The loan was in Confederate money. *Held*: 1. H had the right to pay the debt at any time, though S made no demand. 2. It was a debt payable in Confederate currency, and therefore not usurious. *Stover v. Hamilton*, 31 Gratt. 273.

It is not usurious, upon a settlement of accounts, to take a bond or note for the balance due, including interest, and to receive interest on such bond or note. *Brown v. Brent*, 1 H. & M. 8.

Interest in Advance.—Interest paid on a bond in advance for three years, this being stated in the bond, but paid in land at a price fixed in reference to the annual interest for three years, is not usurious, and the plaintiff may prove the facts at the trial. *Porterfield v. Colner*, 4 Gratt. 55.

Interest in Advance.—Nor is it usurious, upon a settlement of accounts, to take a bond or note for the balance due, including interest, and to receive interest on such bond or note. *Brown v. Brent*, 1 H. & M. 4.

After Maturity.—A bond is not void for usury where it provides for usurious interest only after maturity. *Ward v. Cornett*, 91 Va. 676, 22 S. E. Rep. 494.

Debt Secured by Usurious Deed of Trust.—In December, 1842, C assigned to B a bond on E, who was in doubtful circumstances, for \$529.06, due on 26th October, 1838, and subject to a credit of \$15 paid 1st October, 1842; for which B gave him \$494.25; and C at the same time, executed a deed of trust on property with condition that if the bond with its interest was not paid in twelve months, the trustee should sell and pay the amount to B. This was usurious. *Bell v. Calhoun*, 8 Gratt. 23.

Usurious Judgments.—G took the oath of insolvency at the suit of P and surrendered a bond on H. The sheriff brought a suit on this bond against H who pleaded as off-sets two judgments which he had recovered against G, upon bonds which had been assigned to him. He had sued G upon these before G took the oath of insolvency, but the judgments were not recovered until after the oath was taken, but before the suit brought against him by the sheriff. The plaintiff replied in the form of the statute, Sess. Acts 1844, p. 54, that the judgments were usurious; and the defendant demurred. *Held*, the statute though in terms applicable only to plea, is properly applicable to a replication to a plea of set-off. *Hope v. Smith*, 10 Gratt. 221.

Usury—Administrator.—An administrator stands in the place of his intestate; and if a contract made with the intestate be tainted with usury, a bond taken by the administrator for a debt arising in that

transaction is likewise tainted. *Raynolds v. Carter*, 12 Leigh 170 [166].

Usury Purged by Change of Parties.—A. B and G execute a bond for one thousand dollars to P for a loan of money at usurious interest. Subsequently O, J and W, with B, who signs himself security, execute their bond to P for the amount, principal and interest, of the first bond, and another small bond of A, in lieu of these bonds. The usury is purged by the change of the parties, and the last bond executed is valid. *Drake v. Chandler*, 18 Gratt. 909.

Application of Payments.—Where payments have been made upon usurious contract, which are merely credited on the bond, and not applied specially, the borrower is entitled to have such payments deducted from the principal sum loaned or forborne. *Turner v. Turner*, 80 Va. 379; *Reger v. O'Neal*, 83 W. Va. 159, 10 S. E. Rep. 375; *Norvell v. Hedrick*, 21 W. Va. 523.

Statute of Limitations.—Prior to July 1st, 1850, there was no positive limitation of time as to the right of action upon bonds secured by deed of trust. Even then, however, the common-law presumption of payment arose after the lapse of twenty years, which presumption might be rebutted by showing payment made during that period. After the passage of our statute the limitation was fixed to twenty years, excluding the period of the stay law and subject to a further exception in the case of an order of an account of debts which stops the operation of the statute as to those creditors who come in under the decree, or otherwise become parties to the suit. *Bell v. Wood*, 94 Va. 677, 27 S. E. Rep. 504; *Callaway v. Webster*, 7 Va. Law Reg. 40 (May 1901); *Norvell v. Little*, 79 Va. 141; *Udike v. Lane*, 78 Va. 182.

Statute of Limitations—Plea by Administrator—Form of Plea.—In a suit to recover money advanced to pay a bond debt, the administrator of the party sought to be charged, may set up a bar of the statute of limitations, either by plea, by answer, or by exception to the commissioner's report. *Leith v. Carter*, 83 Va. 889, 5 S. E. Rep. 584.

A bond which falls within the purview of sec. 16, ch. 57, and sec. 3 of ch. 59 of the Code of 1873, and which has no limit as to duration is clearly a continuing obligation. *Elam v. Commercial Bank*, 86 Va. 92, 9 S. E. Rep. 498.

Failure to Sue—Excuse.—Creditor filed a petition in a creditor's suit against a decedent as surety on a bond. Though the debt had been due for twenty-five years no binding contract for delay existed and no notice to proceed against the principal had been given. It appeared that the debt was not barred by the statute of limitation, and the petition explained the delay in bringing the suit. *Held*, creditor was entitled to recover. *Coleman v. Stone*, 86 Va. 886, 7 S. E. Rep. 341.

Where a party presents his claim against a county to the board of supervisors, within the time limited by the statute, and they decline to take it up, and adjourn, and no entry is made of it until a subsequent meeting of the board, after the time of limitation, the statute will not be allowed to bar the claim. *Dinwiddie County v. Stuart*, 28 Gratt. 526.

When bonds are deposited as collateral security for a debt, the creditor may resort to them for satisfaction though the debt so secured be barred by the statute of limitations. *Roots v. Salt Co.*, 27 W. Va. 483.

Nullum Tempus Occurrit Regi.—The act of limitations will not bar a motion, in behalf of the com-

monwealth, against a person who has received public money and is accountable for it. *Kemp v. Com.*, 1 H. & M. 854; *Nimmo v. Com.*, 4 H. & M. 6; *Levasser v. Washburn*, 11 Gratt. 572.

h. Payment.—In debt on a bond, if the defendant, after craving oyer, plead "payment," and it appear, from the condition of the bond, that only a part of the debt had become due at the time of institution of the suit, the plea extends to that part only, and not to sums which might become due thereafter. *Thatcher v. Taylor*, 3 Munf. 249.

Payment—Burden of Proof.—The burden of proof, that a payment made to another than the owner or holder of the evidence of the debt is a lawful payment, is upon the party who makes such payment. If the debtor makes the payment to a party who does not have in hand the obligation, he takes the risk of his authority to make the collection. *Wooding v. Bradley*, 76 Va. 614.

Payment—Evidence.—In debt on a specialty, payment being pleaded, the defendant gives in evidence, as affording ground on which payment might be presumed, a specialty of later date, executed by the plaintiff to the defendant. *Held*, evidence may be received from the plaintiff to prove condition for which the latter specialty was given, and the circumstances under which it was executed. *Johnson v. White*, 8 Leigh 214.

In a suit in equity to enforce payment of a bond debt twenty-eight years after the right to demand it accrued, there being no remedy under the circumstances of the case but in equity, the bill, to rebut the presumption of satisfaction arising from lapse of time, calls on the defendant to answer, whether the debt has been paid or not. *Held*, the defendant was properly compelled to answer to that point. *Baker v. Morris*, 10 Leigh 284.

The bond was subscribed J. Clack, S. Stegar; and the declaration was in conformity to it. Upon the plea of payment, Stegar had a right to prove that the obligee had acknowledged payment of part of the money by J. Clarke. *Stegar v. Eggleston*, 3 Call 449.

Bonds—Presumption of Payment.—The common-law rule of presumption of payment of bonds arising from the lapse of time has not been affected by the statutory provisions adopted at the revival of 1849, prescribing the limitation of such instruments. *Booker v. Booker*, 29 Gratt. 605; *Jameson v. Rixey*, 94 Va. 346, 26 S. E. Rep. 861; *Lightfoot v. Green*, 91 Va. 514, 22 S. E. Rep. 242; *Bowman v. Hicks*, 80 Va. 210; *Norvell v. Little*, 79 Va. 143; *Tunstall v. Withers*, 85 Va. 892, 11 S. E. Rep. 565; *Udike v. Lane*, 78 Va. 182; *Brewis v. Lawson*, 76 Va. 45. See also, *Barton's Ch. Pr.* (2d Ed.) 86; 4 Min. Inst. (3d Ed.) 603.

It has been insisted that since the passage of a statute of limitations to suits on bonds, that no presumption of payment of a bond from lapse of time can arise. This position does not seem to be sound. Though doubtless the presumption of payment had its origin in the absence of any statute of limitation, nevertheless it is held that though a party does not plead the statute of limitations, he may rely on the presumption of payment from lapse of time. The presumption of payment from lapse of time is in no manner affected by the passage of an act of limitation to suits upon bonds. This conclusion is consonant to reason and supported by the English authorities. *Hale v. Pack*, 10 W. Va. 145.

There is a recognized distinction between the statute of limitations, and the presumption of payment from the lapse of time, the condition of the

parties, their relations to each other, etc. In the one case the bar is absolute, in the other it is denominated natural presumption of payment, and may be rebutted. *Lightfoot v. Green*, 91 Va. 509. 22 S. E. Rep. 242; *Perkins v. Hawkins*, 9 Gratt. 656; *Hutsonpiller v. Stover*, 12 Gratt. 588; *Updike v. Lane*, 78 Va. 136; *Booker v. Booker*, 29 Gratt. 605; *Hale v. Pack*, 10 W. Va. 145.

There is a recognized distinction between the statute of limitations, and the presumption of payment from lapse of time, the condition of the parties, their relations towards each other, etc. In the former case the bar is absolute; in the latter it is a rule of evidence, not of pleading, and simply raises a presumption of payment. It is founded upon the idea that, in the ordinary course of human affairs, it is not usual for men to allow real and well-founded claims to lie dormant an unreasonable length of time. *Cledenning v. Thompson*, 91 Va. 518, 22 S. E. Rep. 233.

A bond dated more than twenty years before it was exhibited for payment, shall be taken *prima facie*, as paid. *Tinsley v. Anderson*, 3 Call 285 [329].

While the mere lapse of twenty years without explanatory circumstances affords a presumption of law, that the debt is paid, even though it be due by specialty, still payment may be inferred by the jury from circumstances with the lapse of a shorter period of time than twenty years. When an action is brought on a bond or covenant for the payment of money, if twenty years elapse between the time of its becoming due and of the institution of the action or proceeding, the defendant may without pleading the statute of limitations rely upon presumption of payment; and upon issue joined on plea of payment payment may be inferred by the court or jury, from circumstances, coupled with a lapse of a shorter period than twenty years. *Calwell v. Prindle*, 19 W. Va. 604, 640; *Sadler v. Kennedy*, 11 W. Va. 187; *Hale v. Pack*, 10 W. Va. 145; *Perkins v. Hawkins*, 9 Gratt. 656.

The presumption of payment is not a legal presumption absolutely conclusive, but it is a presumption of fact, which, though not conclusive, is yet *prima facie* proof of payment. If less than twenty years, though nearly that time, have elapsed, all the circumstances are considered, including lapse of time, and their natural weight as evidence is to be given to each circumstance, including lapse of time; but if twenty years have elapsed a legal presumption arises, which must be accepted as proof, unless the contrary appears by evidence. But this presumption may be rebutted by proof which is satisfactory that the debt has not been paid, such as the proof of payment of interest within the twenty years, the continued absence from the country of the obligee, the continued insolvency of the defendant or obligor, or other strong circumstances showing nonpayment, or showing good causes for longer forbearance. *Hale v. Pack*, 10 W. Va. 152; *Eustace v. Gaskins*, 1 Wash. 188.

The common-law rule of presumption of payment only applies to cases where twenty years have elapsed after the right of action accrued. *Updike v. Lane*, 78 Va. 132.

A legal presumption of payment of a bond or covenant given for the payment of money does not arise from mere lapse of time, where the bond or covenant has not been due for twenty years before commencement of suit or proceedings for the recovery of the amount thereby due and payable. If a shorter period, even a single day less twenty years,

has elapsed, the presumption of satisfaction from mere lapse of time does not arise. *Calwell v. Prindle*, 19 W. Va. 604, 640.

The mere lapse of fourteen years since the debt became due in this case, unconnected with pertinent circumstances proved, from which an inference of payment of the debt may be reasonably drawn, does not authorize a presumption of payment by a court or jury. *Calwell v. Prindle*, 11 W. Va. 307, 329.

In August, 1844, C conveys land to his son D to enable D to pay C's debts. On the same day D conveys the land to B in trust to secure a debt of \$5,000, payable in five years, with interest, to S. D dies in 1862, and B in 1866. In August 1867, D files his bill against C, D's administrator and heirs, to subject the land to pay his debt, but he cannot produce the bond. *Held*, under the pleadings, proceedings and evidence in the cause, that no presumption of payment arises. *Coffman v. Shafer*, 29 Gratt. 173.

Presumption of Payment—How Rebutted.—When more than twenty years have elapsed between the date of payment of a bond and the institution of suit thereon, it affords a presumption of payment, which the obligee may rebut by satisfactory evidence; and whether the evidence is sufficient for that purpose, is a question for the jury, and not for the court. *Booker v. Booker*, 29 Gratt. 605.

An endorsement of credit on a bond, made by the obligee within the period that raises the legal presumption of payment, is evidence for the purpose of repelling that presumption. *Dabney v. Dabney*, 2 Rob. 622.

An endorsement on a bond for payment on account of the principal or interest, written by the obligee, without the privity of the debtor, will not be sufficient evidence of an acknowledgment that the bond was then due, so as to repel the presumption of payment, unless it be proved by other evidence than the endorsement itself, that the same was written at a time, when its operation was against the interest of the party making it; that is to say before the presumption of payment attached. *Sadler v. Kennedy*, 11 W. Va. 187; *Dabney v. Dabney*, 2 Rob. 622.

Payment—Authority to Receive.—Attorneys at law employed to collect a debt may receive payment thereof in money, but they have no authority to accept notes or bonds either in satisfaction or as collateral for the debt without express authority from their client. *Kent, Paine & Co. v. Chapman*, 18 W. Va. 501. See *Wiley v. Mahood*, 10 W. Va. 206.

Payment to an attorney at law is good, on the custom of the country, particularly if he have possession of the evidence of the debt; and evidence may be given of payments made after suit brought at any time before trial, but so as to deprive the plaintiff of costs if the payments were made after suit brought. *Hudson v. Johnson*, 1 Wash. 13 [10]; *Branch v. Burnley*, 1 Call 137 [147]; *Smith v. Lamberts*, 7 Gratt. 138; *Wilkinson v. Holloway*, 7 Leigh 277.

Payment by Principal—Effect.—It is a well-settled principle that payment by one who is primarily liable to one entitled to collect the debt is an extinguishment of the debt and all liability thereunder; and however held or however transferred or assigned, it is ever afterwards a mere nullity. *Smith v. Waugh*, 84 Va. 806, 6 S. E. Rep. 182.

It is well settled, that where a surety pays a debt of his principal, which is evidenced by bond, the surety is not substituted to the rights of the creditor

so far as to make him a bond-creditor. The payment completely discharges and destroys the bond and leaves the surety to his remedy on his account for money paid for the use of his principal. The only contract available to the surety after such discharge of the bond, is an implied promise that the debtor will repay him the amount so paid for his use. *Conrad v. Buck*, 21 W. Va. 410; *Powell v. White*, 11 Leigh 309; *Kendrick v. Forney*, 23 Gratt. 748.

Application of Payments.—Creditor having one security for three bonds, and another security for one of them, may apply the proceeds if the first security to the two bonds is not secured by the last security. *Vance v. Monroe*, 4 Gratt. 52.

A debtor by four bonds payable at successive periods, makes payments to his creditor, which upon a settlement after the death of the debtor, are ascertained to amount to more than is sufficient to discharge the first bond. The creditor will not be permitted to apply the amount remaining after discharging the first bond as a credit upon the fourth; but the court will apply it to the second bond in a relief of a party bound as surety for the amount of the second bond. *Ross v. McLaughlin*, 7 Gratt. 87.

i. Novation.

Novations—Bond Given for Debt on Account—At Law—in Equity.—M and D, as his surety, execute a bond to G, upon a settlement of an account for articles furnished by G to M. Though at law the account is merged in the bond, in equity the debt on the account will be held as still subsisting if necessary to do justice between the parties. *Meade v. Grigsby*, 28 Gratt. 612; *Gilbert v. W. C. V. M., etc., R. Co.*, 23 Gratt. 586, and *note*; also, *Coles v. Withers*, 23 Gratt. 186, and *note*.

Debts—Novation.—B is the guardian of J, and upon J's coming of age B has a settlement with J of his account as guardian, and being found indebted on the account in the sum of \$3,000, he executes to J his four bonds, each for \$750, payable in one, two, three and four years, with interest. B pays the interest during his life, and a part of the principal, and was up to the war able to pay the whole. *Held*, the giving and taking these bonds was not a novation of the debt but the debt due from B to J continued to be a fiduciary debt, and entitled to rank as such in the administration of B's estate. *Smith v. Blackwell*, 31 Gratt. 201; *Gilbert v. W. C., etc., R. Co.*, 23 Gratt. 586, and *note*; *Coles v. Withers*, 23 Gratt. 186, and *note*; 1 Min. Inst. (4th Ed.) 471.

Bonds—Novation.—M held the bond of G for \$700 executed before the war. In September, 1862, G proposed to pay M in Confederate money, which she refused to receive, saying she would receive the interest, but not the principal of the money. His brother C said he wanted money, and G said if she would let C have the money, and give up his bond, he would go C's security. M then let C have \$100 of Confederate money, and C and G executed their bond to M for \$800, and she gave up G's bond. Nothing was said about the bond being paid in Confederate money; and G paid to C \$700 in that currency. *Held*, this was not a novation of the debt, but it retained its original character; and as to \$700 it was to be paid in full, and as to \$100 it was to be scaled. *Barnetts v. Miller*, 23 Gratt. 551.

j. Release and Discharge.

(a) Act of Parties.—Whether a bond and deed of trust to secure it, given by a partner after the dissolution of the partnership, for a simple contract debt

of the partnership, releases the other partner in equity depends upon the intention of the parties in giving and taking them; and this intention may be ascertained from the attendant circumstances. *Niday v. Harvey*, 9 Gratt. 454; *Baylor v. DeJarnette*, 13 Gratt. 172; *Cooper v. Daugherty*, 85 Va. 350, 7 S. E. Rep. 387.

Where there is an express agreement between the creditor and his partnership or joint debtor whereby the creditor agrees to take and accept the individual note or obligation, of the partner or joint debtor, in discharge of the partnership or joint debt, such agreement is founded upon a valid consideration, and will have the effect to discharge the joint or partnership debt. *Bowyer v. Kuapp*, 15 W. Va. 277; *Bantz v. Basnett*, 12 W. Va. 772.

Mercantile business being carried on in a single name, the merchant in whose name the business is conducted buys goods, and executes a specialty for the price thereof. The party who sells the goods and takes the specialty is ignorant at the time that the merchant has a dormant partner. Discovering this fact after the death of the merchant who gave the specialty, he then brings an action of assumpsit for the price of the goods against the dormant partner. *Held*, the creditor has no legal remedy on the simple contract, the same being extinguished by the specialty. *Ward v. Motter*, 2 Rob. 536.

The obligee in a bond delivers it to a third party to be surrendered to the obligor, with the understanding on the part of the obligee that the bond was to be delivered to the obligor, and that the third party was then to become the payor of the debt; there being no allegation or proof of fraud, the bond was held cancelled by the aforesaid transaction. *Piercy v. Piercy*, 5 W. Va. 199.

A vendor of land, by executing a conveyance and taking bond and security for the purchase money, discharges the land from his equitable lien; even while it continues the property of the purchaser. *Wilson v. Graham*, 5 Munf. 297.

A makes a promissory note to B who indorses it to a bank, which discounts it for accommodation of the maker; the note not being duly paid, the indorser B gives bond with surety to the bank for the debt. *Held*, this bond, not being yet paid, does not extinguish A's simple contract debt to the bank. *Taylor v. Bank*, 5 Leigh 519 [471].

A party does not lose his right to collect a debt by simply declaring that he does not intend to collect it. He may change his mind and collect it, unless he has actually released it, or his agreement to release is based upon a valuable consideration. *Triplett v. Woodward*, 98 Va. 193, 35 S. E. Rep. 455.

Under our code a creditor may compound or compromise with any joint contractor or co-obligor, and release him from any liability on his contract or obligation, without impairing the contract obligation as to other joint contractors or co-obligors; and when this is done the contract must be credited with the full share of the party released, except in the case of surety or co-surety, when the credit shall be the amount paid; but this shall not affect or impair the right of contribution between joint contractors and co-obligors. Code Va. sec. 2564, 2567, 2569; *Penn v. Bahnson*, 89 Va. 253, 15 S. E. Rep. 566.

(b) Act of Law.—G., a citizen of Maryland, gave his bond, in Virginia, to B., a citizen of Virginia, and, afterwards, in Maryland, became a bankrupt by the laws of Maryland, under which he was duly discharged, by the competent tribunal of Maryland, under a general direction, with respect to his credit-

ors. This did not discharge him, in a suit afterwards brought upon the bond, in *Virginia. Banks v. Greenleaf*, 6 Call 271.

One country will not execute the penal laws of another. But if a person be discharged from a debt by a tender and refusal made in a foreign country, by force of the laws of that country he may defend himself in our courts by relying upon such tender and refusal, and the laws under which he was discharged. *Warder v. Arell*, 3 Wash. 359 [282], 1 Am. Dec. 488.

k. Set-Off.

Statute—Set-Off.—S as principal, and H as his surety, executed their bond to E. E owes S and N, partners, an account, and N assigns it to S. E becomes bankrupt and S proves the account before the register in bankruptcy, and he afterwards became bankrupt. The assignee in bankruptcy of E sues H on the bond, and H pleads the account as a set-off. *Held*, under the Virginia statute of set-off, Code of 1873, ch. 168, § 4, the account is a valid set-off for H in the action against him on the bond. *Edmunds v. Harper*, 31 Gratt. 637.

Set-Off Statute.—Y brings an action of debt upon a bond against W and two others, W being the principal in the bond. The defendants seek to set off a judgment recovered by P against Y, which had been assigned to W. *Held*, under the statute, Code, ch. 172, sec. 4, the judgment is a good set-off to the bond, though the debt sued for is against W and two others, and the judgment is assigned to W; and though the plaintiffs' claim is legal and the claim of W is equitable. *Wartman v. Yost*, 22 Gratt. 595.

Penal Bond—Action—Set-Off.—In an action on a penal bond whose condition recites that if the obligor shall fully recompense a railroad company for any loss incurred by reason of their employment of the defendant as agent for the railroad company, then the said obligation to be void, otherwise, to remain in full force and effect, the defendant may set off his services as agent to reduce the amount of the recovery. *B. & O. R. Co. v. Jameson*, 13 W. Va. 383.

Hire-Bonds—Set-Off.—Upon an action on a bond given for the hire of two slaves, one of whom was never delivered to the hirer, the obligor is entitled, under a special plea filed under the act of April 16th, 1831, Sup. Rev. Code, p. 157, to a credit to the amount of the hire of the slave not delivered. *Isbell v. Norvell*, 4 Gratt. 176.

Equitable Set-Off.—R. C. having sued N. C. at law on bonds given for the purchase money of land, and N. C. having set up the defence of equitable set-off, the rules governing in an equitable forum must apply and the plaintiff be permitted to rebut the claim by any evidence which would be considered appropriate to his defence, had the defendant elected to proceed by bill in equity. *Caldwell v. Craig*, 21 Gratt. 132.

Action on Bond—Set-Off—Simple Contract Claims.—A bill is filed to have an account taken. The items of the account are simple contract claims, except one, of a bond executed by the defendant to the plaintiff, and of which the defendant had taken possession without the consent of the plaintiff. The defendant, in his answer, sets up simple contract claims against the plaintiff, of the same date with the plaintiff's; and also pleads the statute of limitations in bar of the plaintiff's claims. The bar of the statute being allowed as to the simple contract claims of the plaintiff, the defendant is not entitled

to set off his simple contract claims against his bond. *White v. Turner*, 2 Gratt. 503.

I. PRACTICE.

Docketing of Cause.—In debt on bond, if the common order and the common order confirmed have been regularly entered at rules, the cause is properly on the office judgment docket at the next term of the court; though no endorsement of the proceedings may have been made upon the papers in the cause. *Wall v. Atwell*, 31 Gratt. 401.

If the bond or deed sued on is not filed with the declaration, and the defendant appears at rules and craves oyer of it, which the plaintiff does not give, and the defendant will not plead without oyer, the clerk may properly take the rules without regard to the craving of oyer, so that the case may be ready to be disposed of at the next term of the court. *Smith v. Lloyd*, 16 Gratt. 295.

Joinder in Demurrer.—In debt on bond by B against G and S issue is joined on the plea of payment; defendants to prove payment, adduce evidence that G put money into hands of a third person to pay the debt, who informed B that he had the money to pay off the bond; but B declined to receive it, saying he owed S the other obligor more money, without saying that the debt between him and S had been settled; plaintiff demurs to this evidence of payment, but the court refuses to compel defendants to join in the demurrer; and then there is verdict and judgment for the defendants. *Held*: 1. It is error to refuse to compel a joinder in demurrer to evidence, where the evidence is not plainly against the demurrant; 2. the evidence offered for the defendant, was not proof of payment; and 3. judgment given for defendant, being for this cause reversed, judgment for the debt demanded was rightly given for the plaintiff. *Green v. Buckner*, 6 Leigh 82.

Joint Hearing of Causes.—M sues O in equity, to set aside her bond, as having been fraudulently obtained. O files cross bill in the cause, to attach a debt due by S to M for payment of his claim of M. The cases may properly be heard together. *Magill v. Manson*, 20 Gratt. 537.

When Issue Directed.—Upon the question whether the bond of M was obtained by the misrepresentations of O, the evidence being conflicting, an issue should be directed. *Magill v. Manson*, 20 Gratt. 537.

When Account Not Allowed.—Where a jury have found a verdict for the plaintiff in an action of debt on a bond, an account of transactions, which (although partly subsequent to the date of the bond) are old and stale, ought not to be allowed, for the purpose of obtaining a discount against it. *Randolph v. Randolph*, 1 H. & M. 180.

Conclusion of Argument.—In an action on a bond where the only pleas entered are those of payment and usury, the defendant is entitled to open and conclude the argument to the jury, and a denial of this right constitutes error for which the judgment will be refused. *Sammons v. Hawvers*, 25 W. Va. 678; *B. & O. R. Co. v. P. W. & Ky. R. Co.*, 17 W. Va. 848; *Steptoe v. Harvey*, 7 Leigh 501; *Young v. Highland*, 9 Gratt. 16.

J. BURDEN OF PROOF.

It is the established rule, that the burden of proof of the formal execution of a deed, when put in issue under the plea *non est factum*, rests upon the party claiming under it; and that proof must show that the deed was signed, sealed and delivered by the obligor as his deed. *Newlin v. Beard*, 6 W. Va. 110.

Onus Probandi in Equity.—G having agreed to sell W certain escape-warrants upon W's giving bond and good security for the purchase money. W executes a bond, with a blank for the name of the surety, to be filled up at a certain time and place, when and where the escape-warrants are to be assigned and delivered by G; if W fail to give the surety, a court of equity will not permit G to take advantage of the bond, without proof of his assigning and delivering, or tendering the escape-warrants, within a reasonable time, and before commencing suit upon it; as to which, the *onus probandi*, in equity, lies on him. Page v. Winston, 2 Munf. 298.

K. EVIDENCE.

1. **COMPETENCY OF WITNESS.**—A witness was received to prove, that he paid a sum of money for the defendant to the agent of the plaintiff's assignors, in discharge of the obligation upon which the suit was brought. Meade v. Tate, 2 Call 198.

Test of Competency—Time of Test.—One not a party to a bond who has received the money necessary to pay off the bond and has bound himself to pay it, is a competent witness, in a suit upon the bond, to prove payment by himself in accordance with his agreement. The test of incompetency is the cause of action in issue on trial, and not the fact to which a party is called to testify. Wager v. Barbour, 84 Va. 419, 4 S. E. Rep. 842; Code of 1873, ch. 172, § 21; Acts 1877-78, ch. 256, § 1; Code 1887, §§ 3346, 3349.

Commissioner in Chancery—Competency as Witness.—Four commissioners under decree in chancery for sale of land, are named obligees in bond for the purchase money; and suit is brought on the bond, against the obligor, in the name of the four obligees, for the benefit of another person claiming the beneficiary interest in the debt: one of the obligees and plaintiffs, is a competent witness for defendant on a plea of *non est factum*. Hicks v. Goode, 13 Leigh 493.

Obligor Not a Competent Witness.—If the liability of one obligor in a bond is defeated on a ground not personal to himself (as infancy, bankruptcy or death), the liability of all the obligors is at an end; and therefore one obligor is an incompetent witness for his co-obligor in an action on the bond. Brown v. Johnson, 13 Gratt. 644.

In an action against one of two obligors in a bond, the interest of the other arising from his liability to the defendant for contribution is more direct and immediate than his liability as obligor in the bonds to the obligee; and he is therefore an incompetent witness for the defendant. Brown v. Johnson, 13 Gratt. 644.

In an action on a joint bond against the personal representative of a deceased obligor, a surviving obligor is an incompetent witness for the defendant. Brown v. Johnson, 13 Gratt. 644.

The principal obligor in a bond cannot be a witness for his surety jointly bound with him, because the latter would have recourse against the former for the whole recovery against him, including all subsequent costs expended by him. Jones v. Raine, 4 Rand. 386.

Obligor—Discharge in Bankruptcy—Effect on Competency as Witness.—R's executor brought an action of debt upon a bond against the executor of C. C was one of four obligors on the bond, all of whom were dead but T, and T was a discharged bankrupt. The only issue in the case was on the plea of payment. Held, that T having been released from the payment by his discharge in bankruptcy, was a

competent witness at common law for the defendant, to prove payment of the debt. Reynolds v. Callaway, 81 Gratt. 436. See Radford v. Fowkes, 85 Va. 820, 8 S. E. Rep. 817; Tunstall v. Withers, 85 Va. 892, 11 S. E. Rep. 566; 4 Min. Inst. (2d Ed.) 764-769. See also, Mutual Life Ins. Co. v. Oliver, 95 Va. 450, 23 S. E. Rep. 504; Knick v. Knick, 75 Va. 12; Borst v. Nalle, 28 Gratt. 434.

Bond—Surety—When a Competent Witness.—One of two sureties in a joint and several obligation for the payment of money, having received from the creditor a covenant that he shall never be sued thereon, is a competent witness for such creditor, in a suit brought by him as mortgagee of the debtor's land, to set aside a sale and conveyance of the land to third persons, under a prior deed of trust executed by the debtor. Waggener v. Dyer, 11 Leigh 384.

Bond—Partner—Competency as Witness.—In an action of debt on a bond executed by Isaac Campbell & Co. and Andrew Campbell, it appearing that the firm name had been signed by one partner without the authority of the co-partner, it was held that the co-partner was a competent witness since in the case at bar his interest in the cause hung equally between the parties. Black v. Campbell, 6 W. Va. 61; Baring v. Reeder, 1 H. & M. 154.

Bond—Action—Collateral Transaction—Competency of Witness.—W brings debt on a bond against H, and H pleads payment and set-off, on which there is issue. He files with his plea a statement of the payment, which was the amount of a bond of W and J to L, and that W agreed with H, if H would pay the bond due to L, H should have credit for the amount as a payment on the bond sued on. Held, H is a competent witness to prove what passed between himself and J in relation to the arrangement between him and J, for the procurement by H of the bond of L, though J is dead. Huffmans v. Walker, 26 Gratt. 314.

2. **EVIDENCE—ADMISSIBILITY.**—If in debt on bond, with a *proferri*, the defendant craves *overt*, which is given, but the bond shown is a copy, and the defendant plead payment, he waives the necessity of producing the original, and a copy may be given in evidence at the trial, upon due proof of the loss or destruction of the original. Taylor v. Peyton, 1 Wash. 324 [252].

Depositions as Evidence.—In an action of debt on a joint and several bond against two defendants if proper notice to take depositions is served on only one of them, the depositions should be admitted in evidence only against the one duly served. Bowyer v. Knapp, 15 W. Va. 277.

Joint Obligation—Accounts—Admissibility as Evidence.—In debt on a joint obligation, to which the defendants plead payment, they cannot give in evidence a covenant between one of the plaintiffs and one of the defendants, with parol testimony that the plaintiff settled with that defendant, who was the principal debtor, and in such settlement kept their accounts separately, and that each was entitled to one moiety of the debt; that the defendants gave notice that a discount would be claimed by them on account of said covenant; and that the plaintiff who was party to the covenant, said that the same was not settled, and that he intended to allow a credit for it. Arnolds v. Jacksons, 6 Munf. 106.

Declarations of Obligor—Admissibility as to Surety.—The acts, admissions and declarations of the principal obligor in a bond, done and made at the time of its delivery, are evidence against his sureties on the

bond, though he is dead, and therefore not a party to the suit. *Walker v. Pierce*, 21 Gratt. 722.

In the case of *Hodnett v. Pace*, 84 Va. 873, 6 S. E. Rep. 217, in an action on a bond against the administratrix of a surety, the alleged admissions of the principal obligor in the bond, made, if at all, in the absence of the surety, were held to be mere hearsay and inadmissible in evidence.

Opinion of Attorney—Evidence.—The written opinion of an attorney of a party, or the recitals in a bond, though the papers are filed with the answer of a defendant, and are not excepted to as evidence, are not competent proof of the facts recited in them against other parties. *James River, etc., Co. v. Littlejohn*, 18 Gratt. 53.

Record in Chancery Suit—Admissibility as Evidence.—Debt on bond, with condition, that defendant should pay plaintiff \$196, in case plaintiff should be made liable as partner of D. S. and two others, for that or any less sum more than his just proportion, and in case D. S. should be found indebted to the partnership to that or any less amount, after full settlement of the partnership accounts, and application of all effects of the partnership to payment of demands against it; breach assigned, that plaintiff had been made liable for a greater sum more than his just proportion, and D. S. had been found indebted to the partnership in a greater sum, as would appear by the decree in a suit in chancery for the settlement of the partnership transactions; issue on the plea of covenants performed. *Held*, the record of the suit in chancery, to which all the partners or their representatives were parties, declaring that the plaintiff had paid 499 dollars more than his proportion, was competent evidence for plaintiff, though defendant was not a party to the suit. *Beecon v. Stephenson*, 7 Leigh 107.

Usurious Bond—Evidence of Amount Advanced.—A bond is given to close a series of transactions between the obligee and obligor, consisting of loans on the one side and payments from time to time on the other, and when the bond is executed, all the written evidences of the previous transactions are surrendered to the obligor; after the death of the obligee, the obligor files a bill in equity against his administrator, alleging usury in the bond, and setting forth the rate of interest reserved, but not the amount of money advanced, of which a discovery is called for from the administrator, who answers that he has no information enabling him to make such discovery; this court is of opinion that the transactions were in fact usurious, and that the bond, given for money loaned on usury, is within the statute and void as a security for money. *Held*, nevertheless, under the circumstances of this case, the bond should be received as evidence of the amount advanced. *Campbells v. Patterson*, 11 Leigh 114.

Bonds—Action—Conveyance—Evidence of Payment.—The bond sued upon was executed in 1813; and the intestate of the plaintiff having died in 1816, his brother qualified as one of his administrators. In order to sustain the presumption of payment from lapse of time and other circumstances, the defendant offered in evidence a deed by which he conveyed to the brother, whilst he acted as administrator, a lot of ground for the price of \$3,205. *Held*, that it was competent evidence. *Perkins v. Hawkins*, 9 Gratt. 650.

Bonds—Action—Evidence of Ability to Loan.—In an action of debt upon a bond for two thousand dollars, purporting to be for money loaned by the plaintiff

to defendant deceased, evidence tending to show that the plaintiff had not the pecuniary ability to make the loan of the amount and character evidenced by the bond in controversy is competent and relevant and should have been admitted. *McDowell v. Crawford*, 11 Gratt. 377.

Joint Bond—Admissibility as Evidence—Proof of Execution Necessary.—In an action of debt on a bond payable on demand, against three obligors, a plea of *non est factum* was entered. The plaintiffs after proving the signature of one of the obligors to the said bond, but without having proved the signature of the other two obligors, offered the bond in evidence to the jury, to which the defendant objected. *Held*, the objection was proper and should have been sustained. *Kuykendall v. Ruckman*, 2 W. Va. 382.

Bonds—Action—Immaterial Evidence.—In an action of debt on a bond the plaintiff, at the trial, offered the bond in evidence, which was objected to by the defendant as not having been stamped according to the act of congress, defendant offering to prove that bond was not stamped at the time of its execution, but since its execution, a stamp had been placed upon it without his knowledge or authority. It was held that such evidence on behalf of defendant was properly excluded. *Myers v. McGraw*, 5 W. Va. 30.

3. WRITING OBLIGATORY—VARIATION BY PAROL.—A valid obligation created by an instrument under seal, and not performed, can only be discharged at common law by a sealed instrument. In certain cases the statutes have allowed sealed obligations to be discharged by other matter, and in these particular cases such matter may be pleaded and proved at law. But it is sound principle that in an action on an instrument under seal, no parol agreement can be pleaded in bar, unless the statute gives the defence. *Stephoe v. Harvey*, 7 Leigh 501.

Loose verbal declarations of a parent that he meant an existing debt by bond to be considered as an advancement, are not sufficient to cancel the debt or defeat the recovery of it by the parent's executor. Such intent, to be of avail, must be evidenced by writing or by such acts as are sufficient to cancel the debt. *Arnold v. Barrow*, 2 P. & H. 1.

An obligor cannot be permitted under the law to set up and prove, in avoidance of his solemn obligation, a parol promise by the obligee that he would never require payment of the said bond but would surrender and give the same to the said obligor as her portion of his estate. *Chapman v. Persinger*, 87 Va. 581, 13 S. E. Rep. 649; *Towner v. Lucas*, 13 Gratt. 705, 722; *Harris v. Harris*, 23 Gratt. 766.

Parol evidence is not admissible to prove, in behalf of one of three sureties in a bond, that he was induced to sign the bond upon the express promise of the obligee that he should not be required to pay any part of it, and that said obligee would give the said surety a written indemnity to save him harmless. *Towner v. Lucas*, 13 Gratt. 705.

In the absence of fraud, parol evidence is not admissible to show that the obligee contemporaneously with the execution of a bond promised not to enforce it as against one of the parties who executed it. *Barnett v. Barnett*, 83 Va. 508, 2 S. E. Rep. 733; *Watson v. Hurt*, 6 Gratt. 633; *Towner v. Lucas*, 13 Gratt. 705.

Parol evidence is not admissible to prove that bonds and a deed of trust were not to be paid and executed according to their terms, but were only to be paid out of the profits of the property for the price of which they were given. *Sangston v. Gor-*

don, 23 Gratt. 755; Peyton v. Stuart, 88 Va. 76, 16 S. E. Rep. 160. See also, Colhoun v. Wilson, 27 Gratt. 639.

Joint Obligation—Proof of Suretyship.—Parol evidence is admissible to show the fact that one of two joint obligors in a bond was the surety of the other. To allow such evidence is not inconsistent with either the terms or legal effect of the obligation. The binding force of the bond remains unaltered as to both of the obligors, and they are still jointly and severally bound for its payment. Williams v. Macatee, 86 Va. 681, 10 S. E. Rep. 1061.

4. **EVIDENCE—JUDGES OF.**—If the pleas put in issue the loss of the bond, then that issue must be tried by the jury; and if there was evidence introduced before the jury bearing on the question of the loss of the bond, it was for the jury to decide upon the sufficiency of the evidence to establish the loss; and it was error in the court to exclude it. Colley v. Sheppard, 31 Gratt. 312.

5. **EVIDENCE—FAILURE OF.**—In the case of Lindsay v. McCormick, 82 Va. 479, on exception to the allowance of credit for alleged payment of money due on a bond, it was held, that after disregarding all incompetent evidence, sufficient proof had been produced to establish payment of said bond.

In the case of Accident Ins. Co. v. Baker, 34 W. Va. 667, 12 S. E. Rep. 884, various pleas mentioned were held bad, and it was held that the verdict of the jury should have been set aside and new trial awarded, because no facts were proved to warrant the finding of the jury, nor any evidence tending to prove any of defendant's pleas, and judgment was given for the defendant Brown, a debtor under his hand and seal, who, though summoned, entered no appearance and made no defense, and on grounds, if any, personal to his sureties.

L. JUDGMENT.

1. **JOINT OBLIGATION—JOINT JUDGMENT.**—At common law in a joint action against several parties, there can be but one final judgment, and it must be for or against all the defendants; and the rule is the same, whether the contract sued on is joint or joint and several, or whether the action is founded on several and distinct contracts, as the maker and endorsers of a negotiable note. Steptoe v. Read, 19 Gratt. 2.

Upon a *scire facias* to revive a judgment against two persons jointly, and in all joint actions against two persons on a contract, it is error to enter final judgment against one, until the plaintiff has matured the case against the other also, so that a joint judgment may be entered against both, or has proceeded against the other as far as the law authorizes or enables him to proceed. Early v. Clarkson, 7 Leigh 88.

Where the principal and sureties are sued jointly, and the judgment is erroneous as to the sureties, it must be reversed as to all; although the judgment would have been good against the principal, if he had been sued alone. Munford v. Overseers of the Poor, 2 Rand. 318.

In debt on bond for money payable twelve months after date against four obligors, declaration counts against them as joint obligors; but it appears, by defendants' pleas and plaintiff's replications, as well as by evidence of the trial, that in fact the bond was first sealed and delivered by three of the obligors, of whom one was principal and the other two sureties; and that the fourth obligor sealed and delivered it some time after the debt fell due, with a view in so doing to substitute himself as

surety in place of one of the original sureties; and this was done with the assent of the obligee, of the principal obligor, and of the surety for whom the fourth obligor was to be substituted, but without the consent or knowledge of the other original surety. Held, the original obligation was the joint contract of the three obligors, but the obligation of the fourth obligor was his several contract, and therefore plaintiff cannot recover joint judgment against the obligors. Baber v. Cook, 11 Leigh 606.

Joint Action—Judgment under Statute in Virginia.

At common law a judgment recovered against one of two or more persons on their joint contract was a bar to an action against the other. This rule is changed in Virginia by the statute which declares, in effect, that there shall be no merger of the original cause of action until there has been a judgment against every person liable to a recovery upon it. Under this statute, in a proceeding by motion against an ex-treasurer and his sureties, a confession of judgment by the principal does not affect the plaintiff's right of action against the sureties. Cahoon v. McCulloch, 93 Va. 177, 23 S. E. Rep. 225.

In an action of debt upon a bond against five persons, upon one of whom the process is not served by direction of the plaintiff, the four plead usury in the bond, and three of them plead severally *non est factum*. On the trial the jury find in favor of the three defendants, on the plea of *non est factum*; but cannot agree on the plea of usury. There is a judgment in favor of the three, and the case is continued as to the fourth. Afterwards there is a verdict against the fourth; and he moves in arrest of judgment. Held, under the statute, Code 1901, ch. 177, § 19, there may be a judgment in favor of the three at one time, and a judgment in favor of the plaintiff against the fourth defendant at another time. Bush v. Campbell, 26 Gratt. 408; Beasley v. Sims, 81 Va. 646; Muse v. Farmers' Bank, 27 Gratt. 254; Moffett v. Bickle, 21 Gratt. 280; Steptoe v. Read, 19 Gratt. 2; Cahoon v. McCulloch, 93 Va. 177, 23 S. E. Rep. 225; Choen v. Guthrie, 15 W. Va. 107; Enos v. Stansbury, 18 W. Va. 480; Hoffman v. Bircher, 22 W. Va. 552. See Barton's Law Pr. (3d Ed.) 428; 4 Min. Inst. (3d Ed.) 669; Gibson v. Beveridge, 90 Va. 606, 19 S. E. Rep. 785.

Va. Code 1887, § 3396, provides, that, "where, in any action against two or more defendants, the process is served on part of them, the plaintiff may proceed to judgment as to any so served, and either discontinue it as to the others, or, from time to time, as the process is served as to such others, proceed to judgment as to them, until judgments be obtained against all." Under this statute judgment may be had on a forthcoming bond against sureties who have been served by process though the principal has not been served with notice of the motion. Newberry v. Sheffey, 89 Va. 286, 15 S. E. Rep. 548.

Joint Action—Judgment under Statute in West Virginia.—At common law where a joint action is brought upon a joint, or upon a joint and several contract, and all the defendants are alive and have been served with process, only one judgment can be rendered therein, and that judgment must be jointly against all of the defendants, or none of them, save only in a case where some of the defendants are discharged upon matters of defence personal to themselves, which do not go to the whole ground of the action. This rule is relaxed by West Virginia statute so as to permit a plaintiff who brings his joint action against all the joint contract-

ors, to recover against one or more of them, although the action may be barred as to others, where the plaintiff's declaration shows that he could have recovered against any of them *separately*, if he had *sued them only*, and where he proves at the trial the contract as alleged in his declaration. The cases of *Bush v. Campbell*, 26 Gratt. 428, and *Muse v. The Bank*, 27 Gratt. 254, are disapproved by the West Virginia court. *Hoffman v. Bircher*, 23 W. Va. 537; *Choen v. Guthrie*, 15 W. Va. 111; *Stephoe v. Reed*, 19 Gratt. 1, and *fool-mole*: *Moffett v. Bickle*, 21 Gratt. 230.

Joint Bond—Separate Judgments.—It is not erroneous to take separate judgments, during the same term, upon a joint bond. *White v. Tally*, 5 Call 98.

In an action of debt against two, one dies, and the suit is revived against his administratrix; and then she and the other defendant give separate confessions of judgments, and a separate judgment is entered against each. This is not error. *Richardson v. Jones*, 12 Gratt. 53.

2. JUDGMENT—DAMAGES.—In a debt on a bond, damages need not be laid in the declaration or found by the jury. *Taylor v. McClean*, 3 Call 481 [557].

In an action on a bond with collateral condition, the plaintiff may recover more damages than he has laid in the declaration. *Winslow v. Com.*, 2 Hen. & M. 459.

On a bond with a collateral condition, the jury may find more damages than are laid in the declaration. *Johnstons v. Meriwether*, 3 Call 454 [523].

It has been long well settled, that in debt upon a bond, with collateral condition, damages may be assessed beyond those laid in the declaration, if the penalty is sufficient to cover them. *Payne v. Ellzey*, 2 Wash. 143; *Johnstons v. Meriwether*, 3 Call 523; *Peerce v. Athey*, 4 W. Va. 22. See *Woodson v. Johns*, 3 Munf. 230.

3. JUDGMENT—INTEREST.—The court, in an action upon a bond, may instruct the jury with regard to the interest. *Fine v. Cockshut*, 6 Call 16.

By Va. Code 887, sec. 3390, "the jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and fix the period at which such interest shall commence."

When Interest Allowed.—Upon a bond to pay the purchase money of land, but with a provision that upon the vendee's failure to get the legal title from a third party, the contract of sale shall be void; the vendee having been let into possession and continuing to hold, and himself neglecting to get in the title; he shall pay interest. *Bailey v. James*, 11 Gratt. 468.

The penalty and condition of a bond for the payment of money, is in the same sum. It is proper to treat it as a single bill, and to give judgment for the amount of the bond with interest from the time of payment. *Fleming v. Toler*, 7 Gratt. 310.

In debt on a bill penal, a judgment, entered upon *nil dicti* or *non sum informatus*, ought not to be reversed on the ground that the declaration, though describing the bill penal correctly as to the principal, penalty, and date, omits to mention that the debt is payable "with interest from a day prior to the date"; and that the judgment, in conformity with the bill penal, is entered, for the penalty, to be discharged by the principal, with such interest, and costs. *Harper v. Smith*, 6 Munf. 389.

Although the obligation sued on purports to be a penal bill, yet if the sum named in the penalty and condition correspond, there is no error in treating it as a simple obligation and rendering a verdict and judgment for the amount, with continuing interest

from the time the same falls due. *Fleming v. Toler*, 7 Gratt. 310.

In an action of debt on a single bill, under Va. Statute 1805, interest was allowed, although not mentioned in the bill or demanded in the declaration. *Baird v. Peter*, 4 Munf. 76; *Wallace v. Baker*, 2 Munf. 334.

Bonds—Interest—War—Effect.—A bond on its face bears interest, and is secured by deed of trust on land, and obligor and obligee live near each other, and within the Confederate States during the war; and sums about equal to the interest upon the bond are paid upon it annually until after the war. The bond is properly chargeable with interest during the war. *Crenshaw v. Seigfried*, 24 Gratt. 272; *Fred v. Dixon*, 27 Gratt. 541.

Absence of Plaintiff—Effect as to Interest.—Evidence, in order to extinguish the interest, may be given to the jury on the plea of payment to a bond, that the plaintiff was absent in foreign parts beyond the seas, and had not any known agent or attorney within the commonwealth. *McCall v. Turner*, 1 Call 133.

Time from Which Bond Bears Interest.—It is the settled rule that when no day is named in a bond or note given for the payment of a precedent debt it is due and payable on the day of its date, and bears interest from date, though no interest be reserved. The interest follows the principal as the shadow the substance. *McVeigh v. Howard*, 87 Va. 599, 18 S. E. Rep. 31; *Jones v. Williams*, 3 Call 106; *Hatcher v. Lewis*, 4 Rand. 157.

Where no time is fixed for the payment of the principal of a bond, it becomes due immediately, and interest will be allowed from the date of its execution. *Kent v. Kent*, 28 Gratt. 840; *McVeigh v. Howard*, 87 Va. 599, 18 S. E. Rep. 31.

"The words 'on demand' have plain, distinct, clearly defined, legal and popular significations, well known to the courts and to the people. When an obligation for money or its equivalent is executed containing this provision, the parties perfectly understood that the debt is payable presently; that it is due immediately and bears interest from its date." *STAPLES, J.*, in *Omohundro v. Omohundro*, 21 Gratt. 626; approved in *McVeigh v. Howard*, 87 Va. 599, 18 S. E. Rep. 31.

A bond being given to make a title to a particular tract of land, "to contain a certain number of acres," but not binding the obligors to convey any other specific lands to make good a deficiency; the only remedy for such deficiency is a proportionable compensation in money, according to the price agreed on for the whole tract, with lawful interest from the time the same was payable. *Chinn v. Heale*, 1 Munf. 63.

Upon a sale of a house and lot, upon credits extending through several years, separate bonds are taken for the interest. They will bear interest from the time they fell due. *Græme v. Cullen*, 23 Gratt. 266.

Coupons for interest bear interest from the time they are payable. *Gibert v. W. C., etc., R. Co.*, 33 Gratt. 586.

Continuing Interest.—C and P executed their single bill, dated October 18th, 1871, whereby they promised, "six months after date to pay to H or order the sum of seven thousand dollars, with interest at the rate of 12 per centum per annum from date." *Held*: 1. The contract for interest at the rate of 12 per cent. per annum was legal under the constitutional provision in force at the time of the contract, and is not affected by the subsequent

abolition of that provision. 2. The obligors in the bond are bound to pay interest at the rate of 12 per cent. per annum, not only up to the maturity of the bond, but after maturity and until the payment thereof. *Cecil v. Hicks*, 29 Gratt. 1; *Strayer v. Long*, 88 Va. 715, 3 S. E. Rep. 372; *McVeigh v. Howard*, 87 Va. 606, 18 S. E. Rep. 81; *Roberts v. Cocke*, 28 Gratt. 207, and *note*; *Shipman v. Bailey*, 20 W. Va. 147; *Barbour v. Tompkins*, 31 W. Va. 410, 7 S. E. Rep. 1; *Martin v. Thayer*, 37 W. Va. 28, 16 S. E. Rep. 489.

Where a bond provided for the payment of a sum of money three years after date, with interest at 10 per cent. per annum from date, and the claim was audited by the commissioner at 10 per cent. to the time the report was completed, it should bear interest, on the aggregate amount of principal and interest, from that date, at the contract rate of 10 per cent. per annum until paid. *Barbour v. Tompkins*, 31 W. Va. 410, 7 S. E. Rep. 1.

If a bond by its terms bears interest at three per cent. from date, a decree for the payment thereof should be for the aggregate sum due, the interest being computed at three per cent. to the date of the decree, and then the decree ought to provide for the payment of interest thereon at the rate of three per cent. until paid. A decree providing for interest on such aggregate sum as six per cent. is erroneous. *Pickens v. McCoy*, 24 W. Va. 244; *Brooke v. Roane*, 1 Call 206; *Bent v. Patten*, 1 Rand. 25.

A contract of sale, dated Aug. 26, 1873, says the bonds for the purchase money are "to bear interest from this date." The trust deed describes the bonds as "dated Sept. 10, 1873, with 6 per cent. interest from August 26, 1873." The bonds say, "with 6 per cent. interest from date above," when there is no "date above," except the date of maturity of the bond. *Held*, the bonds bear interest from the date of the contract, Aug. 26, 1873, till paid. *Ware v. Starkey*, 80 Va. 191.

4. PENAL BOND—RECOVERY IN EXCESS OF PENALTY.—The American rule to be deduced from all the cases seems to be, that against a surety in debt on bond, nothing shall be recovered beyond the penalty; that against the principal in that form of action, interest may be recovered beyond the penalty, while in England the penalty appears in all cases, except perhaps in equity, to be the absolute limit. But in neither country can damages in gross be recovered, against either principal or surety, beyond the penalty. *Supervisors v. Leonard*, 16 W. Va. 470.

Where the principal and interest, due on a bond, amount to more than the penalty, and damages are found by a verdict, judgment ought not to be entered for the penalty and costs, to be discharged by the principal and interest, with the damages so assessed and the costs; but for the penalty and damages, if not exceeding those laid in the writ. *Tennant v. Gray*, 5 Munf. 494; *Atwell v. Towles*, 1 Munf. 175; *Wilson v. Spencer*, 11 Leigh 261; *Pate v. Spotts*, 6 Munf. 394.

Interest on a bond or judgment for a penalty may be recovered at law or in equity, although the principal and interest exceed the penalty. *Tennant v. Gray*, 5 Munf. 494; *Roane v. Drummond*, 6 Rand. 182; *Baker v. Morris*, 10 Leigh 294; *Tazewell v. Saunders*, 13 Gratt. 354.

Recovery against a principal and surety in a bond for the payment of money is not limited to the penalty but may exceed it, so far as necessary to include

interest from the time of the breach. *Perry v. Horn*, 23 W. Va. 381.

It seems, that in an action of debt on a bond at law, the surplus interest beyond the penalty may be given in the form of damages. *Baker v. Morris*, 10 Leigh 284.

5. JUDGMENT—CLERICAL ERRORS.—Judgment upon *nil dicat* in county court, entered on the minute book, "for specialty and costs," and then entered at large, by the clerk, in the order book for debt with interest from 1st March 1818, the date of the specialty, though the day of payment appointed in the condition was the 1st March 1818; the clerk, in his entry in the order book, following, not the condition of the bond, but a memorandum thereon indorsed, that the debt if not punctually paid should bear interest from the date of the bond. *Held*: 1. It was error to give interest from the date of the bond, instead of the day of payment; and 2. this error was a clerical mistake, amendable by the court, at a subsequent term. *Enbank v. Ralls*, 4 Leigh 330 [308].

In debt on a decree for money, a conditional judgment is entered in the office, without awarding a writ of inquiry of damages, and the judgment not being set aside becomes final at the next term, an execution is sued out on the judgment; but at the ensuing term, the court set aside the judgment as irregularly entered, and gave defendants leave to plead to the action. *Held*, it was error to enter judgment in the office without awarding an inquiry of damages and this was a clerical error, which the court properly corrected at a subsequent term. *Shelton v. Welsh*, 7 Leigh 175.

A judgment is rendered by default in the general court, upon motion, on a bond due the Commonwealth; but the clerk, in entering the judgment, only allows interest from a date posterior to that from which, by the terms of the bond, interest was to run. This error may be amended, upon motion to the general court, at a succeeding term. 1 Rev. Code, 512, sec. 108; *Com. v. Winstons*, 5 Rand. 546.

When an action is brought on a note, which was executed at the time when 5 per centum was the legal rate of interest, upon which the defendant acknowledged the action for the principal with interest from the date of the note; on which acknowledgment a judgment was rendered for the principal with interest at the rate of six per centum per annum; this is not a mere clerical error, but one which can only be rectified by an appellate court. *Bent v. Patten*, 1 Rand. 25.

An action of debt is brought upon a bond for 100 dollars; the bond is declared on as a bond for 100 dollars, but is in fact for 108 dollars; the defendant confesses judgment for the debt in the declaration mentioned, and the judgment is entered for 100 dollars. At a subsequent term of the court the plaintiff, upon notice to the defendant, moves the court to correct the judgment by the bond. *Held*, this is not a clerical error which may be mentioned under the 108th section of the statute of Jeofails. 1 Rev. Code, ch. 128, p. 512; *Compton v. Cline*, 5 Gratt. 137.

6. JUDGMENT—CERTAINTY.—A judgment ought not to be entered on a bond for a sum of money, "subject to a credit for a hogshhead of tobacco," without ascertaining its value; but the amount of such credit should, in the first place, be ascertained by a writ of enquiry, and judgment should be rendered for the balance. *Early v. Moore*, 4 Munf. 232.

Debt upon a bond, the penalty of which was in current money, with condition to pay so much

sterling money. After verdict for the plaintiff, the judgment should be for the current money mentioned in the penal part of the bond, to be discharged by the sterling money in the condition; and the court ought to settle the rate of exchange, which on an appeal should appear in the record. *Terrell v. Ladd*, 2 Wash. 198 [150].

Debt upon a bond in the penalty of £1800 Pennsylvania currency, of the value of £1440 Virginia currency. The defendant having confessed judgment, it was entered for £1800 Pennsylvania currency, of the value of £1044 current money of Virginia, to be discharged by the payment of £720 current money of Virginia, with interest, etc. The confession of judgment fixed the value of the money, and furnished the clerk with a standard for ascertaining the value of the sum mentioned in the condition. *Strode v. Head*, 3 Wash. 192 [149].

Issue before joined on a plea that bond was obtained by fraud, a verdict, "for the defendant, because the jury believe the bond was obtained by fraudulent means," is sufficiently positive and certain. *Chew v. Moffett*, 6 Munf. 120.

In an action in a debt on a bond several issues were made up on several pleas of defendant, one of which was faulty and immaterial; verdict was given for plaintiff on the material issues, nothing being said as to the immaterial issue. On writ of error to the judgment it was held good though there was no finding on the immaterial issue. *Ray v. Clemens*, 6 Leigh 600.

7. JUDGMENT—IN GENERAL.

Amount of Judgment.—Upon a declaration in covenant, charging in general terms the breach of contract to deliver a quantity of corn at a given time, the jury, in assessing the damages, are not restricted to the value of the corn at the time when it should have been delivered, with interest thereon until payment; but may give such damages as, upon the evidence, the plaintiff appears to have sustained. *Merryman v. Criddle*, 4 Munf. 542.

Form of Judgment.—A judgment on a bond, for payment of a debt by instalments, should be, "for the debt in the declaration mentioned, to be discharged by the sum due at the time of institution of the suit; reserving liberty to the plaintiff to resort to a *scire facias* to recover such other damages as might thereafter arise under the condition of the bond. *Thatcher v. Taylor*, 3 Munf. 249.

A executes a writing obligatory to B for payment of tobacco, under a pecuniary penalty, with a condition annexed, that it shall be void if C shall pay the tobacco, or its value to A. In an action brought on this writing the declaration assigns a breach of the condition, and the defendant pleads payment. The verdict and judgment ought to be for the penalty, to be discharged by payment, not of the tobacco with interest thereupon, but of damages, for breach of the condition. *Overstreet v. Marshall*, 1 H. & M. 381; *Moore v. Fenwick*, *Gilmer* 214.

In debt on a bond with collateral condition, if the plaintiff, by replication to the plea of conditions performed charge the breach defectively, but fully avoid, by other replications, such other pleas of the defendant as go to the foundation of the action; to which replications demurrers are improperly filed; and the court enter judgment for the defendant, generally, upon all the pleadings; such judgment is erroneous:—it should only be that the faulty replication is not sufficient in law, etc., and therefore

that the plaintiff take nothing, etc. *Lane v. Harrison*, 6 Munf. 573.

Lien of Judgment—Extent.—A judgment being rendered for the penalty of a bond, to be discharged by the payment of the principal sum due and interest; and the payment of the money having been delayed by an injunction until the principal sum due and the interest exceed the penalty, the lien of the judgment only extends to the penalty, the damages upon the dissolution of the injunction, and the costs at law, without continuing interest. *Michaux v. Brown*, 10 Gratt. 612.

Judgment—Error—Waiver of Objection.—In debt on a bond, defendant pleads that bond was delivered as escrow upon conditions which were not performed, *et sic non est factum*; the plea is not verified by affidavit of the party according to statute 1 Rev. Code, ch. 128 sec. 33, but plaintiff makes no objection for want of such affidavit, and the plea is received by the court, issue joined upon it, trial, verdict and judgment for defendant: the want of the affidavit to the plea, is not a good objection to the judgment in an appellate court. *Hicks v. Goode*, 12 Leigh 498.

Error—Judgment by Consent—Effect.—In an action of debt on two bonds the declaration contains two counts, the first on the larger bond and the second on the smaller, to which there was a special plea in bar. The plea purported to make the defence to the whole action, but the matter of defence went only to the consideration of the larger bond mentioned in the first count. In this the plea was clearly bad but judgment was entered, by consent of the parties, for the amount of the smaller bond on the second count. The defect in the plea above mentioned was cured by the judgment entered by consent, and this left the plea to be tested as to the matter of defence, on the sufficiency of the facts stated in it. *Jarrett v. Nickell*, 4 W. Va. 276, 294.

Judgment—Estoppel.—In an action of debt upon a single bill the clerk enters up the following judgment: "This day came the plaintiff by his attorney, and the defendant withdrawing the plea of payment, saith nothing in bar, whereby the plaintiff remains thereof undefended; therefore it is considered by the court that the plaintiff recover against defendant." *Held*, on motion to set aside judgment, the defendant should not be allowed to contradict the record by evidence *aliunde*, and to prove that what is asserted was not true. *Richardson v. Jones*, 12 Gratt. 58.

Judgment—Requirement of Peace Bond—Error.—Upon an indictment under part 1, § 1, ch. 74, of Acts of 1875, the court, in rendering a verdict of guilty, has no authority to add to its judgment an order requiring the defendant to give bond to keep the peace and in default thereof be imprisoned until such bond be given. And if such order be improperly added it constitutes error for which the judgment will be reversed. *State v. Gould*, 28 W. Va. 258.

Premature Judgment—Error.—On September 30, 1867, a summons in debt on a single bill was sued out, returnable to the succeeding October rules, to which rules it was returned executed on the 3d of October; and the plaintiff filed his declaration, and the defendant not appearing, a conditional judgment was entered against him, which was confirmed at the succeeding rules held October 28, 1867; and final judgment was entered against the defendant on the last day of the succeeding term of the circuit court, which was October 31, 1867, which was less than one month after the service of process on the

defendant. *Held*, the entry of final judgment against the defendant within one month after he was served with process was erroneous. Code 1873, ch. 166, § 6; *Dillard v. Thornton*, 29 Gratt. 392.

Creditor—Double Remedy—Single Satisfaction.—A creditor having two different securities, or two sets of obligors bound for his debt, may proceed against both at the same time, although he is entitled to but one satisfaction. *Carter v. Hampton*, 77 Va. 681; *Asberry v. Asberry*, 33 Gratt. 468.

M. RELIEF IN EQUITY.

1. **JURISDICTION.**—Although under the Code of 1866, ch. 71, sec. 2, one, not party to a bond, may maintain an action in his own name thereon, yet this remedy is not exclusive and recourse may still be had to a court of equity where his rights can be more adequately and completely enforced than at law. *Ralphsynder v. Ralphsynders*, 17 W. Va. 28.

There is a joint covenant by four to pay to R \$300 a year for her life. To secure which annual payment each was to execute his bond with surety, binding him to pay \$75 a year; but this is not done; nor is the annuity paid to her. After the death of R, one of the four joint obligors qualified as her administrator with the will annexed, and then files his bill in equity against the obligors to recover the amount due her. The administrator being one of the obligors could not sue the other at law, and therefore the court of equity has jurisdiction to enforce the payment of the money. *Rodes v. Rodes*, 24 Gratt. 256.

There is a joint covenant by four to pay to R \$300 a year for her life. To secure which annual payment each was to execute his bond with surety, binding him to pay \$75 a year; but this is not done; nor is the annuity paid to her. After the death of R, one of the four joint obligors qualified as her administrator with the will annexed, and then files his bill in equity against the obligors to recover the amount due to her. The administrator being one of the obligors could not sue the others at law, and therefore the court of equity has jurisdiction to enforce the payment of the money. *Rodes v. Rodes*, 24 Gratt. 256; *Spooner v. Hilbish*, 92 Va. 338, 23 S. E. Rep. 751, citing the principal case. See also, *Booth v. Kinsey*, 8 Gratt. 560, and *Ralphsynder v. Ralphsynders*, 17 W. Va. 37.

Plaintiff files a bill in chancery calling on defendants to answer and say on oath whether certain bonds were delivered, and this they did. After eliciting their answer it was held that he could not dismiss the suit; the court had jurisdiction in chancery and plaintiff could not then resort to an action at law; and still less could he litigate his rights both at law and in equity at the same time. *Jones v. Bond*, 86 Va. 81, 9 S. E. Rep. 503.

In an action of debt upon two bonds executed on the 29th of December 1862 and payable twelve months after date, the defendants appeared and defended the action; and the jury scaled the debt, reducing it from \$5,193 to \$3,000, with interest from the day the bonds fell due; and the judgment was accordingly. About a year after the judgment was rendered the defendants in the action filed their bill for an injunction to the judgment, on the ground that the debt was scaled as of its date, instead of the day of its payment. *Held*, the defendants having defended themselves at law, cannot afterwards come into equity for relief. *Penn v. Reynolds*, 23 Gratt. 518.

2. GROUNDS OF EQUITABLE RELIEF.

a. *Lost Instrument.*—A court of equity has jurisdiction

to grant relief on a lost bond, but it generally requires an affidavit of the loss of the bond to accompany the bill. No such affidavit, however, is required where the case stated in the bill would give a court of equity jurisdiction, independently of the loss of the bond. *Lyttle v. Cozad*, 81 W. Va. 183, 198.

Upon a bill in equity for relief upon a lost bond, though regularly an affidavit of the loss of the bond, etc., ought to be filed with the bill, yet if such affidavit is not so filed, but is filed afterwards in the progress of the cause, this is sufficient. *Thornton v. Stewart*, 7 Leigh 128.

Equity will set up a lost bond against a surety, and upon satisfactory proof that the lost bond bound the heirs, against the heirs of the principal obligor also. *Kerney v. Kerney*, 6 Leigh 478.

b. *Mistake.*—In the case of *Mason v. Nelson*, 11 Leigh 227, defendant in an action upon one bond, believing the suit to have been instituted upon another bond then justly due, allowed judgment to go by default, and, upon learning the true state of affairs, sought to enjoin the judgment in a court of equity. It was held, under the peculiar circumstances of the case, that defendant was entitled to relief in equity, and a perpetual injunction was granted accordingly.

A court of equity, at the instance of a *bona fide* purchaser, will correct a defective execution of a power by a married woman, where the defect is the result of mere inadvertence or mistake. The case is unlike an application to reform a married woman's conveyance under a statute relating to alienations by married women, in which case the statute is strictly construed because in derogation of the common law. *Freeman v. Eacho*, 79 Va. 43.

A sum of money is lent to a firm, and the firm is charged with it on the partnership books, but the partner with whom the transaction occurs, executes by mistake a penal obligation, in the name of the firm, under seal, instead of giving merely a promissory note; one of the partners dying, those who survived him, and the executors of the decedent, convey all the effects belonging and debts due to the firm, in trust to pay the debts from the firm; then the creditor who lent the money files a bill in equity against the surviving partners, the executors of the decedent, and the trustee. *Held*, that although at law there would be no remedy on the sealed obligation, except against the partner who executed it, yet equity has jurisdiction to correct the mistake, and hold all the partners as much bound as if there were no seal. *Galt v. Calland*, 7 Leigh 594.

c. *Penalties.*—If a bond be given in the usual form with a penalty, conditioned to be discharged by the payment of the principal at a future day "with interest from the date if not punctually paid," such back interest is to be considered an additional penalty and not recoverable. *Waller v. Long*, 6 Munf. 71.

A court of equity will relieve against back interest secured by way of penalty. *Mosby v. Taylor*, *Gilmer* 172.

Relief may be given against a bond, taken to secure a title to lands, although the consideration was not expressed in the bond; indeed a court of equity will always relieve against a penalty, where compensation can be made. *Hackett v. Alcock*, 1 Call 463.

A stipulation, in a bond or deed of trust that, upon the debtor's failing, at any time, to pay the annual interest, the principal sum (which otherwise would not be payable until a distant day), shall be

considered due, is in the nature of a penalty, against which it is the province of a court of equity to relieve. *Mayo v. Judah*, 5 Munf. 495. But see *Nickels v. People's Bldg. Ass'n*, 93 Va. 880, 25 S. E. Rep. 8.

d. Illegal Consideration.—Where it is proved that part of a bond is on gaming consideration, and other part on lawful consideration, a court of equity will relieve against the part which is vicious, and sustain that which is good; the obligor being plaintiff in equity. *Skipwith v. Strother*, 8 Rand. 214.

3. EXTENT OF EQUITABLE RELIEF.—Courts of equity will decree interest upon a bond of judgment beyond the penalty, against the principal debtor. *Tazewell v. Saunders*, 13 Gratt. 354.

M, a married woman, by executing certain bonds must be presumed to have intended thereby to charge her separate estate with their payment, and the separate estate is therefore liable in equity for such payment. *Garland v. Pamplin*, 32 Gratt. 305.

A simple contract creditor shall receive out of the real assets descended to the heirs at law as much as has been paid to bond creditors out of the personal assets. *Haydon v. Goode*, 4 H. & M. 460.

When lands, held by several devisees in the same will, are charged in equity to satisfy a bond debt of the devisor, the decree should be against the lands of all the devisees (or the money received or claimed, in lieu thereof), in ratable proportions, and not against the land of one only, with liberty to that one to sue the others for contribution. *Foster v. Crenshaw*, 3 Munf. 514.

In equity, whether the lands be charged by the will, or the bond, of the ancestor, creditors must exhaust the personal estate, before they can resort to the lands. *Garnett v. Macon*, 6 Call 308.

4. WHEN EQUITABLE RELIEF REFUSED.

Intention of Parties.—A executes a bond, by which he binds himself to pay a sum certain for the purpose of discharging the debts of C. College, upon condition that like pledges shall be obtained to the whole amount of the college debts; and that this fact shall be announced by a committee constituted of persons named, of whom he was one. A dies before the announcement that the pledges have been obtained; but they are obtained, and the announcement is made by the other members of the committee and another person appointed in his place; and the whole of the college debt is afterwards discharged. *Held*, the bond having been given for the purpose of paying the debts of the college, and they having been paid, a court of equity will not enforce the payment of the bond against A's estate. *Columbian College v. Clopton*, 7 Gratt. 168.

Fraud of Plaintiff in Equity.—Where a party executes his bond to another for the purpose of aiding fraudulent sale he can obtain no relief against the bond in a court of equity—he being *in pari delicto* with the defendant. *Barnett v. Barnett*, 83 Va. 504, 23 S. E. Rep. 733.

If an executrix (without being subject to any compulsion, or undue influence), for the fraudulent purpose of protecting the estate of her testator from the demands of creditors, give her own bond as executrix, for a *scilicet* debt, and confess a judgment, she is not entitled to relief in equity; neither will the court give its aid to the obligee, but will leave him to his remedy at law. *Clay v. Williams*, 2 Munf. 105.

Laches.—It is not the province of courts of equity to see that justice is done, in the abstract, in all possible cases, but only to lend its aid, when from

any cause, without his own default or neglect, a party defendant at law, cannot have justice done him in the courts of law; and this is true, where the discounts, abatements or damages, which are claimed to be set-off in equity, arise out of a breach of the same contract on which the judgment at law is founded. *Cabell v. Roberts*, 6 Rand. 580.

Equity will only relieve against a judgment at law if the omission of the defendant to avail himself of his defence at law was unmixed with any negligence in himself or his agents. Otherwise relief will be denied; for "it is more important that there should be an end of litigation, than that justice be done in every case." *Richmond v. Robinson*, 24 Gratt. 548; *Dey v. Martin*, 78 Va. 4; *Gentry v. Allen*, 33 Gratt. 257; *Black v. Smith*, 18 W. Va. 800; *Braden v. Reitzenberger*, 18 W. Va. 290; *Crumlish v. Shen. Val. R. Co.*, 40 W. Va. 627, 23 S. E. Rep. 90; *Goolsby v. St. John*, 25 Gratt. 146, and *note*.

Equity will not extend its aid to one who has been guilty of culpable negligence. It requires that the party who asks relief on the ground of mutual mistake shall have exercised at least the degree of diligence which may be fairly expected from a reasonable person. And it has been repeatedly decided that equity will not relieve against mistake when the party complaining had within his reach the means of ascertaining the true state of facts, and, without being induced thereto by the other party, neglected to avail himself of opportunities for information. *Persinger v. Chapman*, 93 Va. 353, 25 S. E. Rep. 5; *Foster v. Rison*, 17 Gratt. 340; *Towner v. Lucas*, 13 Gratt. 705; *Harris v. Harris*, 33 Gratt. 766; *White v. Campbell*, 80 Va. 181; *Chapman v. Persinger*, 87 Va. 581, 13 S. E. Rep. 549.

After a new trial at law, a court of equity will not grant a new trial, merely because injustice has been done; but, the party applying for a new trial, must show that he has done everything that could be reasonably expected from him, to obtain relief at law. *Faulkner v. Harwood*, 6 Rand. 123.

In an action at law upon the bond, after the husband's death, by the wife, against the obligor, a plea of set-off setting forth an agreement with the husband, that his dealings with the firm of T. P. & Co., and J. K. B. & Co., of which the obligor was a member, should be set off against the bond, is waived by the defendant's counsel, and there is a judgment for the plaintiff. *Held*, upon a proceeding in equity by the obligor in his own right and as the administrator of the husband, to enjoin the execution of the judgment, that off-sets, if valid, constituted a legal defence, and no sufficient excuse having been shown for failing to make the defence at law, equity will not interfere. *Perkins v. Clements*, 1 P. & H. 141.

5. FORM OF REMEDY.

a. Requirement of Bond.—A purchaser of land, sold under a decree of a court of chancery, may be compelled to comply with the terms of sale and complete his purchase, by paying cash, if it be a cash sale, or giving bond and security if it be on time, either by process of contempt or by a rule to show cause why the land should not be resold. *Gross v. Percy*, 2 P. & H. 483.

b. Injunction.—B for himself and others sells part of a tract of land to J, who executes to B his bonds for the purchase money. The other parties refuse to confirm the contract, but sell their interest in the whole tract to J. B having recovered judgment upon the bonds, J is entitled to have the judgment enjoined, and to be relieved to the extent of the injury he has sustained by the failure of B to procure

the others to execute the contract. *Jaynes v. Brock*, 10 Gratt. 211.

W being the owner of a lot in Danville, made a verbal contract for the sale of it to S, and S sold to A, who received a conveyance for it from W with general warranty, and executed his bonds to S for a balance of the purchase money. At the time for the sale the lot was made more valuable by the change in a street, which street was afterwards returned to its original location by the town authorities. S having made no representations on the subject to A, having been guilty of no fraud, and having made no warranty of title, is not liable to A for the damage he has sustained; and A cannot enjoin the collection of the purchase money. *Price v. Ayres*, 10 Gratt. 575.

A vendee who enters under a title bond from his vendor and holds the land under that title till the statute of limitations would bar a recovery against him by an adverse title, cannot set up defect of title in his vendor existing at the date of sale to him, as a ground of injunction to a judgment on his bond given for the purchase money. *Amick v. Bowyer*, 3 W. Va. 7; *Piedmont Coal & Iron Co. v. Green*, 3 W. Va. 54; *Peers v. Barnett*, 12 Gratt. 410.

In *Slack v. Wood*, 9 Gratt. 40, an injunction to a judgment at law was dissolved as improvidently granted, without answer, though the bill charges that the judgment was recovered without appearance or defence for the money which the plaintiff in the judgment alleged he had paid as surety, though he had not in fact paid one cent of the money, but the same had been paid by another surety, against whom there was a joint judgment with the plaintiff at law; and that of this fact the plaintiff in the bill had no knowledge until after the judgment. *Bierne v. Mann*, 5 Leigh 396 [364]; *Wallace v. Richmond*, 26 Gratt. 67; *Ayres v. Morehead*, 77 Va. 586; *Yuille v. Wimblish*, 77 Va. 306; *St. John v. Alderson*, 32 Gratt. 143, and cases cited; *Canada v. Barksdale*, 84 Va. 742, 6 S. E. Rep. 10.

c. Substitution.—D, being the endorser of C on several notes discounted at bank, and it being expected that he will endorse other notes for C, the latter executes a bond binding his heirs to D, with a condition that he will, when required by the bank of D, pay off all such notes, and thus indemnify and save D harmless. C dies whilst D is his endorser on several notes, which by an arrangement with the bank, D takes up by the discount of his own note; and subsequently the administrator of C pays up the whole amount of the notes, principal and interest, out of the personal estate. *Held*, that this bond was a valid security to D, binding the heirs of C; and that the notes, to the extent of the penalty, having been paid out of the personal assets, the simple contract creditors of C are entitled to have the assets marshaled, and to be substituted to the extent of the penalty of the bond, to the rights of D upon the real estate, in the hands of the heirs of C. *Cralle v. Meem*, 8 Gratt. 496.

Where A gives his bond for duties on goods imported into the United States, for B the importer, and B is not bound in the bond; if A discharges the bond, it seems that he cannot be placed in the condition of the United States, as to priority, in a claim against A under the law of Congress. *Enders v. Brune*, 4 Rand. 438.

d. Cancellation.—S, under duress of an attachment sued out to enforce the performance of an erroneous decree of the court of chancery, executes an obligation; on a bill of review, the obligation was

properly directed to be given up for cancellation. *Nelson v. Suddarth*, 1 H. & M. 350.

If, by an agreement under seal, between the vendor and purchaser of a tract of land, it be covenanted, that if any part thereof should be recovered by law from the purchaser, the vendor will abate, or refund, in proportion; and that he will not bring suit, upon the bond for the purchase money, until the quantity of land which the purchaser is to get be ascertained, provided the purchaser prosecutes a suit for that purpose in reasonable time; a court of equity will give relief, by injunction, against a premature suit on the bond; and if it appear that the purchaser prosecuted his suit in reasonable time, and could not recover the land, the court will decree that the injunction be perpetual; that whatever money has been paid be refunded; that the bond be surrendered and cancelled, and the contract rescinded. *Bullitt v. Songster*, 3 Munf. 54.

e. Vendor and Vendee—Vendor's Lien—Marshaling Assets.—Where a vendor's lien is retained to secure the payment of several bonds given for the purchase money of lands, and a judgment is obtained at law by the assignee of one of said bonds against the principal on said bond and his surety, the surety cannot come into a court of equity and compel such assignee to exhaust his vendor's lien before enforcing the collection of his judgment by execution against the surety, although it is shown that the principal debtor is insolvent. *Armstrong v. Poole*, 30 W. Va. 666, 5 S. E. Rep. 257.

f. Equity Treats That as Done Which Ought to Be Done.—In the case of *Atwood v. Shenandoah V. R. Co.*, 85 Va. 966, 9 S. E. Rep. 748, it was held under the particular circumstances of that case that the failure of a trustee to certify bonds properly issued under first mortgage did not invalidate the bonds. "Equity regards and treats that as done, which, in good conscience, ought to be done." Especially does this maxim apply on behalf of general mortgage bondholders who were induced to believe, and had the right to believe, that these securities, upon the faith of which they parted with their money, were in all respects regular and complete.

N. APPELLATE COURT.

1. JURISDICTION OF APPELLATE COURT.—Debt on a bill penal for \$100, conditioned to pay \$47. The defendant moved the court to stay proceedings, because the penalty was inserted for the purpose of giving the court a jurisdiction which the law withheld. Decided, that the superior court ought not to sustain the motion, but declined deciding whether the fact alleged would avail, if pleaded. *Heath v. Blaker*, 2 Va. Cas. 215.

The court of appeals has jurisdiction to revise any judgment on a bond, provided the penalty amount to the sum limited by law. *Newell v. Wood*, 1 Munf. 555.

How Jurisdiction Determined, Where Proceeding is on a Penal Bond.—Where the proceeding before a court or justice is on a penal bond, with condition for the payment of money, the jurisdiction shall be determined as if the undertaking to pay such money had been without a penalty. And where jurisdiction depends on the amount of a judgment, if it be on such bond, the jurisdiction shall be determined by the sum, payment whereof will discharge the judgment. Code of 1887, ch. 171, § 2494, p. 631.

In an action of debt, in a county court, on a single bill for more than one hundred dollars, if the jury find for the plaintiff, the debt in the declaration

mentioned, to be discharged by less than one hundred dollars; and, upon a writ of supersedeas, at the instance of the defendant, the judgment be reversed; the plaintiff cannot appeal to the court of appeals from such judgment of reversal. *Lewis v. Long*, 3 Munf. 136.

In an action upon a bond, with a penalty, for the payment of money, the jury may make their verdict for the aggregate of principal and interest, and the defendant cannot appeal for that cause, since the mode of finding the verdict is for his benefit. *Smith v. Harmanson*, 1 Wash. 8 [7].

2. PRESUMPTIONS IN APPELLATE COURT.—On exception for refusal to grant a new trial because the verdict is contrary to the evidence, the decision of the lower court should be affirmed unless it plainly appear that it is wrong. *Young v. Johnston*, 10 Gratt. 209. See monographic note on "Bills of Exception," pt. VII. appended to *Stoneman v. Com.*, 25 Gratt. 887.

In an action of covenant upon a lost instrument, there is a verdict and judgment for the plaintiff. On a motion by the defendant to set aside the verdict and grant him a new trial which is overruled, the exception sets out all the evidence. If the evidence of the plaintiff is believed, the verdict is correct. If the evidence of the defendant is believed, it is erroneous. An appellate court cannot reverse the judgment. *Great Falls Mfg. Co. v. Henry*, 32 Gratt. 467.

A writ of error lies to the order of the circuit court reversing the judgment of a justice, and setting aside the verdict of a jury on which such judgment is founded, and directing a trial *de novo*. Such writ, will not be sustained by this court unless such circuit court has plainly erred, but the judgment will be affirmed. *Cleavenger v. Rohrbauhaugh*, 46 W. Va. 148, 32 S. E. Rep. 1016.

In a suit on a bond against five obligors, a sixth being omitted, it appearing from the declaration that they were securities for him, but it not being alleged that he had sealed the bond; and no plea in abatement having been filed, the court, after verdict for the plaintiff, will presume that the obligor not named was dead (though not so stated in the declaration), and will sustain the judgment. *Winslow v. Com.*, 2 Hen. & M. 459.

If the bill of exceptions state, that there was no other proof, except what went to prove the bond, sued on, paid, the court will not enquire whether other evidence was improperly rejected. *Smith v. Walker*, 1 Call 24 [28].

In the case of *Smith v. Burton*, 94 Va. 158, 26 S. E. Rep. 412, the plaintiff introduced on the trial a writing obligatory by which the defendants had bound themselves to save him from all loss by reason of his liability on certain notes, and also executions issued on the judgment recovered on the notes, which executions had been paid by him. The plaintiffs, in the appellate court, attempted to show that the evidence did not connect the executions with the notes referred to in the writing obligatory. *Held*, this question should have been raised in the lower court by an objection to the admissibility of the executions as evidence.

3. PROCEEDINGS IN APPELLATE COURT.—A commissioner having by mistake omitted a credit in ascertaining the amount due upon a bond, the appellate court will correct the decree in this respect, and affirm it with costs. *Tazewell v. Saunders*, 13 Gratt. 354.

In an action of assumpsit to recover money received in payment of a bond by an attorney for the plaintiff, if the plea of *nil debet* is entered, though this plea is irregular, it is cured by verdict and will be treated in the appellate court as a plea of non-assumpsit. *Smith v. Townsend*, 21 W. Va. 486; *Hunnicutt v. Carsley*, 1 H. & M. 153; *State v. Seabright*, 15 W. Va. 586.

It seems that, where, in an action of debt on a bond, an office judgment is reversed on the ground that the declaration is radically defective, the appellate court, if the writ be correct, will not enter judgment for the defendant, but send the cause back to be proceeded in from the writ. *Hill v. Harvey*, 3 Munf. 535.

Bill filed to subject heirs to the payment of the bond of their ancestor, does not allege that the heirs are bound in the bond; but makes the bond an exhibit with the bill. The answer does not admit or deny that the heirs are bound in the bond; and before the cause is heard the bond is lost out of the papers in the cause. There is proof of the existence of the bond, but no proofs on the question whether the heirs were bound by it; nor is that question made in the court below; but a decree is made against the heir. *Held*, that though this court will reverse the decree for want of the proof that the heir is bound, the cause will be sent back to give the plaintiff an opportunity to amend his bill, and show that the heir was bound in the bond. *Piper v. Douglas*, 8 Gratt. 371.

819

*Stevens & al. v. Davison.

June Term, 1868, Richmond.

[98 Am. Dec. 692.]

1. **Railroad Corporations—Authority of Directors to Lease Road.**—The board of directors of a railroad company have no authority, without the sanction of a lawful meeting of the stockholders, to make a lease for years of the road and property of the company, with authority to the lessees to operate the road and to charge for carrying upon it.
2. **Same—Same—Case at Bar.**—A by-law of the stockholders provides that no contract shall be made by the directors involving the franchise of the road, except the same be approved by a general meeting representing a majority of the stock, after being recommended by a majority of the stockholders. Though a lease made by the directors does not involve the essential franchise of the company to be a corporation, yet if it authorizes the lessees to take toll upon the road, it involves a franchise within the meaning of the by-law, and is null and void.
3. **Same—Alteration of By-Laws by Directors—Case at Bar.**—Though a by-law of a company authorizes the directors to alter or amend the by-laws, the directors have no authority under said by-law or otherwise to disregard or alter another by-law, which was intended to impose a limitation on their powers.
4. **Same—Appointment of Receiver.**—Though a court of chancery will be reluctant to appoint a receiver to take charge of and manage a railroad, it is competent to do so when such a course is indispensable to secure the rights of the legitimate stockholders, and to prevent a failure of justice.
5. **Same—Same.**—Though the court should properly, under the circumstances, appoint a receiver to

take charge of and manage the road, it may not be proper to enjoin the directors of the company from doing any act as such.

820 *In February, 1854, the General Assembly of Virginia passed an act to incorporate the Alexandria and Washington Railroad Company, with authority to construct a railroad from Alexandria to the city of Washington, with a capital of three hundred thousand dollars, subject to all the provisions of the Code of Virginia applicable thereto. And it was provided in this act, that the said company should not permit the said road to pass into the exclusive possession of any corporation without the limits of the Commonwealth of Virginia.

In February, 1856, the General Assembly passed another act authorizing the Alexandria and Washington Railroad Company, for the purpose of completing their road, to sell their bonds, with coupons attached, to the amount of one hundred thousand dollars, at a rate of interest not exceeding seven per centum per annum, to be paid semi-annually. In pursuance of this act, the said railroad company sold \$30,000 of their bonds, and to secure the same, executed a deed by which they conveyed to Walter Lennox, of the city of Washington, all the property and franchises of the company, in trust to be sold for the payment of the said bonds upon the failure of the company to pay the interest or the principal for six months after it fell due. This deed, however, recognized the existence of another deed, which had been executed in April, 1855, to secure the payment of the principal and interest of sixty thousand dollars of the bonds of the company, guaranteed by the city of Washington.

In February, 1862, the County Court of Alexandria, in pursuance of a provision in the deed to Lennox, on the motion of Joseph Davison, the attorney in fact of the holders of all the bonds in said deed of trust mentioned, reciting that Lennox was incapacitated for executing the trust, appointed Joseph B. Stuart, of Washington city, trustee in the place of said Lennox.

821 And there having *been a failure by the company to pay the interest upon the bonds, at the request of Davison, the attorney in fact of the holders of the bonds, Stuart, in April, 1862, made a sale of all the property and franchises of the company, when Alexander Hay and Joseph Thornton became the purchasers at the price of \$12,500.

A few days after the sale another company was formed under the original charter, with a capital of \$300,000, which was afterwards increased to \$500,000; and in the name of the Alexandria, Washington and Georgetown Railroad Company. The by-laws adopted by this new company provide that it shall be managed by a board of five directors, to be annually elected from among the stockholders; and to hold their offices until their successors are elected; and that the board of directors shall elect from

among their number a president, secretary and treasurer, no two of which offices shall be filled by the same person. The sixth by-law provides, "that the president shall make all contracts of purchase or sale, by and with the advice of the directors, or a majority of the same; but no contract shall be made involving the franchise of said road, except the same be approved by a general meeting representing a majority of the stock, after being recommended by a majority of the stockholders." The eighteenth by-law provides, that these by-laws and regulations may be altered or amended by an affirmative vote at any regular meeting of directors, and the approval of the board at the next regular meeting.

From the time of the organization of the new company Joseph B. Stewart was a stockholder, director, and the secretary of the company. It does not appear when Leonard Huyck became a stockholder of the company, but some time previous to May 5th, 1866, he was a director and the treasurer of the company; and he and

822 Stuart had issued stock of the company, in excess of the amount of *the capital, to the extent of seven thousand three hundred and eighty-four shares. Of this over-issue of stock there were eight hundred and seven shares standing in the name of O. A. Stevens, who was the recording secretary of the company. He says in his answer in this case, that the certificates were filled up in his name in his absence, by Huyck, or under his direction, without the knowledge of himself, and that on the same day, in said office, as soon as he returned, and before the certificates were taken from the office, the same were endorsed by him, under the direction and instruction of Huyck, who thereupon took the same into his possession; and that he, Stevens, received no benefit from the same of any kind.

On the 5th of May, 1866, there was the annual meeting of the directors of the company. This was the day for the annual meeting of the stockholders; but the directors, whose duty it was, had failed to call the meeting. At the meeting of the directors, there were present R. W. Latham, President; F. P. Stanton, Leonard Huyck, and Joseph B. Stuart. The President stated to the meeting, that after mature deliberation, he was confident it would be to the best interests of the company to lease the road for ten years to Oscar A. Stevens and W. Jackson Phelps, one the superintendent, and the other the general manager of the company; and that after a consultation with a majority of the stockholders, representing nearly the whole of the capital stock of the company, he had concluded to lay before the board of directors a lease prepared for that purpose. This lease was approved and ratified by the directors, and the President was directed to execute it; which was done on the same day.

By this lease the said company, by its directors, leased to Oscar A. Stevens and W. Jackson Phelps the road of the said

company, and all its property and rights of every kind, both real and personal, except as hereinafter *excepted, for the term of ten years, commencing on the 5th day of May, 1866, and ending on the 5th day of May, 1876, upon considerations set out at length therein. These considerations were: 1st. That the lessees should pay the interest on the bonded debt of the company, that debt being \$300,000, and the annual interest thereon being \$21,000, payable semi-annually. 2d. That they should pay further, \$7,500 annually, which was to be invested as a sinking fund, to be applied to the payment of said bonded debt. 3d. That they should pay to the company fifty per cent. of the earnings or gross receipts, payable annually at the end of each year, after deducting therefrom the two sums before mentioned. 4th. That they might make all necessary repairs and improvements, for the better practical working operations of said railroad or its branches, either by the use or the sale, with the consent of the directors, of any of the property leased. And they were to keep the road and its branches and all the property leased in good repair. 5th. That they were to furnish and pay for all future rolling stock which they might require in working the road, after the company had paid for and completed the contract for that theretofore purchased and contracted for with Messrs. Grice & Long, of Philadelphia, which was to be paid for by the company, and to belong to the lessees for the purposes of the lease. 6th. They were to keep good, competent men in the management and working of the road; and they were to pay all damages arising from accidents by and through the negligence of their employees, and save the company harmless in this respect. 7th. They were to build certain depots in the manner directed by the company, the cost of which was to be charged to the company, to be deducted from the per centum to be paid by the lessees. 8th. They were to pay all Government, State or city taxes of a general nature, required to be paid by the company. 9th. *They were to observe and fulfill the contracts theretofore made by the company with the Adams Express Company, and with the Alexandria and Fredericksburg, and the Richmond, Fredericksburg and Potomac railroad companies, the company reserving the right to modify these contracts according to the true intent and spirit of the same. And whatever was received under the contract with the Adams Express Company, was to be charged against the company and deducted from the annual per centum to be paid by the lessees, up to \$7,000 per year during the lease, which was to be paid by the express company to the lessees. All over this sum to be treated as earnings of the road and disposed of as such.

The company was to construct the extension of their road from the intersection of Maryland avenue and Sixth street across the canal, or if constructed by the lessees,

it was to be deducted from the annual per centum payable to the company. And all improvements of a permanent character, which might be deemed necessary, and become the permanent property of the company, constructed by the lessees, were to be charged to the company; but after being constructed, they were to be kept in repair by the lessees; but the lessees were not bound to expend in improvements in any year more than the per centum payable to the company. And the company was to pay for all rights of way which might be deemed necessary for the better practicable working of the road. And the company reserved the right to sell and dispose of any real estate that might not be necessary to the working operations of the road. And any additional real estate which might be necessary was to be purchased and paid for by the company. And the company was to take from the lessees, at valuation, all rolling stock and other materials and fixtures acquired by them for the road during the term of its lease, at its termination; and to pay the instalment *of interest which would fall due on the first of June, 1866. And if the lessees failed to pay the interest on the bonded debt for thirty days after it was due, or the \$7,500 for thirty days after the first of June of each year, commencing with June, 1867, or should fail for sixty days after the first of June of each year of the lease, to pay the per centum agreed to be paid after deducting such portion as was properly chargeable to the company, then the lease to be void.

At the meeting of the directors of the company before mentioned, F. P. Stanton resigned his office of director, the resignation to take effect on the adjournment of the meeting; and the lease aforesaid having been executed and delivered during a recess of the meeting, after this was done, at the afternoon session, Stevens was appointed a director in his place.

The company not being able to comply with its contract with Grice & Long, Steven & Phelps were authorized to carry it out on their own account; and having agreed with Grice & Long upon the terms for the purchase of the rolling stock and motive power, they transferred this contract to Adams Express Company, who advanced the money to pay for it, and it was to be held by the lessees as the property of the Adams Express Company, for which they were to pay a rent to Adams Express Company.

In November, 1866, Joseph Davison, one of the stockholders in said railroad company, after notice to the parties, filed in open court, on behalf of himself and such other stockholders as would join him, his original and amended bill, against Stevens and Phelps, the railroad company, and the directors of the company, in which he charged that the lease made by the directors to Stevens and Phelps was null and void, and should be set aside on various grounds. 1st. That the directors had no author-

826 ity, *under the charter and laws of the land, to make the lease. 2d. That they were forbidden by the sixth by-law of the company to make such a lease. 3d. That the directors and lessees were both acting in a fiduciary character to the company when it was made; and that, under all the circumstances, it was invalid and should be set aside; and that at a full meeting of the stockholders of the company held in October, the said lease was repudiated and annulled by a unanimous vote. The prayer of the bill was for an injunction, for the appointment of a receiver, that the lease might be annulled, for an account, and for general relief.

The parties answered at great length, contesting all the grounds stated in the bill for avoiding the lease. The cause being heard upon the bill, the answers and exhibits filed by both parties, the court being of opinion that the lease was made illegally and improperly, and without lawful authority, and that the same should be declared void and be annulled upon a final hearing of the cause, awarded an injunction against Stevens and Phelps, restraining them from the further working of the road by virtue of the said lease; and the directors were enjoined and restrained from acting as officers and directors of the company. And a receiver was appointed to take possession of and control and operate the road, under certain directions stated in the decree.

From this decree Stevens and Phelps obtained an appeal to the District Court of Appeals at Fredericksburg, where it was affirmed; and they then obtained an appeal to this court.

Daniel and G. W. Brent, for the appellants.

R. G. Brent and Magruder, for the appellee.

JOYNES, J., delivered the decree of the court:

827 *The court, without deciding whether or not it would have been competent to the stockholders of the Washington, Alexandria and Georgetown Railroad Company to make such a lease of their railroad as that in the proceedings mentioned, which is a question that does not arise in this cause, is of opinion that it was not competent for the board of directors of the said company, without the sanction of a lawful meeting of the stockholders, to make the lease in the proceedings mentioned: 1. Because a board of directors of a railroad company have no authority to make such a lease under the powers vested in such a board by law; and 2. Because the said lease was in contravention of the sixth article of the by-laws of said company, which provides, that no contract shall be made "involving the franchise of said road, except the same be approved by a general meeting representing a majority of the stock, after being recommended by a majority of the stockholders;" the court being of opinion that, while the said lease does not involve the essential franchise of the said company

to be a corporation, it does involve the franchise to take tolls upon the road of said company, which comes within the meaning of "the franchise of said road," as expressed in the said by-law. And the court is further of opinion, that although, by the eighteenth article of the by-laws of said company, authority is given to the board of directors to alter or amend any of the said by-laws, the said board had no authority, under the said by-law or otherwise, to disregard or to alter the said provision of the sixth by-law, which was intended to impose a limitation upon the powers of the board of directors.

The court is further of opinion, that the said lease, having been made by the board of directors, two of whom had been concerned in the fraudulent issue of a very large amount of spurious stock, greatly exceeding in amount the lawful stock of the company, having been made on 828 the *very day on which the regular term of office of said directors was to expire, and on which the annual meeting of the stockholders of said company should regularly have been held, and when the said board of directors had failed to issue the call which it was their duty to issue for the said meeting; being made to two persons in the employment of said company, one of whom had been an agent, to some extent, in the issue of a large amount of such spurious stock, and securing to the said lessors a clear profit, except the amount payable for taxes, to the extent of one-half of the gross earnings of said company during the term of the said lease, besides the sum of seven thousand dollars per annum, to be paid by the Adams Express Company under a previous contract with the said railroad company; and charging all the debts and expenses of the said company, except the taxes upon the shares of the gross earnings reserved to the said company, the same must be regarded as a fraud upon the rights of the stockholders; and that this conclusion is not repelled by the statement that the said lease was made after consultation with a majority of the stockholders, and with their approval, because: 1. It does not appear whether the stockholders thus consulted were the holders of genuine stock or of spurious stock; and 2. The approval of stockholders thus informally obtained could have no legal force or effect. The court is, therefore, of opinion, that the said lease is null and void, and should be so declared upon the final hearing of this cause.

The court is further of opinion, that while, for the reasons assigned in the case of *Gardiner v. The London, Chatham and Dover Railway Company*, 2 Law Reports (Chancery Appeals) 201, a court of chancery will be reluctant to appoint a receiver to take charge of and manage a railroad, it is competent to do so where such a course is indispensable to secure the rights 829 of the legitimate stockholders, *and to prevent a failure of justice. And the court is of opinion, that under the cir-

cumstances of this case, it was proper for the court to appoint a receiver to take charge of and manage the said railroad until it can be ascertained, by a proper enquiry, to be made in this cause, who are the legitimate stockholders of said company, to whom the custody and management of said railroad should be committed. And the court is of opinion, that it is not made to appear that the Circuit Court erred in not appointing the lessees as the receivers to manage the said railroad during the pendency of this cause.

But the court is of opinion, that it was not proper to enjoin Robert W. Latham, Joseph B. Stuart, Samuel M. Shoemaker, Oscar A. Stevens and J. Deane Smith from acting as directors and officers of said railroad company, or doing any act as such; such an order not being necessary to accomplish the object of the principal order.

The court is, therefore, of opinion, that the said order of the Circuit Court be amended by striking therefrom the order of injunction last mentioned, and that the said order as amended be affirmed; and that the appellants pay to the appellees their costs, &c.

Decree amended and affirmed.

830

*Turner v. Smith, &c.

June Term, 1868, Richmond.

1. **Recovery of Rent—Special Verdict—Inferences by Court—Case at Bar.**—In a proceeding to recover rent due upon a perpetual lease granted out of land, with right of distress and entry if the rent was not paid, a special verdict finds the entry of the grantee of the rent upon the land, and the holding by him and those claiming under him for forty-three years; but does not find that the original entry was under the right of entry given by the deed, or that the parties held adversely, nor any facts from which such an entry or such a possession results as a conclusion of law. The court, therefore, cannot infer either fact.

2. **Taxes—Sale of Land under Act of Congress—Duty of Commissioner.***—Commissioners making a sale of land for taxes under the act of Congress of February 6th, 1863, are bound to bid off the land for the United States, if no person will bid more than two-thirds of its assessed value, unless the owner shall request it to be struck off to some other person at a less price; and the commissioners have no discretion in the case.

3. **Same—Same—Certificate of Commissioner—Void.**—When the certificate of the commissioners of the sale of land for taxes under the act of Congress, shows upon its face, that the land had been sold to a purchaser other than the United States, for less than two-thirds of its assessed value, it shows that the commissioners had no authority to make the sale to the purchaser, and it is therefore void and of no effect.

This was a proceeding upon a warrant of distress for rent issued by a justice of the peace for the county of Alexandria, in April,

1867, at the suit of R. M. & J. M. Smith against David Turner. The warrant was levied and Turner gave a forthcoming 831 bond, which was forfeited *and returned to the clerk's office of the county court of Alexandria.

The case was removed, by consent, to the Circuit Court of Alexandria county, and Turner pleaded nil debet, no rent in arrear, and no demise, on which issues were joined; and on the trial the jury found a special verdict.

It appears from the special verdict that William H. Hannon, being seized in fee of a house and lot in Alexandria, did by deed bearing date the 19th day of November, 1819, with his wife, grant to Wm. S. Moore a yearly rent of two hundred and twenty-four dollars, payable on the 19th day of November and May in each year forever, to be issuing out of and charged upon said house and lot, with right of distress and entry for non-payment of the rent.

On the 15th of July, 1825, Moore and wife conveyed this rent, with other property, with the right of distress and entry, to Robert J. Taylor, in trust, to secure a large debt owing by Moore to Thomas Irwin; and Moore having died insolvent largely indebted to Irwin, Taylor in the year 1830 sold and conveyed the said rent, with the right of distress and entry, to Thomas Irwin, Jr.; and the said rent came by similar conveyances to Thomas Irwin, Jr., and others, descendants of the original Thomas Irwin; and they, by deed of the 21st of May, 1854, conveyed the said rent, with all its incidents, to Richard M. Smith and James M. Smith, "with all the right, title and interest in law or equity which they had or held in the said lot of ground derived from any source whatever."

It appears further that Hannon died insolvent about the year 1821, and that thereupon, or shortly thereafter, Moore took possession of the house and lot, and held it until the sale by Taylor. That Irwin then took possession, and the parties deriving title under him took it successively, until the conveyance to the plaintiffs the 832 Smiths; *and they held it until the sale to Hunter, who has since held possession of it.

In May, 1861, the Smiths abandoned their residence in Alexandria, and went within the military lines of the Confederate States. On the first of March, 1864, the said house and lot was assessed at \$3,500, and was sold for United States taxes, under the act of Congress for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes, to the defendant Turner, who fully complied with the terms of sale, and received the certificate of the commissioners. The certificate is set out in the special verdict, and shows on its face the fact, that the house and lot was assessed on the land books of the State for 1860, at \$3,500, and that it was purchased by Turner at \$1,750.

Upon the facts stated in the special verdict, the Circuit Court rendered a judgment

*See foot-note to Martin v. Snowden, 18 Gratt. 100.

for the plaintiffs. Turner obtained a supersedeas to this judgment to the District Court of Appeals at Fredericksburg; and that court having affirmed the judgment, he brought it by writ of error to this court.

Francis L. Smith, for the appellant.
G. W. Brent, for the appellees.

JOYNES, J. It was contended by the counsel for the plaintiff in error, that no rent was due to the defendants in error at the time they sued out their warrant of distress, which is a ground of defence allowed in such a case by section 4, chapter 189 of the Code. And, in the first place, it was contended, that the ground rent had been extinguished before the sale by the United States tax commissioners, by reason of the title to the rent and the title to the land on which it was charged having been united in the same. To maintain this

833 it was insisted: 1. That *it must be presumed that Moore, when he took possession of the land after the death of Hannon, in 1821, did so by virtue of the right conferred upon him by the deed granting the rent, in case the rent should at any time remain unpaid for thirty days, and no sufficient distress to satisfy the same could be found on the land, to enter on the land and hold the same as his absolute estate; and 2. That if it cannot be presumed that Moore entered upon and held the land under this clause of the deed, the defendants in error and those under whom they claim, had, at the time of the tax sale, held the land in adverse possession for forty-three years, and had thereby acquired a valid title thereto.

But neither of these positions can be maintained. The case comes up on a special verdict. The verdict does not find such an entry by Moore, nor does it find an adverse possession by him or by any other person under whom the defendant in error claims, nor any facts from which such an entry or such a possession results as a conclusion of law. The court, therefore, cannot infer either fact. Nor, indeed, would the facts found warrant us in holding that there was such an entry by Moore, or such an adverse possession, if we were at liberty to make inferences on the subject. The control which Moore assumed over the land after Hannon's death seems to have been taken in order to secure the annual payments due him on account of the ground rent. The lease which he made of the land is consistent with that object. The Irwins entered and held possession under a deed conveying to them the ground rent only. They exercised no act of ownership over the land except to occupy it and pay the taxes, as Moore had done, and with the same object. They asserted no adverse claim to it. When they conveyed the ground rent to the defendants in error, they added a clause purporting to convey also "all their right, title and interest" 834 *in the land "derived from any source whatever." But this clause

passed nothing. Whatever may have been the intention with which that clause was inserted, it could not have been understood by either the grantors or grantees as passing an interest in the land which the grantors neither had nor claimed. It furnished no color of title to the defendants in error.

But it is contended further, that if the ground rent had not been extinguished in the manner contended for before the tax sale, it was extinguished by that sale. It is claimed that this results from the provision of the fourth section of the act of June 7, 1862, (12 Stat. at Large 423,) which is in these words: "The title of, in and to each and every piece or parcel of land upon which the tax has not been paid, as above provided, shall thereupon become forfeited to the United States, and upon the sale hereinafter provided for, shall vest in the United States, or in the purchaser at such sale, in fee simple, free and discharged from all prior liens, encumbrances, right, title and claim whatsoever." It is contended, that the effect of this provision is, that the purchaser shall not take merely the title of the owner to whom the land was charged, or by whom the tax was payable, free and discharged from all encumbrances, &c., but shall take a new, independent and absolute title, and that the sale consequently extinguished the ground rent, the continued existence of which would be inconsistent with such an absolute and perfect title as the act designed to confer upon the purchaser.

Several answers have been made to this argument: 1. That the act of Congress under which the sale was made is unconstitutional and void. 2. That the tax commissioners, in making the sale in the present case, exceeded the authority conferred by the act, so that the sale was void. 3. That whatever may be the operation of the tax sale upon the title to the land itself, 835 it had no effect upon *the title to the ground rent, which was a separate and distinct estate; in support of which the case of *Irwin v. Bank of United States*, 1 Barr. R. 349, was cited.

I do not think it necessary to consider the first or last of these positions, as I think the second is well taken.

The sale is claimed to be void, because, as appears on the face of the certificate of sale, the land was sold for less than two-thirds of its assessed value. The seventh section of the act of June 7, 1862, as amended by the act of February 6, 1863, provides that the several lots and parcels of land upon which the taxes shall not be paid, shall be advertised for sale by the commissioners, and shall be severally sold to the highest bidder, for a sum not less than the taxes, penalty and costs, and ten per cent. per annum interest on said tax; and then adds: "In all cases where the owner of said lots or parcels of ground shall not, on or before the day of sale, appear before the said board of commissioners and pay the amount of said tax, with ten per centum interest thereon, with the cost of advertising the same, or request the same

to be struck off to a purchaser for a less sum than two-thirds of the assessed value of said several lots or parcels of ground, the said commissioners shall be authorized at said sale to bid off the same for the United States at a sum not exceeding two-thirds of the assessed value thereof, unless some person shall bid a larger sum; and in that case, the same shall be struck off to the highest bidder," &c. The provision of the original act, for which the foregoing was substituted by the act of February 6, 1863, was as follows: "And the said commissioners shall, at said sale, strike off the same severally to the United States at that sum, [that is to say, the taxes, penalty and costs, and ten per cent. per annum interest on the tax,] unless some person shall bid the same, or a larger sum."

The argument is, that under the 836 act of February 6, 1863, the commissioners were bound to bid off the land for the United States, if no person should bid more for it than two-thirds of its assessed value, and that they had no authority to sell any parcel of land at less than two-thirds of its assessed value to any purchaser other than the United States, except in case the owner should request it to be done; which does not appear, and is not alleged in this case.

It is a general principle, applicable to the sale of land for taxes, that the purchaser must show that all the provisions of the law have been fully complied with. "The purchaser setting up a new title in hostility to the former owner is not to be favored, and should have looked into it with care before buying, and not expect to disturb or defeat old rights of freehold, without showing a rigid compliance with all the material requisitions of law under which the sale was made." *Mason v. Fearson*, 9 Howard U. S. R. 248. The purchaser is "bound to show every fact necessary to give jurisdiction and authority to the officer, and a strict compliance with all things required by the statute." *Parker v. Overman*, 18 Howard U. S. R. 137. The grounds of this doctrine are fully stated, and numerous cases in which it has been laid down and acted on collected, in the second and third chapters of *Blackwell on Tax Titles*. The counsel for the plaintiff in error, however, relies upon the provision of the act of February 6, 1863, which declares, that "the certificate of said commissioners shall only be affected as evidence of the regularity and validity of sale by establishing the fact that the said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of this act." It is insisted, that the effect of this provision is to preclude any enquiry in respect to the regularity of the sale, or in respect to the authority of the com- 837 missioners "to make it, upon any other grounds except those specified.

It is not necessary to consider what is the effect of this provision. Numerous cases involving the construction of analogous

provisions are collected and discussed by *Blackwell* in his third chapter. Among the cases there cited is *Parker v. Overman*, above referred to. The statute provided that the "deed shall be taken and considered by the court as sufficient evidence of the authority under which such sale was made," &c. It was held that "sufficient" was used in the sense of "prima facie." But whatever may be the effect of this provision in excluding evidence aliunde to impeach the validity of the sale on the ground of want of authority in the commissioners to make it, it can only apply to a case in which the certificate is regular on its face, and shows nothing to impeach the authority of the commissioners. It cannot apply to a case in which the defect of authority is apparent on the face of the certificate. The object of this provision is to exempt the purchaser from the necessity of preserving the evidence that the requirements of the law have been complied with, and to make the certificate evidence of that fact, and conclusive evidence, perhaps, with the exceptions specified. It would be absurd to say that this presumption shall attach to a certificate which shows upon its face that the presumption is contrary to the fact. The object was to afford protection to purchasers who received regular certificates, upon which they have a right to rely. The same considerations did not require that this protection should be afforded to purchasers who take certificates which show upon their face that the sale was made without authority. If the certificate, on its face, shows a prima facie case of sale without authority, the party who relies upon it must establish the existence of any other facts, not apparent on the certificate, which may be necessary to show that the "authority 838 existed, notwithstanding what appears on the certificate. The existence of such other facts cannot be presumed.

The question then is, whether the certificate of sale in this case shows, on its face, that the sale was made without authority. The words of the act are that the commissioners shall "be authorized" to bid off the land for the United States. Literally construed, this language is permissive, not mandatory. But such expressions are often construed to be mandatory, and not merely permissive. And it is a general rule of construction, that where power is conferred upon public officers by statute, in language which literally imports permission or authority merely, the language will be construed as peremptory whenever the power is conferred for the benefit of the public or of individuals. Thus, in *Supervisors v. United States*, 4 Wallace U. S. R. 435, the words "may, if deemed advisable," were construed as imposing a positive and absolute duty, and not as devolving a mere discretion. The same rule was acted on by this court in *Bean & al. v. Simmons*, 9 Gratt. 389. Here the authority was to be exercised for the benefit of the government of the United States, representing the whole public, and the government had a right to claim

its exercise as a duty imperative on the commissioners. The authority was conferred for the benefit of the government, not for the benefit of the commissioners. The ninth and eleventh sections of the act of June 7, 1862, provided for the disposition of the lands to be thus acquired by the United States. Congress certainly did not intend to leave it to the commissioners to say what lands they should bid off for the United States, or whether they would bid off any, and thus to enable them to say to what extent the policy of Congress in the ninth and eleventh sections aforesaid should be carried into effect, or to defeat it altogether. It, on the other hand, laid

839 down ^a rule by which the commissioners were to be governed, and which they had no right to disregard. That Congress intended to impose a duty upon the commissioners in this case, and not merely to invest them with a discretion, appears further from the provision of the act of June 7, 1862, for which that now under consideration was substituted. In that act the language was that the commissioners "shall" strike off the land to the United States, unless some person shall bid a larger sum than that limited by the act. The sum limited by that act was the minimum sum at which the commissioners were authorized to sell the land, namely, the tax, penalty and costs, and ten per cent. interest on the tax. The amendment consisted in these particulars: 1. A permission to the owner to appear before the commissioners in proper person, and pay the tax, with interest and cost of advertising, by which the authority of the commissioners to make a sale would be defeated. 2. A provision, in effect, that the land might be sold to any person for less than two-thirds of its assessed value, if the owner should so request; in which case the commissioners could not bid it off for the United States. 3. That if the owner did not so request, the commissioners should bid off the land for the United States at not more than two-thirds its assessed value, unless some person would bid more. Congress still aimed at the acquisition of land at these sales, to fulfill the purposes contemplated by the ninth and eleventh sections aforesaid, but it chose to change the maximum price at which it might be bid off for the United States, for the reason, probably that it had been found by experience that the United States could get no land, or not enough, at the maximum price limited by the original act. But surely Congress did not mean, by the amended act, any more than by the original act, to leave it to the discretion of the commissioners to say whether they

would or would not carry out the policy of Congress ^{by} bidding off the land for the United States on the terms specified. It meant, in all cases, to take the land to the United States, if it could be obtained on the terms specified in the act, and to deny authority to the commissioners to sell it to any other purchaser.

Another provision of the act of February

6, 1863, is in these words: "And provided further, that at such sale, any tracts, parcels, or lots of land which may be selected under the direction of the President for government use, for war, military, naval, revenue, charitable, educational, or police purposes, may, at said sale, be bid in by said commissioners, under the direction of the President, for, and struck off to, the United States." Here again the language used is, literally construed, permissive, but the obvious meaning was that it should be the peremptory duty of the commissioners to bid off for the United States the lands that might be selected. And the commissioners had no authority to defeat the object of the government by selling such land to another purchaser. The case is substantially analogous to that which has been considered before; in both cases, the law makes it the duty of the commissioners to bid off the land for the United States, and not to sell it to another; in effect, to reserve it from sale.

I consider the provision in question, therefore, as a limitation on the authority of the commissioners. A sale made to another purchaser, of land which Congress directed to be bid off for the United States, and not to be sold to another, was void for want of authority in the commissioners to make it, and not merely voidable at the election of the United States.

It is no answer to say that no injury is done in such a case to the owner, as it is not material to him whether his land is bid off for the United States, or sold to another purchaser, because, in either case, it 841 would be lost to him. ^{If} the question related to a mere irregularity in the proceedings of the commissioners, not in any way affecting their authority to make the sale, it might, and probably would, have been incumbent on the owner to show that the irregularity was one which might, by possibility, have done him an injury. But when, as in this case, the objection goes to the authority of the commissioners to make the sale, it is not necessary for the owner to show that he was, or might have been, injured by the sale. When he shows that the commissioners had no authority to make the sale, he shows that the sale was void and of no effect whatever. See Blackwell, second chapter, especially pp. 63, 64. In this case, the certificate shows a sale for less than two-thirds of the assessed value, which was prima facie without authority, and it does not appear that the owner requested the land to be struck off at less than two-thirds of its assessed value, which could alone repel the presumption arising from the face of the certificate.

I am of opinion, therefore, that the judgment of the District Court should be affirmed.

MONCURE, P., concurred in the opinion of Joynes, J.

RIVES, J., dissented.

Judgment affirmed.

842 *Clafin & Co. v. Steenbock & Co.

June Term, 1866, Richmond.

1. Attachments—Abatement of—Jurisdiction of Court.*

—Where an attachment has been sued out under § 2 of ch. 151 of the Code, ed. 1860, in a suit pending in a county or corporation court, though the defendant has given a forthcoming bond, the court has jurisdiction at a monthly term of the court to abate the attachment.

2. Same—Same—Insufficient Cause—Jury Waived,†

On a motion to abate an attachment on the ground that it was issued on false suggestions and without sufficient cause, the plaintiff declining to express any wish for a jury, and the defendant expressing a wish that a jury might be dispensed with, and that the court should hear and decide the case; the court should hear and decide it without a jury.

3. Same—Same—Same—Question in Issue.—

Though in an action for maliciously suing out an attachment, the plaintiff cannot recover if it appears that the defendant, in suing out the attachment, acted *bona fide* and upon such apparent grounds as justified him in believing that the facts really existed which would authorize its issue; yet upon a motion, under § 22, ch. 151 of the Code, to abate the attach-

*The principal case is cited in Withers v. Fuller, 30 Gratt. 552, and *note*.

†Attachments—Abatement of—Insufficiency of Cause—Jury Waived.—The principal case is quoted from in Wallace v. McCarty, 8 W. Va. 199.

Attachments—In General.—For the proposition that the proceeding by attachment is an extraordinary remedy, and is susceptible of great abuse, it is therefore closely watched and never sustained unless all the requirements of the law have been complied with, the principal case is quoted with approval, in Ballard v. Great Western Mining Co., 39 W. Va. 401, 19 S. E. Rep. 513; Crim v. Harmon, 38 W. Va. 600, 18 S. E. Rep. 754; Long v. Ryan, 30 Gratt. 724, and *note*.

See, in accord, Delaplain & Co. v. Armstrong, 21 W. Va. 211.

In Altmeyer v. Caulfield, 37 W. Va. 856, 17 S. E. Rep. 412, JUDGE DENT, who dissented upon the facts in the case, stated the law however in accordance with the above, saying: "The remedy by attachment is harsh, not only towards the defendant, but also to the other creditors over whom the attachment creditors obtain priority, and should be strictly confined within the limits prescribed, and in a careful compliance with the requirements of the statute as to what the affidavit should contain and express is most just and reasonable. There being a plain direction of the statute violated by the appellant in the preparation of the affidavit, notwithstanding it may be apparent from the affidavit, taken as true, that he is justly entitled to recover, in any event, the sum stated, the circuit court committed no error in quashing the attachment. Clafin v. Steenbock, 18 Gratt. 854; Capehart v. Dowery, 10 W. Va. 180; Sandheger v. Hosey, 26 W. Va. 224; Ruhl v. Rogers, 29 W. Va. 779, 2 S. E. Rep. 798."

In Benn v. Hatcher, 81 Va. 35, the principal case is followed on the point that, the affidavit may be made by the plaintiff's agent, that case going further however, and holding that a third person, who has knowledge of the facts, may make the affidavit.

Attachments—Abatement of—Insufficient Cause—Question in Issue.—For the proposition that, the remedy for attachments is justified, not by the be-

ment on the ground that it has been issued on false suggestions or without sufficient cause, the question is whether, upon all the evidence, there was reasonable ground or probable cause to believe the defendant was doing the act which would authorize the attachment; and not whether the facts as they appeared to the affiant, though only a small part perhaps of the case, afforded him reasonable ground for such a belief.

4. Appellate Practice—Cause Heard by Judge—Exception to Decision.‡—When a cause is heard by the Judge, and there is an exception to his decision, the whole evidence is spread upon the record, and the appellate court must regard the case as upon a demurrer to evidence, considering the appellant as the demurrant.

843 *On the 10th of April, 1867, H. B.

Clafin & Co., wholesale dry goods merchants of New York, sued out of the clerk's office of the Hustings Court of the city of Richmond a writ in case, against J. Steenbock & Co., dry goods merchants in Richmond, returnable to the May rules, laying their damages at fifty thousand dollars. On the same day Moses T. Davis, the agent of Clafin & Co., made oath before the clerk of the said court, that he believed their claim to be just, and that they ought to recover at least forty-eight thousand dollars; and that he believed that the defendants were removing their estate, or the proceeds of the sale of their property, or a material part of such estate or proceeds, out of this State, so that process of execution on a judgment in said suit, when it should be obtained, would be unavailing. On this affidavit an attachment was issued, by which the sergeant of the city was directed to attach the estate of the defendants for the amount of forty-eight thousand dollars; and the sergeant levied the same on their stock of goods in their store in the city of Richmond. In July, Steenbock & Co. gave a forthcoming bond, and thus released the property from the attachment.

Relief of the affiant, however honestly entertained upon reasonable grounds, that the facts sworn to in the affidavit exist but by the *existence of the fact*, the principal case is cited and followed in Sublett v. Wood, 76 Va. 318; Starke v. Scott, 78 Va. 185.

See also, discussion in 1 Va. Law Reg. 233, where the principal case among others is cited.

See, upon the subject of probable cause, Burkhart v. Jennings, 3 W. Va. 242; Spengler v. Davy, 15 Gratt. 381; Burruss v. Trant, 88 Va. 980, 14 S. E. Rep. 845; Wright v. Rambo, 21 Gratt. 158, and *note*.

‡Appellate Practice—Cause Heard by Judge—Exception to Decision.—For the proposition that, where a cause is heard by a judge and there are exceptions to his ruling and the evidence is spread upon record, the appellate court must regard the case as upon a demurrer to the evidence, considering the appellant as the demurrant, the principal case is cited and followed in Ramsburg v. Erb, 16 W. Va. 787; Nutter v. Sydenstricker, 11 W. Va. 542; State v. Denoon, 34 W. Va. 141, 11 S. E. Rep. 1004; Board of Education v. Parsons, 24 W. Va. 553.

See also, Dearing v. Rucker, 18 Gratt. 426, and *note*.

See monographic *note* on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887, sec. 7, E.

At the June rules the plaintiffs filed their declaration in their suit. The first count was in trover, the second in detinue, and the third was for a deceit and false representation in the purchase of a large amount of goods by the defendants from the plaintiffs.

Whilst the cause was pending in court, the defendants Steenbock & Co., at the December term of the court for 1867, moved the court to abate the attachment, on the ground that the same was issued upon false suggestions and without sufficient cause; and the plaintiffs objected to the court's entertaining the motion, on the ground that the same was cognizable only at the quarterly terms of the court; and that the

December term being a monthly term, 844 *the court could not then entertain the motion. But the court overruled the objection, and determined to hear the motion; and the plaintiffs excepted.

After the court had decided to hear the motion, the plaintiffs and defendants were requested to state whether they desired a jury to be empanelled to ascertain the issue of fact arising upon the motion; whereupon the plaintiffs declined to express any desire upon the subject; and the defendants stated that they did not wish a jury empanelled, but desired that the matter should be heard by the court without the intervention of a jury; whereupon the court was of opinion, that it was not proper, in such circumstances, that a jury should be empanelled; and the plaintiffs again excepted.

The court then proceeded to hear the evidence, when an immense amount of testimony was introduced by the plaintiffs and defendants, some in the form of depositions, and some given orally in court, and reduced to writing. And the court held, that the attachment was issued upon false suggestions and without sufficient cause, and rendered judgment that the attachment be abated. To this judgment of the court the plaintiffs again excepted; and the whole evidence was spread upon the record. And they thereupon applied to a judge of this court for a supersedeas to the judgment; which was awarded.

The last exception involves a simple question of fact, and it would be as useless as it is impossible to give a statement of the evidence bearing upon it.

Ould, Lyons and Gilmer, for the appellants.

Williams and Crump, for the appellees.

MONCURE, P. I think that the Hustings Court did not err in overruling the objection of the plaintiffs to the jurisdiction of the said court at a monthly term thereof, to hear and decide the motion of the defendants to abate the *attachment, 845 on the ground that the same was issued upon false suggestions, and without sufficient cause; as mentioned in the first bill of exceptions. A county or corporation court is but one court, though it has both monthly and quarterly terms. The Code, ch. 157, § 16, prescribes the general juris-

diction of such court, declaring, among other things, that it shall have jurisdiction to hear and determine all motions, and other matters made cognizable therein by any statute. Id., § 17, declares that certain enumerated subjects, including "such motions as are provided for by the fifth section of chapter 167, and actions at law, shall be cognizable only at a quarterly term thereof;" and that "all other matters or things authorized by law to be done by or in such court, may be done either at a monthly or quarterly term." The motion in this case is one of the subjects expressly embraced in § 16, prescribing the general jurisdiction of the court; and is not one of the subjects exclusively assigned to the cognizance of a quarterly term thereof, by § 17. It is, therefore, one of the "other matters or things" which the concluding sentence of that section declares "may be done either at a monthly or quarterly term." But it is argued that as the attachment in this case was issued under the second section of chapter 151 of the Code, in a suit pending in the Hustings Court, of which suit a quarterly term of that court has exclusive cognizance under the Code, ch. 157, § 17, as aforesaid, the attachment is an incident to the suit and inseparable therefrom, and like the suit, is exclusively cognizable at a quarterly term; and therefore, that the motion to abate the attachment could not be entertained at a monthly term. But I do not think there is any such necessary or inseparable connection between the attachment and the suit. And I think very great inconvenience and injury might arise from the want of jurisdiction by a

monthly term of such a motion, while 846 none whatever *can arise from the existence of such jurisdiction. I am also clearly of opinion that the Legislature intended to give jurisdiction to a monthly, as well as a quarterly term of a county or corporation court in such a case, and that this intention plainly appears throughout the attachment law as contained in the Code, ch. 151. The act of March 19, 1867, Sess. Acts p. 796, cannot affect the case, as the second section of that act provides that until the Criminal Court of the city of Richmond is organized as provided for by the act, the jurisdiction of the Hustings Court of said city shall remain as it now is; and it appears that such criminal court has not yet been organized.

I am further of opinion that the Hustings Court did not err in hearing and deciding the said motion without the intervention of a jury; as mentioned in the second bill of exceptions. "On a motion, when an issue of fact is joined and either party desire it, or when, in the opinion of the court, it is proper, a jury shall be impanelled, unless the case be one in which the recovery is limited to an amount not greater than twenty dollars, exclusive of interest." Code, ch. 167, § 8, p. 704. In this case the plaintiffs and the defendants were requested by the court to state whether they desired a jury to be impanelled to ascertain the

issue of fact arising under the motion. The plaintiffs declined to express any desire upon the subject, and the defendants stated that they did not wish a jury impanelled, but desired that the matter should be heard by the court without the intervention of a jury; which was accordingly done, the court being of opinion that it was not proper, under the circumstances, to have a jury.

But I am of opinion that the Hastings Court erred in deciding that the attachment was issued upon false suggestions and without sufficient cause, and in rendering judgment that the said attachment be abated as mentioned in the third bill of exceptions.

847 *The plaintiffs labor under a great disadvantage in this case, in consequence of the manner in which it comes up for revision before this court; that is, upon a certificate of the evidence on which it was heard and decided by the court below. In such a case the appellate court must regard the case as upon a demurrer to evidence, considering the appellant as the demurrant. In this case, there is a great mass of evidence, and a great deal of it is apparently conflicting. But, in my view of the case, there is an ample sufficiency of uncontradicted evidence to entitle the plaintiffs to a judgment in their favor on the defendants' motion to abate the attachment. I think the question raised by the motion is, whether the plaintiffs, when they sued out the attachment, believed the matters stated in their affidavit as the foundation thereof, to be true, and had sufficient cause for so believing; not whether those matters were in fact true. If they believed them to be true, and had sufficient cause for so believing, the attachment was then rightfully issued, the conditions on which the remedy was granted having been fully complied with. They cannot be deprived of the benefit of the remedy by its being shown that the matters which they thus believed, and had sufficient cause for believing, to be true, were not in fact true. This, I think, is the necessary construction of the Code, ch. 151, § 22, which gives the defence. "The right to sue out any such attachment may be contested," is the language with which that section is commenced. This means that it may be contested whether the attachment was rightfully sued out. And this becomes more plain as the section proceeds: "And when the court is of opinion that it was issued on false suggestions, or without sufficient cause, judgment shall be entered that the attachment be abated." Can it be said that the attachment was issued on false suggestions, when the affidavit on which it was issued states that the

848 affiant believed the matters *therein stated to be true, and when he had sufficient cause for so believing? My construction is further confirmed by the act of 1840-41, p. 77, ch. 67, § 1, which was the source, or one of the sources, from which the provision in the Code, ch. 151, § 22, was

derived. That act was passed in consequence of the decision of this court in *Redford v. Winston*, 3 Rand. 148, in which it was held, that where an attachment is issued against the estate of a tenant for rent to become due at a future day, on the oath of the landlord that he has sufficient grounds to suspect that his tenant will remove his effects, &c., it is not competent for the tenant, on the return of the attachment, to plead that his landlord had not sufficient grounds to suspect that the tenant was about to remove, &c. The act provided that in all cases of attachment for rent it should be lawful for the tenant to "contest the right of the landlord to sue out his attachment; and if it shall be made to appear that the landlord or lessor had not just cause to suspect that the tenant would move his effects from the leased tenement before the rent was to become due, or that for any other cause an attachment should not have issued, judgment shall be entered for the tenant that the attached effects be restored to him with costs." Under that act there could have been no doubt but that it was incumbent on the tenant, in order to sustain the defence which it gave, to show, not that he did not intend to move his effects from the leased tenement, but that the landlord had not just cause to suspect such intention. The Code, ch. 151, § 30, further confirms the same construction; but I will not quote it here. The second section of chapter 151 of the Code was intended to afford a substitute for the right which formerly existed to demand bail, which right was abolished by the Code of 1849. That section was not in the original report of the revisors. See their report, 753.

When they framed that part of their

849 report, *they had not thought of recommending the abolition of imprisonment for debt, and consequently the right to demand bail in civil actions. Afterwards, in the progress of their work, they determined to make such a recommendation, as may be seen by reference to their report, p. 840; and as one of the consequences of the proposed change, they recommended an amendment of ch. 151, by inserting therein what is now § 2 of that chapter of the Code. That that section was intended as a substitution for bail for the defendant's appearance, is also shown by what is said by this court in *Pulliam, &c., v. Aler*, 15 Gratt. 54. Now, in regard to bail, we know that, in a large class of actions it was demandable of right, and no terms were laid upon the plaintiff in demanding it. He gave no security, and was personally answerable for damages only in an action for maliciously demanding it, without sufficient cause. And in all other personal actions it was demandable by an order of a judge or justice, "upon proper affidavit, verifying the justice of the plaintiff's action, and showing probable cause to apprehend that the defendant will depart from the jurisdiction of the court, so that process of execution cannot be served upon him." 1 R. C. 1819, p. 499, §

44. There can be no doubt as to the true construction of that section. The same may be said of the bail law of 1852, adopted after the Code of 1849 took effect, and embodied in the Code of 1860, forming §§ 33-38 of ch. 151, pp. 652-3. By section 33 the affidavit is required to show, "that there is probable cause for believing that the defendant is about to quit this State," &c.; and by section 36, the court in which the case is pending is authorized, after reasonable notice, to discharge the defendant from custody, &c., on being satisfied, not that the defendant was not about to quit the State, but "that there was not probable cause for so believing." Now there can

not be any doubt about the meaning
850 of this section, and *it is not only in pari materia with the one we are now construing, but is a section of the same chapter of the Code with that. What is indifferently called "reasonable cause," "just cause" and "sufficient cause" in these statutes in pari materia, mean the same thing; and what that meaning is is fully explained by Judge Daniel in the case of Spangler v. Davy, 15 Gratt. 381, in which it was held, that justifiable probable cause for suing out an attachment against the effects of a debtor is, a belief of the attaching creditor in the existence of the facts essential to the prosecution of the attachment, founded upon such circumstances as, supposing him to be a man of ordinary caution, prudence and judgment, were sufficient to produce such belief. It is not, therefore, a rash belief, formed without due caution, which will be sufficient in such cases; but the belief must be formed on reasonable grounds, after proper enquiry. If the plaintiff use all proper means to ascertain the fact, and after doing so act upon his bona fide belief, founded on reasonable grounds, in suing out the attachment, it cannot be abated on the ground that it was issued on false suggestions, or without sufficient cause, even though it may turn out that he was in fact mistaken. If this be not so, the remedy by attachment is no substitute for the old remedy given by the bail law, and is productive of little or no good, but rather of evil. Its chief effect will be to involve men in trouble, litigation and even ruin.

If these be sound principles, and I think they are, their application to this case must result in the reversal of the judgment. I do not wish to make further comments on the evidence in this case than the decision of it absolutely requires; because, unfortunately, the litigation between these parties will not be ended by this decision. The action at law is yet to be tried, and other actions may possibly grow out of its decision; none of which actions do I wish, in the least degree, to affect or prejudice.

851 In my *own mind, I have no doubt but that the uncontradicted evidence in the case shows that the attachment was not issued on false suggestions, or without sufficient cause, within the true intent and meaning of the Code, ch. 151, § 22; and a

sufficient reason may perhaps be assigned for this opinion by briefly referring to a few prominent facts of the case. When the attachment was sued out the defendants were indebted to the plaintiffs in upwards of \$48,000; most of the amount being not then due and payable. About \$40,000 of the amount [I speak in round numbers, which are sufficiently near the truth for the purposes of the case] were for goods purchased on or about the 4th and 8th days of March, 1867. The amount of these purchases was so great—exceeding by three or four times the amount which had ever before been purchased by and of the same parties in the same time—that the suspicion of the plaintiffs was excited, and one of them (Mr. Bancroft) determined not to deliver the goods without being first satisfied by the defendants that it could be safely done. Accordingly, Mr. Nicholas Steenbock was sent for by Mr. Bancroft, and they had an interview on the subject, in which the fullest assurances were given by Mr. Steenbock of the solvency of his firm; of the success of their business; that the goods were wanted for the purpose of being sold in their legitimate Richmond trade; and that the amount would be duly paid at maturity. So well satisfied was Mr. Bancroft with these assurances, that on the faith of them he delivered the goods; taking defendants' notes on time, without security. There is no dispute about this evidence of Bancroft. He fortifies it by figures made at the time, in the presence of N. Steenbock, who tacitly admits the truth of it by not denying it, nor even giving any testimony in the case. Julius Steenbock seems also, in effect, to admit the correctness of the evidence of Bancroft

as to the communication made to
852 *him by N. Steenbock. Shortly after this heavy sale—less than a month—the plaintiffs hear that the defendants are selling goods at auction in Richmond, and send an agent (Davis) forthwith to this city to look after the debt. It turns out that, in the short interval between the time of the sale by the plaintiffs to the defendants early in March, and the visit of Davis to Richmond early in April, 1867, goods to the amount of \$48,000 and more had been at different times shipped by the defendants to New Orleans, and to the amount of thirty odd thousand dollars had been at different times shipped by them to Baltimore; and all of them sold out in those cities at public auction for cash; of course at a heavy loss. And in these shipments all, or nearly all, of the goods bought by the defendants of the plaintiffs for the legitimate Richmond trade were embraced, having been forwarded from Richmond shortly after their arrival from New York—in many instances in the original packages—so that, when search was made for the plaintiffs' goods in the store of the defendants after the levy of the attachment, not one article of them could be found. When, under these extraordinary circumstances, Davis, the agent of the plaintiffs,

called on Julius Steenbock for an explanation, he refused to give any! Can it be said that the attachment sued out by the plaintiffs, under these circumstances, was sued out on false suggestions or without sufficient cause? It matters not how the fact was in regard to John Levy and M. M. Levy, the father-in-law and brother-in-law of Julius Steenbock, and the alleged purchasers of the goods shipped to New Orleans. That fact, if true, was unknown to the plaintiffs, and the defendants refused to give them or their agent any explanation. Julius Steenbock says that Davis showed him no letter of credit from his principals, or the explanation would have been given. But he ought not to have waited for a demand of such an explanation. He knew the goods had been

853 *reluctantly delivered by the plaintiffs, and only on the faith that they were to be sold in the legitimate Richmond trade, and he ought not to have changed them from that destination without letting the plaintiffs know why it was done. But surely it cannot be necessary to say anything more, and I wish, for reasons before stated, to say nothing which is not necessary for the purposes of this case.

I am, therefore, for reversing the judgment.

JOYNES, J. I do not concur in the views which have been expressed by my brother Moncure, in reference to the construction of the twenty-second section of the chapter on Attachments in the Code. As the question is an important one, and of the first impression in this court, I propose to state briefly my own views in respect to it.

The general policy of the attachment laws is to furnish a stringent remedy against the defendant, under certain circumstances which make such a remedy necessary to secure the rights of the plaintiff. Thus, by the first section, the remedy is given where the defendant is not a resident of this State, but has effects or debts due him within the State; by the second section, it is given where the defendant is removing or intends to remove specific property sued for, or his own estate, or the proceeds of the sale of his property, or a material part of such estate or proceeds, out of this State, so that process of execution in the suit will be unavailing; by the third section, it is given, whether the claim be payable or not, where the debtor intends to remove, or is removing, or has removed, his effects out of the State, so that there will probably not be therein sufficient effects of the debtor to satisfy the claim when judgment is obtained therefor, should only the ordinary process of law be used to obtain such judgment; and by the fourth section, it is given to a landlord for the recovery of rent, where

854 *is removing, or has within thirty days removed, his effects from the leased premises, and where there will not probably be left on the premises property liable to distress sufficient to satisfy the

rent when it becomes payable. It is only the necessity of doing justice to the plaintiff, under such circumstances, that authorizes a departure from the general policy of the law, which secures to the debtor the control of his property until judgment has been obtained in the due course of proceeding, and from the general principle, dictated by natural justice and sanctioned by universal law, that a party shall have notice of all legal proceedings which are to bind either his property or his person.

This extraordinary remedy is not only harsh towards the defendant himself, but its operation is harsh towards the other creditors of the defendant, over whom the attachment creditor obtains priority. It is susceptible of great abuse, and has often been greatly abused. It is, therefore, closely watched, and will never be sustained unless all the requirements of the law have been complied with. From the necessity of the case, the law accepts an affidavit *ex parte* as sufficient *prima facie* evidence of the justice of the claim, and of the existence of the facts alleged as authorizing the attachment, to justify the issuing of the process in the first instance. If a party sues out such a process recklessly and without having sufficient grounds to justify him in believing that the facts exist upon which it is based, the defendant can obtain redress by an action for damages. But in this action the plaintiff cannot recover, if it appears that the defendant in suing out the attachment acted *bona fide*, and upon such apparent grounds as justified him in believing that the facts really existed. The case will not be altered though it is made to appear, upon a full development of all the facts, in the trial of the action, that

the appearances on which the defendant acted *were altogether delusive, and the inferences which he drew from them without any foundation in fact. Spangler v. Davy, 15 Gratt. 381.

But the Legislature considered that this remedy did not afford an adequate protection against the abuse of this process, and by the twenty-second section provided another. That section provides that "the right to sue out any attachment may be contested; and when the court is of opinion that it was issued on false suggestions or without sufficient cause, judgment shall be entered that the attachment be abated." The remedy thus provided is altogether different from the remedy by action. The object of the latter is to obtain indemnity from the party, and to inflict punishment upon him for wrongfully and maliciously abusing the process, whereby the plaintiff in the action has been injured and oppressed. The object of the motion is to arrest the mischief by abating the attachment. The question to be tried is the "right to sue out" the attachment; in other words, whether it was issued "on false suggestions or without sufficient cause." In the present case, the ground alleged for the attachment is that the defendants are removing their effects. The plaintiffs in-

sist, that though the defendants may not have been, at the time of suing out the attachment, in the very act of removing their effects, they were engaged in a course of removing them from time to time. If that was so, then a state of facts existed in which the law gives the remedy by attachment. In the view which I take of the law, the question on the trial of the motion was, whether, upon all the evidence, there was reasonable ground or "probable cause" to believe that the defendant was so removing his effects, and not whether the facts as they appeared to the affiant, though only a small part, perhaps, of the facts of the case, afforded him reasonable ground for such a belief. The decision must be

according to the real truth of the
856 *case as ascertained from a full investigation of all the facts, and not according to the apparent or probable truth as it seemed to the affiant upon such of the facts as were known to him. I say nothing of the burden of proof, or as to what is to be done on such a motion if no evidence is offered, or if the existence of any probable cause is left in doubt. No such question has been raised in this case, the defendants in the motion having first introduced their evidence to show the existence of probable cause, and thus assumed the burden of proof. In an action for malicious prosecution, or for maliciously suing out an attachment, the burden of proof is in the plaintiff to show the want of probable cause, though it involves the proof of a negative. 1 Greenleaf Ev. § 78. O'Grady v. Julian, 34 Alab. R. 88.

If, on the trial of such a motion, it appears that there were facts which, at the time the attachment was sued out, afforded reasonable ground to believe that the defendant was engaged in a course of removing his effects, which he had not completed but designed to continue, it is competent for the defendant to show that the inference drawn from these facts was unfounded, and that the real truth of the case was otherwise. Thus, if a merchant in Richmond, who has recently come from another State, is found to be packing up his goods and sending them to the wharf, having disposed of the house in which he had been doing business, especially if the goods are removed at night, there would be reasonable ground to believe that he was removing, or intended to remove, his effects out of the State. It would be competent for him to show that, in point of fact, he was only removing his goods to Petersburg, where he had rented or purchased a store, and intended to prosecute his business. Upon that state of proof, it would appear that the affiant, upon the partial state of facts known to him, had reasonable ground

857 for *suing out the attachment, but that, upon the whole case, there was no ground for the attachment. In such a case, it seems to me, the attachment should be abated. But when the existence of "probable cause," in the first instance, is thus made out, and the defendant under-

takes to repel it by proof that the real truth is otherwise, he must do so by clear evidence. Unless he can place the fact beyond doubt, the attachment must stand, for then the defendant has failed to overthrow the "probable cause" raised by the evidence.

It remains to enquire, whether this is the true construction of the statute?

The attachment provided for by the first section is given upon affidavit, among other things, that the defendant is not a resident of the State. Upon a motion to abate such an attachment, the enquiry must be, whether or not this averment is true. It is a matter of fact, capable of definite ascertainment, and the law contemplates the existence of the fact as the ground of the attachment. The phraseology of this section affords no ground for contending that the motion to abate should turn upon the belief of the affiant, and the grounds which he had for such belief.

The third section gives an attachment upon complaint that the defendant intends to remove, is removing, or has removed his effects out of the State, &c., and an affidavit of the truth of the complaint, to the best of the affiant's belief. Here again the attachment is given on the ground that certain things exist, and the fact that they do exist is established prima facie by the oath of the affiant. On the motion to abate such an attachment, the enquiry must be, whether the fact exists on which the attachment was based, where the fact is one that admits of definite ascertainment, as that the defendant "has removed" his effects, or whether there was probable cause to believe that he intended to remove, &c.,

which is only a probable fact, and
858 *not capable of positive ascertainment. The words of this section cannot be construed so as to refer the right to the attachment to the mere belief of the affiant, on probable grounds. They clearly predicate the right to the attachment on the existence of the facts, actual or probable, which authorize it, and allow the existence of those facts to be established, for the purpose of suing out the attachment, by the oath of the affiant that he believes them to exist. The same remarks apply to the fourth section.

When the fact is such as I have called a probable fact, as that an intention exists to do an act, or that an act will be done in the future, all that we can say of it is, that from evidence presented to our minds, we infer, conclude or believe that the fact exists, or that it will occur, and that the grounds of such inference, conclusion or belief are sufficient to justify it. If these grounds are sufficient to justify such inference, conclusion or belief, there is sufficient cause for the attachment; for that is the highest degree of certainty of which the nature of the case admits. But if, when we look at all the facts, we find that sufficient grounds did not exist for the inference, conclusion or belief, then we cannot say that such probable fact exists or will occur. In such a case, we cannot say that

the attachment was issued on sufficient cause. When, on the other hand, the fact is such a one as has an actual existence and admits of absolute proof, we can affirm that it does exist, and not merely, as in the other case, that we believe it to exist, or believe that it will occur, and that we have sufficient grounds for our belief. Perhaps this distinction between the two classes of facts contemplated by the attachment law, may account for the use, in the 22d section, of the two expressions, "on false suggestions" and "without probable cause." But this does not seem to be a matter of any practical importance.

But it is insisted, that the language 859 of the second section *makes the right to the attachment which it provides for, depend altogether upon the belief of the affiant, and that, in reference to an attachment under that section, the only enquiry under the 22d section is, whether the affiant believed what he swore to, and had present to his mind sufficient grounds to justify that belief, as in an action for wrongfully and maliciously suing out an attachment; in other words, whether he acted honestly and discreetly.

In considering this construction, several observations occur at the outset:

1. It imputes to the Legislature an intention and policy, in reference to attachments under the second section, altogether different from that which it had in reference to attachments under the other sections.

2. It makes the enquiry, on the motion to abate, refer to matters which, in the nature of things, evidence can scarcely reach, namely, the sincerity of the affiant's belief, and the extent of his information.

3. It affords a most inadequate protection against the abuse of the process, by making a man subject to it, though he proves, to demonstration, that he was not doing, or did not intend to do, the act which renders an attachment proper and necessary, and simply because appearances were against him.

4. It is unjust to the creditor himself, who must lose the benefit of his attachment, though the facts of the case clearly entitle him to it, because the affiant did not happen to know all the facts, or enough of them to justify him in his belief, though he acted honestly, and his belief was in accordance with the real truth of the case.

5. It makes the rights and liabilities of the defendant depend not, as in other cases, upon his own conduct as ascertained by judicial enquiry, but on the plaintiff's opinion of it, upon imperfect knowledge of the facts, provided the facts known justify suspicion, standing alone.

860 *I concede that we must adhere to and abide by the language of a statute where it is clear and unambiguous, and not depart from it upon a conjecture that the Legislature could not have meant what it has plainly said. This has been called the "golden rule." (20 Eng. L. & Eq. R. 231; 22 Ibid. 209.) But a strict adherence to the

words of the statute is only required when the intention is so plainly expressed that it cannot be mistaken. The paramount enquiry is, what was the intention of the Legislature. As a primary rule, the intention is to be collected from the words where they are explicit. But unless the words are so explicit and peremptory as to exclude all construction, the court will consider not merely the words, but the intent to be collected from the cause and necessity of the act being made, from a comparison of its several parts, and of other acts in *pari materia*, and even from extraneous circumstances which may throw light on the subject. *Dwarris Stat.* 693; *Fox's adm'r v. Commonwealth*, 16 Gratt. 1; *Hawkins v. Gathercole*, 31 Eng. L. & Eq. R. 305; *United States v. Freeman*, 3 Howard U. S. R. 556; *Sedgwick* 236. And in putting a construction upon the provision of the 22d section we must enquire, in accordance with the rules laid down in *Heydon's case*, 3 Rep. 7: 1. What was the law before that provision was enacted. 2. What was the mischief and defect against which the previous law did not provide. 3. What remedy the Legislature provided to cure the mischief. 4. The reason of the remedy.

First, then, as to the language of the law. The second section gives the attachment on affidavit: 1. That the plaintiffs claim is believed to be just. 2. That the affiant believes the plaintiff is entitled to recover so much at the least. 3. That the affiant believes that the defendant is removing, or intends to remove, his effects, &c. The affidavit is not required to be made by the plaintiff himself.

861 *When the allegation is that the defendant intends to remove his effects, all that the affiant can possibly swear to is his belief. So where the allegation is, that he is "removing his effects," meaning that he is engaged in a course of removing them from time to time, so that, &c., all that the affiant can affirm is his belief. The provision then amounts, in substance, to the same thing as if the statute had said, "upon affidavit that the defendant is removing, or intends to remove." And how would that differ, in substance, from the third and fourth sections, which give the attachment on complaint that certain facts exist, or will occur, and provided that the truth of the complaint shall be verified according to the affiant's belief? In one sense, the law in each case gives the attachment upon the belief of the affiant, and because he believes. But the law does not mean to make the rights of the defendant, in either case, dependent ultimately upon the belief. It means to make them dependent upon the existence of a state of facts in which it allows the extraordinary remedy by attachment, for the sake of justice and from necessity, and only allows the affidavit to be evidence *prima facie* of the existence of such facts, so as to authorize the process to issue.

What, then, is the "sufficient cause" for issuing such an attachment, within the

meaning of the 22d section? Is it the existence of the probable fact sworn to by the affiant, and which, according to the policy of the law, justifies the remedy by attachment; or is it the mere belief of the affiant that such fact does exist or will occur, entertained honestly and upon reasonable grounds. If we look to the policy of the law, to the analogy of other sections besides the second, and to the object for which the provision of the 22d section was enacted, and do not adhere to the strictest literal interpretation of the mere words, the answer must be, as it seems to me, that it is the former.

862 *It is obvious from what has been said, that the language does not necessarily require the other construction. It is not so explicit and unequivocal as to prevent our resorting to the ordinary rules of construction to ascertain the intention of the Legislature. I have adverted to the policy of the attachment law, and to the construction of the first, third and fourth sections, in connection with the twenty-second, and I need say no more upon those subjects. Let us now consider the construction of the twenty-second section with reference to the rules above suggested in analogy to the rules laid down in Heydon's case. In *Mantz v. Henley*, 2 Hen. & Mun. 308, upon an attachment against an absconding debtor, issued on the ground that the affiant had grounds to suspect and verily believed that the defendant intended to remove his effects, the defendant filed a plea in abatement, which was informal, but the purpose of which was to controvert the facts alleged as the ground for the attachment. The plea was held bad on demurrer, because it was defective in point of form; but Judge Roane regarded it as substantially sufficient: thus conceding the right of the defendant to controvert the facts alleged as the ground of the attachment. In that case, the affidavit alleged that the affiant had grounds to suspect and verily believed, &c. The plea did not take issue on these averments of the affidavit, and was not objected to for the failure to do so, but took issue on the facts which the affidavit alleged he believed, and had grounds to suspect. In *Redford v. Winston*, 3 Rand. 148, Winston issued an attachment for rent upon an affidavit that he had sufficient grounds to suspect and verily believed that Redford would remove his effects, &c. Upon the return of the attachment Redford tendered a plea, that Winston has not sufficient grounds to suspect and verily believe that said Redford would remove the effects, &c.

The court held that this plea was 863 properly rejected; and *Judge Green intimated the opinion, that in an action against an absconding debtor, the defendant could not plead that the attachment was founded upon a false suggestion, but was left to his action on the attachment bond. And it is worthy of note, that both Judge Green and Judge Carr regarded the plea tendered by Winston as putting in issue the fact of his being about to remove

his effects, and not as putting in issue merely the sufficiency of the grounds which the affiant had within his knowledge for his belief. The point decided in *Redford v. Winston* was, that in an attachment for rent, the ground for issuing the attachment cannot be controverted. In 1 Rob. (old) Prac. 628, the author intimates his disapproval of Judge Green's dictum in *Redford v. Winston*.

Thus it appears that before the adoption of the Code, it was settled that, in an attachment for rent, it was not competent for the defendant to controvert the grounds on which the attachment was issued, and that it was doubtful and unsettled whether this could be done in an attachment against an absconding debtor. The twenty-second section was intended to provide a remedy for this defect in the law, and to extend to all classes of attachments the right which, in *Mantz v. Henley* Judge Roane conceded to exist in respect to an attachment against an absconding debtor. And accordingly, the revisors, in their note to this section, say, in reference to the provision in question: "This is according to *Mantz v. Henley*, 2 Hen. & Mun. 308. A different rule as to attachments for rent was laid down in *Redford v. Winston*, 3 Rand. 148. * * * By the section as proposed by us, an attachment for rent issued without sufficient cause, is placed upon the same footing as any other attachment."

In support of the construction which I am controverting, reference is made to the act of March 2d, 1827, (Supp. R. C. 256.) and to the act of February 6th, 1841, 864 *(Sess. Acts p. 77,) which are cited in the margin of the Code. The act of March 2d, 1827, provides that it shall be lawful for the tenant "to contest the right" of his landlord to sue out the attachment; and if it shall be made to appear to the court that the landlord had not "just cause to suspect" that his tenant would remove his effects, &c., judgment shall be entered for the tenant, &c. The act of February 6th, 1841, provides to the same effect, and also that judgment shall be entered for the tenant, if it shall appear "that for any other cause an attachment should not have issued." These acts shed not the least light upon the question before us. It still remains to be considered, what is the "right to sue out the attachment" which may be contested, and whether the "just cause to suspect" has reference to the actual facts of the case, or only to such of the facts as were present to the mind of the landlord when he sued out his attachment. The act of March 2d, 1827, was evidently passed in consequence of the case of *Redford v. Winston*, and in order to allow such a defence as was attempted in that case, which, as we have seen, controverted the probable facts alleged as the ground of the attachment, or rather the ground to suspect the existence of those facts, and not merely the belief of the affiant, and the presence to his mind of facts sufficient to justify that belief.

A question analogous to that I am now considering has been decided under the attachment law of Missouri. In *Chenault v. Chapron & al.*, 5 Missouri R. 438, an attachment was issued upon an affidavit that the affiant "verily believed" that the defendant was about to remove his property out of the State. The statute authorized the defendant, in every case of attachment, to file "a plea in the nature of a plea in abatement, putting in issue the truth of the affidavit upon which such attachment was sued out." The defendant pleaded

865 that he did not intend to remove *his property out of the State. To this plea the plaintiff demurred, and assigned for cause of demurrer that the plea did not deny that the affiant did believe that the defendant was about to remove his effects out of the State. The demurrer was sustained by the court below; but the judgment was reversed by the Supreme Court. *Edwards, J.*, delivering the opinion of a majority of the court, said: "Whether the affiant really believes the affidavit true or false, is a matter wholly immaterial, except so far as his own conscience is concerned. He may very honestly believe it true, and yet it may be wholly false. It is not, then, the truth of his belief as to the existence of the fact which is to be put in issue, but it is the existence of the fact itself; that is, whether the defendant was or was not about to remove his property out of the State. The belief of the affiant of the existence of one of the causes mentioned in the first section of the attachment law will authorize the issuing of the attachment, but nothing more. On the trial of an issue as to the truth of the affidavit, the fact authorizing the attachment to issue must be found to exist, or the suit will be dismissed. It was not necessary then that the plea should put the affiant's belief in issue. The frequency of attachments, in cases where credulous affiants merely believed the cause to exist, but where in fact none of the causes authorizing creditors to sue out attachments did really exist, had grown into a great evil, and to remedy this the Legislature passed the last section of the act amendatory of the attachment law. In authorizing the plea in abatement, then, the Legislature intended to strike, not at the shadow, but at the substance of the evil; not at the truth or falsehood of the affiant's belief, a thing that no evidence could touch, but at the truth or falsehood of the facts stated in the affidavit, a thing that was tangible."

The attachment act of New Jersey 866 gives an attachment *against an absconding debtor, "if any creditor shall make oath that he verily believes that his debtor absconds," &c. The courts of that State hold that it is competent to the court, under the general jurisdiction to prevent the abuse of process, to quash an attachment issued without sufficient cause. In *the City Bank of New York v. Merritt*, 1 Green R. 131, it was insisted that the affidavit was conclusive; but the Supreme Court of New Jersey held otherwise. The

Chief Justice said: "The plaintiff or his agent may, from wrong information or other causes, very honestly and reasonably fall into error concerning the absconding of the debtor; but the consequences would be pernicious if the debtor was irrevocably fixed by it, and his property wrested from him by force of the attachment." The same was held, by the same court, in *Brun-dred v. Del Hoys*, 1 Spencer R. 328; and the court said in that case, that the proceedings should be set aside, though the plaintiff may have acted in good faith in making the affidavit.

It has also been urged that the second section of the attachment law was introduced as a substitute for bail, as was said by this court in *Pulliam v. Aler*, 15 Gratt. 54. This is supposed to explain why the attachment under that section is given upon the mere belief of the affiant, and to show the propriety of not abating it when sued out honestly and upon reasonable grounds of belief.

There is no doubt that the object, or one of the objects, contemplated by the introduction of this section was to afford a substitute for bail under the former law. But, while that is so, the attachment provided for by it is not governed by the same rules which applied to bail. Bail gave the creditor no security except for the presence of the defendant when a ca. sa. should be issued against him: if the ca. sa. could be executed, the bail was discharged. The attachment gives a security for the

867 debt by a lien on *the property of the defendant. Bail was demandable as matter of right, and without any affidavit, in all actions of debt upon written obligations for the payment of money, and in all actions of covenant and detinue. In all other actions, it might be obtained by the order of a judge or justice of the peace, upon proper affidavit verifying the justice of the plaintiff's action, and showing probable cause to apprehend that the defendant would depart from the jurisdiction of the Commonwealth. But there was no provision made for discharging the order for bail, or for releasing the bail, upon proof that there was not sufficient ground to apprehend that the defendant would leave the Commonwealth. The defendant, when arrested upon a writ on which bail was required, could relieve himself by a confession of judgment, after which, if he was prayed in custody, he could be discharged upon taking the oath of an insolvent debtor. Otherwise, he must give bail, or be committed to prison. But the 22d section of the attachment law makes provision for discharging an attachment issued under the 2d section, as well as any other, when issued without sufficient cause. The 2d section gives an attachment in lieu of bail upon the same easy terms upon which bail might be obtained on the order of a judge or justice of the peace; but there the analogy ceases. The provision for discharging the attachment when issued "without sufficient cause," to which there was no corre-

sponding provision in the law respecting bail, destroys all further analogy. The fact that the attachment was provided as a substitute for bail, is thus deprived of all force in reference to the question I am now considering.

Reliance is also placed upon the 30th section of the attachment law, which is in these words: "If upon defence being made, in any case in which property is seized under an attachment, that the attachment was sued out without sufficient cause, 868 it be found either by the court or *by the jury, if one be empanelled, that the defence is well founded, judgment may be entered for the defendant against the plaintiffs for the damages sustained by the defendant by reason thereof." From this it is argued, that the enquiry upon a motion to abate an attachment on the ground that it was issued without sufficient cause, is the same as in an action to recover damages for suing out an attachment without sufficient cause; and must be confined, therefore, to the good faith and reasonable discretion of the plaintiff or affiant. But I do not perceive the force of this argument. We have seen that, in the first, third and fourth sections of the chapter, the right to the attachment is made to depend upon the existence of certain actual or probable facts, the existence of which is sufficiently verified for the purpose of suing out the attachment by the affidavit of the affiant to the best of his belief. There is no room to contend, upon the language of these sections, that, upon a motion to abate the attachment, the attachment can be sustained upon the ground only that the affiant believed what he swore to, and that he was justified in believing it. And yet, in an action to recover damages, it would be a sufficient defence that the defendant acted in good faith and upon reasonable grounds of belief. In such cases, therefore, the enquiry upon a motion to abate is not the same as in an action for damages. Where, in such a case, on a motion to abate, or after judgment on such a motion, which seems to be the meaning of the 30th section, damages are claimed under that section, the court, if it tries the case, must distinguish between the grounds of the motion to abate and the grounds of the claim for damages. So if the case is tried by a jury, the court must take care, by proper instructions, to see that the same distinction is observed. And so in reference to an attachment under the 2d section.

869 *It has been objected that the construction upon which I insist, will render the remedy given by the second section of little value, and deter parties from resorting to it. The only effect of that construction, however, is to abate an attachment whenever it is made to appear that a state of things did not exist at the time it was issued, in which such a remedy is proper under the law. Is it any objection to the construction, that it will have the effect of confining the remedy to the cases in which the law designed to give it,

and of preventing its abuse, by the application of it to other cases, which are not within the reason and policy of the law? The effect upon the policy of the law, and upon the rights of the defendant and of his other creditors, is the same, whether the misapplication of the remedy results from mistake or from design. The construction which I give to the law will not only confine the remedy to the cases which are proper for such a remedy, but it will make parties more cautious in resorting to it than they would be under the other construction. Is this a just ground of objection, when we consider the harshness of the remedy and its liability to abuse?

Entertaining these views of the construction of the attachment law, and considering the weight which, under the decisions of this court, I am bound to attribute to the judgment of the court below, upon the evidence certified, I feel some doubt whether the judgment in this case ought to be reversed. But my impressions upon this subject are not of so clear and decided a character as to induce me to dissent from the opinion of my brethren, who have no difficulty as to the conclusions which ought to be drawn from the evidence. I forbear to discuss the evidence, lest any thing I might say might prejudice the trial of the action. I will only add, what is necessary to a distinct expression of my opinion, that I think the undisputed facts of this case show that there was sufficient cause when the 870 attachment *issued, to believe that the defendants were removing their estate, or the proceeds of the sale of their property, or a material part of such estate or proceeds, out of this State, so that process of execution on a judgment in the suit, if obtained, would be unavailing. The court below must be taken to have decided upon the evidence that the defendants, in point of fact, were not so removing. The doubt which I have intimated is whether, in view of the weight to be attributed, under the decisions of this court, to the judgment of the court below on this point, we can say that it came to a wrong conclusion in respect to it.

Upon the whole, I concur in the order which is to be entered reversing the judgment.

RIVES, J. After the fullest consideration, I am unable to acquiesce in the construction which the President of the court has placed upon the twenty-second section of the attachment law. It confounds the issue under a motion to abate, with the issue in an action on the case for the abuse of this process. In the latter, I might concede to the plaintiff in the attachment, the privilege of defending himself on the question of damages, by proof of justifiable cause for his resort to this 'exceptionable remedy; but when this section explicitly enables the defendant to "contest the right to sue out the attachment," I can find no warrant in precedent, authority or reason for restricting that contest to the truth or

bona fides of the plaintiff's affidavit, rather than to the existence of the facts which it purports to verify. Our legislation consequent upon the decision of *Redford v. Winston*, 3 Rand. 148, shows the intention of the Legislature to make the facts or allegations of the plaintiff's affidavit traversable, and to allow of a defence that did not exist in cases of bail, and that was specially denied in that particular case. But this branch of the case is exhausted by my 871 brother Joynes; and it is *sufficient for me to declare my full and hearty concurrence in his opinion and reasoning upon it.

I do not, however, share his doubts as to the judgment of reversal. In this case, as in *Mitchell, &c., v. Baratta, &c.*, 17 Gratt. 465, I readily resolve all doubts and conflicts of evidence in favor of the judgment below; but I must be permitted to make and follow my own inferences from the plain and undisputed facts of the cause. For reasons already assigned, I refrain from any comment on the evidence. The matter in issue under the motion to abate, was the act of "removing their effects;" and in view of the shipments to Baltimore and New Orleans, and their correspondence with the auctioneers of those cities, I cannot escape the conclusion that the appellees were at the time of the suing out of the attachment in a course of removing their effects, or "a material part" thereof, so that execution upon a judgment thereafter to be obtained would be unavailing.

The judgment was as follows:

The court is of opinion that the said Hustings Court did not err in overruling the objection of the plaintiffs to the jurisdiction of the said court at a monthly term thereof, to hear and decide the motion of the defendants to abate the said attachment on the ground that the same was issued upon false suggestions and without sufficient cause, as mentioned in the first bill of exceptions.

And the court is further of opinion that the said Hustings Court did not err in hearing and deciding the said motion without the intervention of a jury; as mentioned in the second bill of exceptions.

But the court is also of opinion that the said Hustings Court did err in deciding that the said attachment was issued upon

872 false suggestions and without sufficient cause, *and in rendering judgment that the said attachment be abated; as mentioned in the third bill of exceptions.

Therefore it is considered that the said judgment be reversed and annulled, and that the plaintiffs recover against the defendants their costs by them expended in the prosecution of their writ of supersedeas aforesaid here. And this court proceeding to enter such judgment as the said Hustings Court ought to have entered, it is further considered that the motion of the defendants to abate the said attachment on the ground that the same was issued upon false suggestions and without sufficient

cause be overruled, and that the plaintiffs recover against the defendants their costs by them about their defence to the said motion in the said Hustings Court expended. And it is ordered that this cause be remanded to the said Hustings Court for further proceedings to be had therein. Which is ordered to be certified to the said Hustings Court.

873 ***Brummel & Co. v. Enders, Sutton & Co.**

Same v. Hill's Ex'or.

Same v. James Gray's Sons.

June Term, 1868, Richmond.

1. **Negotiable Notes—Sale of Usury.**—B & Co. make their negotiable notes, blank as to the names of the payees, and put them into the hands of an agent to be sold for their benefit. The agent sells them at a greater discount than the legal rate of interest; the purchasers not being informed that they were sold for the benefit of B & Co.; and the names of the purchasers are inserted in the blanks as payees either by the agent at the time of the sales, or by themselves afterwards. The purchasers sue upon the notes, describing themselves as payees, against B & Co. as makers; and B & Co. plead usury. **HOLD:** It is not usury.

2. **Same—Same—Same.**—The case of *Whitworth v. Adams*, 5 Rand. 333, has settled the law of Virginia on the subject of usury in the purchase and sale of negotiable paper.

***Negotiable Notes—Sale of Usury.**—The principal case was sustained in *Gimmi v. Cullen*, 20 Gratt. 447, and *Moseley v. Brown*, 76 Va. 421.

See also, in accord, *Whitworth v. Adams*, 5 Rand. 333; *Taylor v. Bruce*, *Gilmer* 42; *Hansbrough v. Baylor*, 2 Munf. 86; *Bailey v. Hill*, 77 Va. 492.

In *Danville v. Sutherland*, 20 Gratt. 579, the court said: "There is no doubt, whatever, that the owner of a note has the right to sell it for the most he can get; as he would have the right to sell any goods or wares he owned. But, on the other hand, it is quite as certain that no one has a right to make his own note and sell that for what he can get; for this, while in appearance the sale of a note, is, in fact, the giving a note for money. It is a lending and a borrowing, and nothing else.

"It is said, in *Whitworth v. Adams*, 5 Rand. 333: 'If A, wishing to raise money, were to make his note payable to B, and then go to B and offer to sell it to him; and B, supposing that a man might lawfully sell his own note, were to give the money for it, verily believing he was purchasing a note, and not lending his money on the security of a note, this would unquestionably be a loan; on the ground that he had intentionally done that which the law makes a loan. And this intention would, if the note were taken at a high discount, be a corrupt intent sufficient to vacate the contract.'

"This principle of law is in conformity with leading adjudicated cases, and is recognized universally by the elementary writers. *Parson's Mercantile Law*, 265; *Brummel & Co. v. Enders, Sutton & Co.*, 18 Gratt. 873; *Brockenbrough's Ex'or v. Spindle*, 17 Gratt. 43."

See generally, monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 608.

These three cases were heard and decided together in this court. They were actions of debt in the Circuit Court of the city of Richmond, brought respectively by Enders, Sutton & Co., Hill's ex'or and James Gray's sons, against Joseph Brummel & Co., upon promissory negotiable notes. In their declarations the plaintiffs declared upon the notes as payees against the defendants as makers thereof. The defendants pleaded usury; on which issues were made up.

874 *The question involved is the same in all, though the facts are slightly variant.

In the case of Enders, Sutton & Co., the plaintiffs declared on seven notes, amounting to \$10,234.75; and on the trial, after the plaintiffs had introduced the notes in evidence, the defendants introduced B. W. Green as a witness, who stated that the notes sued on were given to him by Joseph Brummel & Co. to raise money upon, the names of the payees being left blank; that the witness passed the said notes to the plaintiffs, and inserted the names of the plaintiffs as payees in said notes; that he did not remember at what time he did so, but inferred that it was when he passed the notes to the plaintiffs, as it was done in his hand-writing; that the plaintiffs were in the habit of taking the notes of the said Joseph Brummel & Co. from the witness at a greater rate of discount than six per cent. per annum, and that he remembered but one instance in which the plaintiffs took such a note of Brummel & Co. at a rate not exceeding six per centum per annum, but after the great lapse of time the witness could not recollect as to these particular notes. Another witness proved that the note taken at the legal rate of interest was not one of the notes sued on.

In the case of Hill's ex'or, B. W. Green was introduced as a witness, who stated that Hill met him on the street, and asked him if he had any of Brummel & Co.'s notes, that he wanted to buy one; that he replied that he could get one, and that the witness went to Brummel & Co.'s office and got said note; that the said note was made for the purpose of raising money; that it was payable to blank or order, leaving a blank for the name of the payee to be inserted in it; that it was handed to him by the defendants without any consideration moving from him to the defendants at that time, and that Hill took the note from the witness at a greater rate of interest
875 than six per centum per annum.

That he passed the note to Hill without the blank being filled up. It was further proved that Johnson, a clerk of Hill's, filled up the blank; and that Green owed Hill a note, which was taken up as a part of the consideration of the note of the defendants; and that Green promised to endorse the note if requested.

In the case of James Gray's sons, one of the plaintiffs was introduced as a witness by the defendants, who stated that the note sued on was purchased by him of a note and exchange broker, but he could not rec-

ollect who it was; that at the time of the purchase the note was payable to — or order; there being a blank space for the name of the payee; and that he filled up that blank space with the names of the plaintiffs; that the price paid for the note was less than the face thereof after deducting therefrom six per cent. per annum. That the discount was one per cent. per month; and that the broker from whom he bought the note told him that it had been given by the defendants for wheat, which they had purchased from a person who wanted to leave town, and who had left it there to be sold. The witness said further that the plaintiffs had had no transactions with the defendants, and had not loaned them any money.

The defendants asked in each case, several instructions varying slightly in form, but substantially the same. The substance of these instructions was, that if the jury believed the facts as they have been hereinbefore stated, they should find for the defendants.

These instructions the court refused to give; and in the first case instructed the jury, that if they believe, from the evidence, that the notes declared on in this action were made by the defendants for the purpose of being sold, leaving the names of the payees blank, and were given by them to B. W. Green to be sold, that said Green offered the notes to the plaintiffs, and
876 that the plaintiffs, knowing *the notes to be made for the purpose and in manner aforesaid, and to have been delivered to Green as aforesaid, purchased the same at a discount greater than legal interest, then the jury will find for the defendants.

In the second case, the court instructed the jury, that if they believe from the evidence that the note declared on in this action was made by the defendants for the purpose of being sold, leaving the name of the payee blank, and was put by them in the hands of B. W. Green to be sold, and that Green sold the note to the plaintiff's testator at a discount greater than legal interest, and at the time of the sale promised and agreed with the plaintiff's testator, that he would endorse the said note before its maturity, then the jury will find for the plaintiff; unless they shall further believe from the evidence, that at the time of such sale the plaintiff's testator knew the note to have been made for the purpose and in the manner aforesaid, and to have been delivered to Green to be sold as aforesaid; in that case they will find for the defendants.

In the third case the instruction was: If the jury believe, from the evidence, that the plaintiffs bought the note on which this suit is brought, from a broker, who represented that the note was a business note, and had been made by Joseph Brummel & Co. for wheat by them purchased, and had been left by the person to whom it had been originally given, to be sold for said person, and that the plaintiffs having no

notice or information to the contrary, bought the said note under these circumstances, then the transaction is not usurious, although the plaintiffs may have bought it at a greater rate of discount than six per cent. per annum, and although when they bought the note the names of the payees were left blank, and the plaintiffs, after purchasing the note, inserted their own names as payees thereof.

The defendants excepted to the 877 opinions of the court *refusing to give the instructions asked by them, and giving those given by the court. And the juries having found verdicts for the plaintiffs in all the cases, the court rendered judgments upon them. Brummel & Co. thereupon brought up the cases to this court.

The cases were argued by Andrew Johnston, for the appellants, and Howison, for the appellees; but they are fully discussed by the judges.

RIVES, J. It is essential to the proper consideration of these causes to acquire precise ideas of the state of the pleadings, the force of the proofs, and the real nature of the transactions to which they relate. A common principle underlies them; and though a slight diversity of circumstances may distinguish them, it will be found, on examination, to constitute no ground for practical distinction in the disposition to be made of them.

The pleadings are the same in all the cases. They are actions of debt by the payees of promissory notes against the makers. The defence is usury. The contract of indebtedness declared on, is a plain and complete promissory note, and has no other parties to it upon the record but the maker and payee. The action is founded on this privity of contract; the right of recovery grows out of the note alone; the defence is predicated of the invalidity of the note; and the record admits no "lis mota" except between the immediate parties to this written contract. If, therefore, the rights or interests of any third party are affected by this litigation, it must be outside of the pleadings, and arise out of the proofs.

Let us then examine these latter critically, and see if they establish any fact calculated to impart to the pleadings, and the issue made by them, any effect different from that which legally and properly attaches to them. The 878 *facts are prefaced in the bills of exceptions taken to the instructions refused, and the instructions given by the court on the trial. The chief distinctive feature consists in the fact that these notes were originally payable to —, and that the blanks were not filled until the discount, and then with the names of the respective payees. That in the first of these cases, the names were inserted by the witness, who was acting as the agent of the makers in raising money upon the notes, in the second, by the clerk of the payee, and in the third, by one of the pay-

ees, is wholly immaterial; for clearly it is to be taken as done in every case with the assent of the payees, and stands on the same ground as if the payees had inserted their own names with their own hands in these respective blanks. It is a fact common to all these cases that the discount upon the notes was usurious.

In the case of Enders, Sutton & Co., the statement of the witness B. W. Green is, "that the notes sued on were given to him by Joseph Brummel & Co. to raise money upon, the names of the payees being left blank; that the witness inserted the names of the plaintiffs as the payees in the said notes; he did not remember at what time he did so, but infers that he did so when he passed the said notes to the plaintiffs, as it was done in his (the witness') handwriting; that the witness passed the said notes to the plaintiffs; that the plaintiffs were in the habit of taking the notes of the said Joseph Brummel & Co. from the said witness at a greater rate of discount than six per cent. per annum," &c. It will be seen that this statement does not explicitly disclose for whom the money was raised upon these notes—whether for Brummel & Co., or for the witness Green; but as no claim or title is asserted by the latter as the holder or owner of these notes, the inference is irresistible that he was acting as the agent or friend of Brummel & Co.

in this negotiation. As this evidence 879 is *certified by way of showing the relevancy of the instructions asked, we are warranted in having recourse to the language of these instructions to relieve ourselves of this ambiguity. Accordingly, we find in the second instruction this recital: "That said Green, acting on behalf of the defendants, sold the said notes to the plaintiffs." The terms, also, of the court's instruction, import the existence of this agency: "If the jury believe, from the evidence, that the notes declared on in this cause were made by the defendants for the purpose of being sold, leaving the names of the payees blank, and were given by them to B. W. Green to be sold," &c.; thus distinctly implying, as it seems to me, that the notes were to be sold for the benefit of the defendants, and by Green as their agent. It seems to me, therefore, to result from this certificate of facts, that Green was acting as the agent of Brummel & Co. in raising money upon these notes for their benefit; and that there is no pretence for considering him as the holder or owner of this note and the seller thereof for his own use.

There is none of this doubt about Hill's case. Green becomes Hill's agent for the procurement of this note, and pays the proceeds to Brummel & Co. The statement is, "that the said Hill met the said Green on the street, and asked him if he had any of Brummel & Co.'s notes; that he wanted to buy one; that Green replied that he could get one, and then went to Brummel & Co.'s office and got the said note for him; and that he never passed any other note of said

defendants to the said Hill. Being asked who filled up the blank for the name of the payee, witness said he passed it to Hill without the blank being filled, but that he thought it was filled up by Mr. Johnson, who was in Hill's employment. Witness further stated that he paid the proceeds of the note to the defendants, after it was thus taken by Hill, and that the deduction was over one per cent. per month."

In this case, then, if the maxim, 880 *"*qui facit per alium, facit per se*,"

be not obsolete, the dealing was virtually between Hill and Brummel & Co.; Green was the agent of Hill in the transaction, and not of Brummel & Co., as in the preceding case.

In the last case, Gray's sons purchased the note at a usurious discount of a broker, being blank as to payee, and filled the blank with their own names, upon an assurance by the broker that "the note had been given by the defendants for wheat, which they had purchased from a person who wanted to leave town, and who had left it there to be sold."

Let us now enquire how we are to regard these diversities in the mode of acquiring these notes, and whether they demand the application of different principles in their decision. It must be conceded that the defence of usury is perhaps clearer in Hill's case than in the others, because there the dealing or negotiation is directly between the payee by his agent, and the makers. But in my view, all these diversities are merged and obliterated by the legal consequences of the act of the payees in filling the blanks with their names. But before proceeding to develop and sustain this idea, I must now take up the third branch of my enquiry, namely, as to the real nature of these transactions in raising money upon notes blank as to payee.

The elementary definition of a promissory note requires certainty as to the payee. 1 Parsons on Notes and Bills, chap. 111, § 1, p. 30. This rule is strictly adhered to. In Gibson v. Minet, 1 H. Bl. 569, Eyre, Ch. J., said: "If I put in writing these words, 'I promise to pay £500 on demand, value received,' without saying to whom, it is waste paper. If I direct another to pay £500 at some day after date for value received, and do not say to whom, it is waste paper." These notes, when discounted through the agency of Green on behalf of Brummel & Co. in the first case, of Hill

in the second, and through the agency 881 *of the broker in the third, being blank as to the payee, were incomplete and waste paper till filled with the names of payees. It is not doubted that it is competent to the drawer of a bill or the maker of a note to emit it with such a blank, the effect of which would be to authorize any bona fide holder to insert his own name. Thus, in Crutchley v. Clarence, 2 Maule & Sel. R. 90, Lord Ellenborough, C. J., said: "As the defendant has chosen to send the bill into the world in this form, the world ought not to be deceived by his

acts. The defendant, by leaving the blank, undertook to be answerable for it when filled up in the shape of a bill." Le Blanc, J., treated it "as if the defendant had made the bill payable to bearer;" and Bayley, J., said: "The issuing the bill in blank, without the name of the payee, was an authority to a bona fide holder to insert the name." To the same effect is the case of Crutchley v. Mann, 5 Taunt R. 529, where it was held, that a bill made payable to the order of —, may be filled up by any bearer who can show that he came regularly to the possession of it, with his own name. But until the blank is filled up, the instrument is invalid. Seay v. The Bank of Tennessee, 3 Sneed's R. 558. In other words, it is an inchoate instrument, whose ultimate validity must depend on its passing to some person legally entitled to insert his own name in the blank. As contended for in argument, it is somewhat analogous to a note payable to maker's own order before his endorsement thereof. After it is endorsed and put into circulation by the maker, it becomes, in effect, a note payable to bearer; but before that is done, and while retained by the maker, it has no vitality, and is nothing more than waste paper. There seemed to be an incongruity in the idea of a note payable to one's own order; hence in Brown v. De Winton, 6 C. B. 336, 60 Eng. C. L. 335, the judge, delivering the opinion of the court in that case, doubted "whether, if a man

882 *makes a note payable to his own order, he can, with propriety of language, be said to have made a promissory note at all. No man can make a contract with himself; there ought to be two parties to a contract; and in case of a promissory note, there ought to be a promisor and promisee." Proceeding further, however, in the analysis of such a note, he concluded that "an instrument so drawn is an incomplete instrument, being in the nature of a conditional engagement, in case he should afterwards endorse the note, to pay it to the person to whom, by such endorsement, he should direct it to be paid. Such an instrument is of no legal or binding effect, until something further is done to give it validity. It is another question what is the nature of such an instrument after it has been endorsed and put into circulation. As no particular form of words is essential to form a valid promissory note, such an instrument, if endorsed to G. S. or order, imports a promise to pay G. S. or order the money therein mentioned. And if the maker of such a note endorses it in blank and circulates it, he must, we think, be considered as engaging to pay the amount to any person who may be the lawful holder of it for value; that is, in effect, to the bearer." Assuming, then, the correctness of this analogy, and the pertinency of this authority, I am justified in treating these notes, while the blanks are not yet filled, as "incomplete instruments, in the nature of conditional engagements to pay them, when filled up, to those who shall become

bona fide holders of them, and so entitled to insert their names, but as of "no legal or binding effect" till consummated by the indication of a certain payee, and the completion thereby of the note itself. The filling the blanks is that "something further which must be done to give these notes validity." But who now shall be regarded as authorized to fill these blanks with his name? No one but a bona fide holder; not

883 a finder, who gives no consideration; *nor a thief, whose possession is felonious; nor, by parity of reasoning, a person whose mala fides consists in his violation of law.

Having thus sought to ascertain and fix the character and legal import of these notes when put upon the market, I now recur to that prominent fact which, as I have already said, appears to me to render of no significance the difference of circumstances attending the acquisition of these notes. That fact is the act of the parties in constituting themselves the payees, and thus dealing directly, without any remove, with the makers. They must be held to be bound by the legal consequences of this act. Their ignorance of such consequences, if it existed, will not and cannot avoid them. Besides, it is difficult to suppose that men of business, practically informed of the jealous care with which the courts seek to suppress every form or shift of usurious dealings, could have misinterpreted the effect of inserting their names into these blanks. They must have known and felt that they were thereby perfecting a written obligation previously of no binding effect, and making themselves parties in such way to the contract as to subject themselves to the liabilities of a direct negotiation with the maker or borrower, and thus forfeiting all opportunity of varying the written contract by parol proof inconsistent with its obvious import or effect. They must have known that a pretended purchase of the maker of his own note would be but a very poor and insufficient disguise to shield them from the imputation of usury. Why, then, did they place themselves in this attitude, and accept the position by this form of writing of close and immediate privity with the needy borrowers? They ought to have said to Green and the broker: "It would be a very poor and flimsy device to pretend to buy these notes of the makers; the law construes it as a loan of money on

884 the note precedes, *or, as is more usual, follows the advance of money; and, therefore, it will not do for us to put our names in these blanks and thus deal with the makers in these transactions; give vitality to this blank paper by getting some other person to consummate it as payee, or send it after the alleged purchaser of wheat for his name; and then we can buy it as a perfected note and the legitimate subject of a sale; but, before this be done, for us to assume the relation of payee to the makers would prevent us from taking the notes except at full value." Such, it seems

to me, would be the conduct and language in these cases of men at all conversant with business, and with the conditions of permissible trade in paper, or what is familiarly termed shaving.

This particular aspect of this enquiry is illustrated by the character of the pleadings, which to this end I specially set forth and distinguished at the threshold of this investigation. Under these pleadings, and the issue to which they lead, there arose but one question, and that was, what was the consideration paid for these notes. It would have sufficed for the defence to put but one solitary question to the witness Green, and that was to ascertain the amount of the discount. If that was usurious, the controversy was closed, and the case stood forth as a naked and indisputable one of usury. The plaintiffs would have been estopped from the proof of facts variant from the contract declared on; and the court would have been bound by the pleadings and the proofs to declare the note void for the usury. Had the case then been brought to this court upon such a record of pleadings and proofs, I cannot doubt that such a judgment would have met a unanimous concurrence here. Is the case at all changed by proof that the note was blank and incomplete till the plaintiffs gave it life by the insertion of their names? It

885 can only be because the note was marketable and purchasable *when in the hands of the makers' agents, whether private or public; and I have endeavored to show, by the analyses of the pleadings, proofs and the transaction itself, that it was not the subject of a sale, and that by accepting and filling it up as payees the plaintiffs below chose to take it for the money advanced or loaned. It will not be contested that there is no one here but the payees, who affect to be the first and the only holders. The makers could not have been holders; and Green, as the agent of the makers with Enders, Sutton & Co., and in Hill's case, if not the agent of Hill, as I suppose him to have been, at least the intermediary between Hill and the makers, did not pretend to be a holder for himself. The broker, in Gray's sons' case, asserted no title as holder, but rather his agency for an unnamed holder for value on a sale of wheat. In all these cases, then the plaintiffs below were the first holders. But, unfortunately, there is an ineradicable vice in their title. They were not, as the law requires them to be, bona fide holders. The note sprung from a usurious dealing. In its original form it was a blank piece of paper; and to adopt the forcible language of Judge Roane in *Taylor v. Bruce*, Gilm. 88-9, I may add that, "as an effective note, it was coeval with and only ushered into existence by the usurious contract, and was only delivered to the appellees as an evidence of that contract."

Now in regard to questions of this character, they fall within the province of the court for determination. What shall be deemed usury, is a question to be determined

by the court. Whether a transaction is a loan or a purchase, is an inference of law, which the party is not competent to swear to. *Roane, J., Gilm. p. 83. In Whitworth v. Adams, 5 Rand. 333, Judge Carr, p. 340, said: "In a special verdict the jury need not find the usury; they find the facts, and the law infers the usury; and cited* 886 *Chesterfield v. Janssen, 2 Ves. R. 147; Gibson v. Fristoe, 2 Call 62; and Marsh v. Martindale, 3 Bos. & Pull. R. 153. In a still later case of Brockenborough's ex'ors v. Spindle's adm'rs, 17 Gratt. 21, the same principle is again announced with great clearness and distinctness. Having the facts, therefore, certified in this case, our province and duty is to declare whether they constitute usury. We are not precluded from our judgment on the facts by the very common subterfuge of avoiding a treaty for a loan, and cloaking it under the guise of a sale; we must tear away the veil thrown over the transaction, and look through the forms under which the parties carried on their forbidden dealings, to detect their real nature. In the performance of this task for myself, I have reached the conclusion that these notes are void for the usury that tainted them in their inception. It might have been otherwise, had the appellees observed the precaution of putting others in their place as payees, and taking and holding as endorsees of such third parties in the absence of any corrupt bargaining with the makers, and any guilty knowledge on their part of this illicit mode of raising money on one's own notes for one's own benefit. I am at a loss to discover in the proofs any foundation for the pretension of the appellees to claim under endorsement. There was none such; it is wholly factitious; their title rests exclusively on delivery from the makers or their agents, and their election to take not as endorsees, but as payees. I was, therefore, surprised at the pains taken by the appellant's counsel to divest his adversaries of these Protean shapes. Whether I regard the pleadings or the transaction itself, there seems to me no just pretence for saying that the title of the appellees is, in any respect or upon any hypothesis, different from that of mere payees. Any such claim would be, it must be confessed, extremely shadowy and unsubstantial, as no human wit could discern from the proofs of* 887 **these causes, the person or persons, of whom they were the endorsees.*

But it is said that my decision of these causes militates against the cases of *Taylor, adm'r of Holloway v. Bruce, Gilm. 42,* and of *Whitworth & Yancy v. Adams, 5 Rand. 333,* and that we are constrained by the authority of these cases, to sustain the rulings of the court below. To this, I cannot assent. I accept the authority of those cases; and hold that their reasonings are in entire accordance with my positions. They fortify rather than oppose my views. In fact, I beg leave now to resort to them as armories from which I can draw the most effective weapons in my defence. Our

first enquiry, then, must be directed to the precise character of these cases. In the first, the makers of an accommodation note with good endorseers, placed it in the hands of a broker for sale; and its purchase at a usurious discount in the absence of proof that the purchaser knew these facts, namely—the invalidity of the paper as between the parties and the agency of the broker—was adjudged to be free of usury. The second was the case of an accommodation note, given to the payees for their accommodation, endorsed by them, and then placed in the hands of a broker for sale, and sold by him at a usurious discount; it was held that such purchase was not usury, the purchaser not knowing that it was accommodation paper or for whose benefit it was sold. It is observable that these cases are very unlike the present. Those notes were certainly complete in form; and the purchaser's title was that of endorsee. Here the notes were incomplete, and the plaintiffs sued as payees. True, the dissenting judges in those cases treated those accommodation notes as between the original parties as without consideration and invalid, and as in that sense inchoate and dependent for final validity upon delivery to a bona fide holder for value. But if

888 *this view was not sustained in "the judgment of the court, it by no means follows that the notes now under our consideration, blank as to payees, and therefore dissimilar from those, may not justly be characterized as incomplete and conditional, and not, therefore, in that form, the subject of sale or traffic. This palpable distinction obviates the pertinency of those authorities to the questions we are now considering. But I claim that the opinions of the judges who concurred in the judgment of the court in those cases, fully concede and establish every position for which I now contend. To show this, I submit the following quotations from those opinions. In Taylor, &c., v. Bruce, Judge Coalter (p. 60-1,) said: "It is true that the defendant admits in his answer that he received the notes at a discount, which would be usury, if the transaction had taken place in consequence of a personal interview between him and the makers, as is alleged in the bill, whether a loan of money had been mentioned or not; there being no difference between the execution of a note before the money is advanced, and the pretended sale of that note by the maker at a usurious discount, and the execution of such note afterwards in order to secure the money advanced with usurious interest. The former would be clearly a shift to evade the statute. It would be no answer for the party to say, that there being nothing said about a loan, he considered it a fair purchase of a note in market. He must know, in the case supposed, that the note was given for no other consideration but that of the money advanced," &c.*

In *Whitworth, &c., v. Adams,* Judge Cabell used language which seems to me to corroborate the views I have taken, and to

concede all the positions for which I contend. He admits (p. 411) that "if the purchase had been made directly from the principal, it would be clear usury, because the note being merely for accommodation, was *not, as between the parties to it, the evidence of any subsisting debt. It was consequently, as to them, not an available note, nor could any action as between them be maintained upon it. It has no legal existence till it is negotiated for value. And if it be negotiated directly for the party for whose accommodation it was made, to a person acquainted with the facts of the case, on a contract to receive for it less than its nominal amount discounting the legal interest, it would not differ in any substantial respect from the present advance of money on a contract that, in consideration of the advance, the person receiving it should give his obligation to the party making the advance to pay him at a future day, a sum greater than the sum received and legal interest. This last transaction would be a direct loan at illegal interest; and as the negotiation of the note, under the circumstances supposed, does not differ from it, the law infers that the party really intended a usurious loan, and resorted to a sale of the note as a shift or device to conceal it. He is advancing his money to the very man whose bill or note he gets; and the bill or note had no legal obligation whatever until he received it. The substance and nature of such a transaction is nothing more than a loan, at more than legal interest; and the bill or note is a security for it."

If, now, it be true, as I have contended, that these notes had no legal obligation till the payees received them and inserted their names in the blanks, and that such payees are thereby shut up and bound to a direct privity of dealing with the makers, I am justified in invoking the opinions just quoted to aid me in stripping from these transactions the thin disguise of a sale. I can say with Judge Coalter that "the appellees must have known that the notes were given for no other consideration but that of the money advanced;" and with Judge Cabell, "that they were advancing their money to the very firm whose notes *they got; and that the notes had no legal obligation until they received them: hence the substance and nature of the transaction was nothing more than a loan at more than legal interest, and the note a security for it."

When shall it be said that these notes were issued? not surely when in the possession of the makers or their agent to raise money upon them, and while they were loosely floating in the market as blank notes awaiting completion in the act of transfer or negotiation; but rather in the language of Bayley, J., in *Downes v. Richardson*, 7 Eng. C. L. R. 227, "they were issued as soon as there was some person who could make a valid claim upon them;" and this was only when the appellees filled the blanks with their names and thereby

took upon themselves the relation, rights and liabilities of payees. While the makers, their agents or strangers held this paper in its blank form, it imposed no obligation; it was a mere preparation to raise money; but when its character was stamped upon it by its completion or the filling of the blanks, then it partook of the nature of the contract out of which it arose, and if that was usurious, it became void in its inception. And where a note is not available till discounted, and is discounted at a sum greater than the legal interest, it is usurious and void. *Powell v. Waters*, 8 Cow. R. 669.

Parsons, in his treatise on Mercantile Law, ch. xiv, § iv, p. 265, proposes a test for the determination of questions like the present, which would dispose of these cases in accordance with my views, upon a principle plain and easily applicable. To prevent misapprehension, I quote the whole passage: "There are, perhaps, no questions in relation to interest and usury of more importance than those which arise from the sale of notes or other securities. In the first place, there is no doubt whatever that the owner of a note has as good right to sell it for the most he can get, as he would have to sell any goods or wares which he *owned. There is here no question of usury, because there is no loan of money, nor forbearance of a debt. But on the other hand, it is quite as certain that no one has a right to make his own note and sell that for what he can get; for this, while in appearance the sale of a note, is in fact the giving of a note for money. It is a loan and a borrowing and nothing else. And if the apparent sale be for such a price that the seller pays more than legal interest, or, in other words, if the note bears interest and is sold for less than its face, or is not on interest and more than interest is discounted, it is a usurious transaction. Supposing these two rules to be settled, the question in each case is, under which of them does it come, or to which of them does it draw nearest?"

"We are not aware of any general principle so likely to be of use in determining these questions as this: If the seller of a note acquired it by purchase, or if it is his for money advanced or lent by him to its full amount, he may sell it for what he can get; but if he be the maker of the note or agent of the maker, and receives for the note less than its face after a lawful discount, it is a usurious loan. In other words, the first holder of a note (and the maker of a note is not, and cannot be, its first holder) must pay the face of the note or its full amount. And after paying this, he may sell it, and any subsequent purchaser may sell it as merchandise."

Applying this test to the cases at bar, the first holders, and none can be such, as I have endeavored to show, but the payees in these cases, must give full value, and thus meet the condition of bona fides. If this were not so, a strange incongruity would arise. Usury by the first holder va-

cates and destroys the title of any subsequent holder; the note itself being usurious, is void by the statute in the hands of an innocent holder without notice; it cannot,

therefore, be valid in the hands of the
892 payee and void in *the hands of his endorsee; if void in the hands of the latter, it is for a stronger reason void in the hands of the former. It is, therefore, most justly held, that the holder entitled to fill the blank in notes like the present, must be a bona fide holder; a holder for full value, and untainted by usury, so that he may then sell it, like any other commodity, for what he can get; and that the best practical test for determining such questions will be found in the general principle thus laid down by Parsons.

It was a boast of *Ld. Mansfield in Floyer v. Edwards*, Cowp. R. 112, that "where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute." The same jealous care to uphold and vindicate this statute, which was evinced by this remark, ran through the early decisions of the courts in the administration of this statute. But it is curious to observe how it has been impaired by the commercial spirit of the age, and has yielded steadily to the popular theory that money is, like any merchandise, worth what it will bring and no more, and that its value should be left to fix itself in a free market. But still while the statute exists, and demands enforcement from the courts, I accept the authority of these decisions as founded in justice and wisdom, and am not disposed to relax any of the rules against these extortionate and illicit practices. It is, perhaps, an idle attempt to withstand these judicial expedients to unfetter the traffic in money; they have already removed many of the restraints from the usurer; and I must confess my inability to discern any effective ones that will be left, when the needy can put upon the market their notes blank as to payees, and raise money upon them by sale to any one, at usurious rates, who will put his name in the blank and take the relation of payee. It will be a vain thing to say that a man cannot sell his own note, when the only thing required

of him to effect this object will be to
893 send it out *blank as to payee, and let a friend, agent or stranger sell it in this form to any one, who will put his name in the blank, or else, as in *Hill's* case, quietly await a messenger from the usurer to put in circulation this new and popular form of security. If such anomalous paper is taking the place of regular business paper, as has been stated in the argument of the counsel for the appellees, it cannot be too soon extirpated and supplanted by sounder, less factitious and less suspicious securities. It is, therefore, I feel peculiar sensibility and regret that I lack the concurrence of my brothers to stamp the reprobation of this court upon these practices; to denounce these notes in their blank form as incapable of sale to the first holder or payee; and thus to inhibit

the growing traffic in them which must eventually make shipwreck of the great cardinal principle forbidding the sale by the maker of his own note.

In conclusion, I cannot find more impressive utterance for my opinion of these cases than to adopt the language of Judge Roane in *Taylor, &c., v. Bruce*. It is far more applicable to this case than to that. Had he then foreseen the further step that would be taken in these cases to remove the restraints against usury, he could not have applied to it more descriptive language, or used stronger remonstrance. He said, "We have undoubtedly gone far enough in sanctioning the sales of the consummated notes of others, bona fide held by the seller, at a usurious rate of discount. I will not, however, go further and permit a man to sell, not his own note, for a note presupposes a real payee as well as a drawer, but his own blank paper at an illegal rate of discount. I will not by this means disrobe the consideration, on which it is granted, of its usurious taint, and repeal, pro tanto, the act of usury."

For these reasons, I dissent from the affirmance of the judgments in these cases.

894 *JOYNES, J. The case of *Whitworth v. Adams*, 5 Rand. 333, must be considered as settling the law of Virginia on the subject of usury in the purchase and sale of negotiable paper. It was the decision of a majority of a full court, after a most thorough discussion and examination of the subject by each of the judges. Though contrary to decisions in many, if not most, of the States, it was in accordance with the decision of two judges in a court of three in *Taylor v. Bruce*, Gilm. 42; and for more than forty years it has been acquiesced in by the Legislature, and been regarded by the courts and the community as establishing the law. I shall not, therefore, enter into any discussion of the principles involved in that case. Indeed, the authority of that case has not been questioned in the argument.

Whitworth & Yancey made their negotiable note payable to *Wilson & Orr*, for the accommodation of the payees, who put it into the hands of *Belcher*, a broker, for sale on their account. *Belcher* sold the note to *Johnson* at a discount of three per cent. a month. *Johnson*, at the time he discounted the note, did not know that it was made for accommodation, nor for whose benefit it was sold. The note had, of course, no binding force in the hands of *Wilson & Orr*, for whose accommodation it was made, nor in those of *Belcher*, their agent. It was then but an inchoate instrument, which could only become valid and binding by passing into the hands of a bona fide holder for value. It was conceded by the dissenting judges that a consummated and bona fide note given for value—a business note—might be sold at any price without violating the statute against usury. But it was contended that as this note was not

valid and binding in the hands of Wilson & Orr, or of Belcher, the same principles did not apply; that there was nothing that could be sold; and that the transaction
895 *was, in substance and effect, a loan to Wilson & Orr of the sum paid by Johnson for the note, upon their obligation, by the endorsement, to pay the sum expressed on the face of the note, and was, therefore, usurious. But the court held, that as Johnson did not know that the note was made for accommodation, or that it was sold for the benefit of a party whose name was upon it, he was to be regarded as a bona fide purchaser from Belcher, the holder and apparent owner of the note, who did not endorse it, and that the transaction was, therefore, substantially the same as the purchase of a business note, and not usurious.

The argument that has been urged upon us with so much earnestness in this case, is substantially the same that was urged by the dissenting judges in *Whitworth v. Adams* and in *Taylor v. Bruce*. It was overruled then, and it must be overruled now, unless it can be shown that there is some substantial ground of distinction between this case and those.

It is contended that this case is to be distinguished, on the ground that the note in *Whitworth v. Adams*, as well as that in *Taylor v. Bruce*, was regularly filled up with the name of a payee, and endorsed by him; so that it had all the appearance of a complete and valid instrument; whereas the notes in this case were blank as to the name of the payee, and were, therefore, incomplete and imperfect on their face.

In order to determine the weight due to this suggestion, it is necessary to consider the legal character and effect of a negotiable note, which is blank as to the name of the payee. This is settled by authority in England and in the United States, and is well understood among commercial men. The question as to the effect of such an instrument came before the court of K. B. in the year 1813, in the case of *Crutchley v. Clarence*, 2 Maule & Sel. R. 90, which is the leading case. That was an action
896 against the *drawer of a bill of exchange payable to the order of —

(the name of the payee being left blank). It was endorsed to the plaintiff by one Vashon, and the plaintiff inserted his own name as payee. It was objected that the plaintiff had no right to insert his name as payee, and the case was distinguished from *Russell v. Langstaffe*, Dougl. R. 514, because in that case the bill was filled up by one of the original parties. But the court overruled the objection, and held that the plaintiff was entitled to recover. Lord Ellenborough, C. J.: "As the defendant has chosen to send the bill into the world in this form, the world ought not to be deceived by his acts. The defendant, by leaving the blank, undertook to be answerable for it when filled up in the shape of a bill." *Le Blanc*, J.: "It is the same thing as if the defendant had made the bill pay-

able to bearer." Bayley, J.: "The issuing of the bill in blank, without the name of the payee, was an authority to a bona fide holder to insert the name." Though the bill in this case was endorsed to the plaintiff, the title to it did not pass by the endorsement, because the name of the endorser was not in the bill. It passed by the delivery. In the following year the same question came before the court of C. B. in an action against the acceptor of the same bill. *Crutchley v. Mann*, 5 Taunt R. 529 (1 Eng. C. L. R. 179). It was objected that the authority given to the person to whom the bill was first delivered, to insert his name as payee, was not transferable from hand to hand. But the court held that the plaintiff had a right to insert his name as payee, and was entitled to recover. Upon the authority of these cases it is laid down in all the treatises, that any bona fide holder of a bill or note which is blank as to the name of the payee, may insert his own name, and thus acquire all the rights of payee.

The same doctrine has often been affirmed in this country. In *Ives v. Farmers' Bank*, 2 Allen R. 236, the *defendant signed a printed form of a note, and which, as signed, read as follows:
\$1,585.90.

Brooklyn, September 20, 1858.
after date, promise to pay to the order of Dec. 23,
dollars at value received.
Geo. R. Ives.

The paper in this form was delivered to one Yale, and the defendant alleged that it was delivered to him only as a memorandum, and not to be used as a note. But Yale filled it up so as to make it a note for the sum of \$1,585.90, payable to the order of himself three months after date, at the Atlantic Bank, New York, and endorsed it to the plaintiff, who discounted it for his benefit. The court held, upon the authority of the cases just cited, that the paper, as signed by Ives, was a promissory note, importing a complete and valid contract, and that evidence was not admissible to show that it was intended to be only a memorandum, as that would be to vary by parol the meaning of a written instrument. The court, after referring to the cases above cited, and stating the opinion just mentioned as to the character and effect of the paper, said: "If it had been passed to the bank by Yale in the condition in which he received it, it would, therefore, have been a complete note, except the name of a payee, and the bank would have been authorized to fill the blank with any name that they had chosen; and as they took it in good faith, it can make no difference in the rights of any party that the blank was filled by Yale, in order to add his own liability as an endorser."

White v. Verm. & Mass. R. R. Co., 21 Howard U. S. R. 575, was an action upon coupon bonds issued by the railroad company payable in blank, no payee being inserted. They were issued in Massachusetts

to a citizen of that State, and passed through several intervening *holders to the plaintiff, a citizen of New Hampshire, who inserted his name as payee, and brought suit on the bonds in the Circuit Court of the United States. It was objected, that as the bonds were issued to a citizen of Massachusetts, and as they were not negotiable, or if negotiable, were not payable to bearer, the plaintiff could not sue in the Federal Court. But the court held, that it was "the intention of the company, by issuing the bonds in blank, to make them negotiable and payable to the holder as bearer, and that the holder might fill up the blank with his own name, or make them payable to himself or bearer, or to order. In other words, the company intended by the blank to leave the holder his option as to the form or character of negotiability, without restriction." * * * "Until the plaintiff chose to fill up the blank, he is to be regarded as holding the bonds as bearer, and he held them in this character until made payable to himself or order. At that time he was a citizen of New Hampshire, and, therefore, competent to bring the suit in the court below.

In this last case the bond passed from hand to hand by delivery while blank as to the payee, as the bill did in *Crutchley v. Clarence*, and as the court said the note might have done in *Ives v. Farmers' Bank*. The instrument, in all these cases, was regarded as payable to bearer, as long as it remained blank. So in *Wookey v. Pole*, 4 Barn. & Ald. 6 R., (6 Eng. C. L. R. 323,) it was held, that an Exchequer bill payable to — or order was, until filled up, payable to bearer; and that, while in that condition, it passed by delivery. This construction is made in order to give effect to the intention of the party who sets the paper afloat with a blank for the name of the payee. And upon the same ground, a bill or note payable to the order of a fictitious payee, is regarded as payable to bearer. *Gibson & al. v. Minet & al.* 1 H. Bl. R. 569.

In *Rex v. Randall, Russ. & Ry. C.* 899 C. 195, it was held *that a bill blank as to the payee did not answer the description of a bill of exchange in an indictment. But however that may be, the cases above cited abundantly establish that a party to such a bill is liable upon it as if it was filled up. It has been held, too, that while a bill or note is blank as to the payee, the holder cannot sue upon it as bearer, but that he must insert his name as payee. *Greenhow v. Boyle*, 7 Blackf. R. 56; *Seay v. Bank of Tennessee*, 3 Sneed R. 558. But these cases fully recognize the doctrine of the case of *Crutchley v. Clarence*. They only hold that the insertion of the name of the plaintiff, so that the paper may, on its face, import a contract with him, is necessary to enable him to sue upon it. In *Rees v. Conococheague Bank*, 5 Rand. 326, it was contended that the plaintiff could not recover under an endorsement in blank, without writing over it an assignment to himself. But the argument was overruled,

and the court held, that the election of the plaintiff to treat the endorsement as a transfer to himself, is proved as well by suing on the note in his own name, as by writing an assignment to himself over the endorsement. If, however, the insertion of the name of the payee is necessary to enable the plaintiff to sue upon such a note, it is only a matter of form, and may be made at the trial, as was conceded by the court in the case cited from 3 Sneed.

These cases establish two propositions: 1. That a negotiable note blank as to the name of the payee, imports a contract by the maker of the note to pay the sum expressed in it, which may be transferred like other negotiable paper. 2. That the transfer of such a note may be made by delivery, as if it was, in express terms, payable to bearer. And this corresponds with the common usage and understanding among merchants. Notes are often taken in blank as to the name of the payee, in order to enable the holder to pass them off without incurring liability *by endorsing them, and without inflicting the injury upon their credit which would result from endorsing them "without recourse." The same object may be effected, and frequently is, by making the note payable to the order of the maker.

A note blank as to the payee being thus a form of paper legitimately and frequently used in the usual and regular course of business, how can we say that the face of such a note indicates that it was made for accommodation, or that it ought to excite suspicion and enquiry in respect to the consideration? And as notes in that form are transferable by delivery, why might not *Enders, Sutton & Co.*, when they found such notes in the hands of *Green*, regard them as notes given for value and belonging to him, and purchase them accordingly, as if they had been filled up payable to bearer, or filled up to a payee and endorsed by him in blank? On what ground can we hold that a purchaser of such a note takes it at his peril, which would not equally apply to a note regularly filled up with the name of a payee? In *Wookey v. Pole*, above cited, the fact that the Exchequer bill was blank as to the payee was not held to put the banker upon enquiry as to the title of the party from whom he received it; the title of the banker was put upon the same principle as if the bill had been filled up payable to bearer.

The case of *Aude v. Dixon*, 6 Exch. R. 869, has been cited to show that when a party takes a note which is blank as to the name of the payee, he takes it at his peril, and cannot claim the protection which the law gives to the bona fide holder of a note that is complete and perfect on its face. That was an action against *William Dixon* as the maker of a promissory note. It was proved that *Richard Dixon*, the brother of the defendant, being desirous of borrowing £100 on the security of a promissory note, applied to the defendant to become one of his securities,

901 *which he agreed to do on the representation of his brother that one Robinson would become his co-surety, and that the defendant should not be responsible unless Robinson joined in the note. On the faith of that representation, the defendant signed the following blank instrument, leaving a space for Robinson as the first signature: "_____ December, 1848. On demand we do hereby jointly and severally promise to pay to Mr. _____, or order, £100. As witness our hands. William Dixon." Robinson refused to sign the paper, and Richard Dixon took it in its imperfect state to the plaintiff, who advanced the money upon it, upon Richard Dixon's representation that he had authority to deal with it. The blanks were filled up by inserting "26" before "December," and the name of the plaintiff as payee. It was held that the plaintiff could not recover, on the ground that Richard Dixon had only a limited authority to make the paper a binding instrument as to the defendant; that is, on the condition that Robinson would sign it as co-security. Parke, B., delivering the opinion in which Alderson, B., and Platt, B., concurred, said, "A party who takes such an incomplete instrument cannot recover upon it, unless the person from whom he received it had a real authority to deal with it. There was no such authority in this case, and unless the circumstances show that the defendant conducted himself in such a way as to lead the plaintiff to believe that the defendant's brother had authority, he can take no better title than the defendant's brother could give. The maxim of law is, 'nemo plus juris in alium transferre potest quam ipse habet.' It is a fallacy to say that the plaintiff is a bona fide holder for value; he has taken a piece of blank paper, not a promissory note. He could only take it as a note under the authority of the defendant's brother, and he had no authority; consequently the instrument is void as against the defendant." During

902 *the argument, Parke, B., said: "Suppose Richard Dixon had authority to fill up the instrument with £100, and he inserted £200, would the defendant be liable? In the case of *Rex v. Hart*, 1 Mood. C. C. 486, all the judges were unanimously of opinion, that where a blank acceptance is delivered to a person with authority to fill it up with a particular sum, and he inserts a larger sum, he is guilty of forgery."

It is apparent from this statement, that Aude v. Dixon was wholly unlike the present case. The defendant in that case never intended to be bound to any body by the instrument as it stood; he only intended to be bound along with Robinson. The negotiation of the paper and the insertion of the name of the plaintiff as payee were, therefore, without authority. The face of the paper showed what was, at least, the original intention of the defendant, and the court held him bound to enquire whether that intention had been changed. In the case of a note blank only as to the name of

the payee, the face of the paper indicates that the maker intends to be bound to any person who may be the holder, and an authority is implied to any bona fide holder to fill it up with his name as payee. In the latter case, the paper on its face imports a contract binding on the party whose name is signed to it; in the former, it imports no such contract, in the view which was taken by the court in *Aude v. Dixon*.

Some of the grounds assigned for the decision in *Aude v. Dixon* have a bearing on this case, but they are inconsistent with well settled principles. Thus it was said that the plaintiff could not be a bona fide holder because he took a blank piece of paper and not a promissory note. That is inconsistent with numerous cases, which hold that where a signature is affixed to a blank paper, with authority to write a promissory note over it, a party who takes it bona fide and for value after it is filled

903 up, will have all the rights of a bona fide holder, though he knows that the paper was blank when signed and filled up afterwards. *Fant v. Miller & Mayhew*, 17 Gratt. 47, 80, and cases cited; *Story Prom. Notes*, section 122.

It was also said that if a person signs a blank with authority to fill it up as a note for £100, and it is filled up as a note for £200, he will not be liable. This is contrary to numerous cases in England and in this country. *Montague v. Perkins*, 22 Eng. L. & Eq. R. 516; *Barker v. Sterne*, 9 Exch. R. 684; *Putnam v. Sullivan & al.*, 4 Mass. R. 45; *Fullerton v. Sturges*, 4 Ohio R. (N. S.) 529; *Fanning v. Farmers and Merchants Bank of Memphis*, 8 Sm. & Mar. R. 139; *Van Duzer v. Howe*, 21 N. York R. 531; 1 *Parsons Notes and Bills*, 111-115. And in such a case the title of the bona fide holder will not be affected by the agreement as to the amount for which the note was to be filled up, and of which he had no notice, although he knew the fact that the signature was affixed to a mere blank. 4 Mass. R. 45; 4 Ohio R. (N. S.) 529; 8 Sm. & Mar. R. 139. And so the doctrine that the filling up of a note over a blank signature for a larger sum than that authorized, is a forgery, is contrary to the decision in *Putnam v. Sullivan & al. supra*.

I think, therefore, that I am warranted in saying, that so far as *Aude v. Dixon* contains anything that can be regarded as adverse to the views I have advanced in this case, it is entitled to no weight as authority.

It is proper to notice in this connection the case of *Hatch v. Searles*, 31 Eng. L. & Eq. R. 219, which may be supposed to furnish some support to *Aude v. Dixon*. That was the case of a claim presented in an administrator's suit by the endorsee of a bill of exchange against the acceptor's estate. The reporter in his head note to the case states the ground of the decision to be,

904 that as the holder of the bill, who was an endorsee, was aware, when *he took the bill, that the acceptance had been given in blank, he must be taken to

have had as full knowledge of all the circumstances of the origin of the bill, and of the want of title in his endorser, as he might have acquired if he had made proper enquiry. If the decision involved this principle, it is inconsistent with the cases before cited. But it is remarkable that if the Lords Justices rested their decision on this principle, neither of them mentions it in his opinion. The case was decided on the ground that the circumstances under which the holder of the bill received it, were such as ought to have excited suspicion and led to enquiry. But the fact that the acceptance was in blank, was not mentioned as one of those circumstances.

It was further contended in the argument, that as Enders, Sutton & Co. have chosen to insert their names in the notes as payees, so as to indicate a transaction directly between themselves and the makers, and have, in their declaration, described themselves as payees, they cannot be allowed to repel the defence of usury, by showing that, in point of fact, they had no transaction with the makers, but obtained the notes by transfer from a previous holder. It was said by counsel that the plaintiffs attack in the character of payees, and defend in the character of endorsees, and that the law will not allow them thus to assume inconsistent positions.

There is no force in this objection. The question is, whether the transaction under consideration was a loan of money at an illegal rate of interest, or a lawful purchase of notes at a discount. To ascertain this, we must look at the real facts of the transaction, and not at its mere form. If a transaction amounts, in substance and effect, to a loan of money at more than legal interest, the consequences cannot be evaded by any form it may be made to assume. If, on the other hand, there was really no loan of money, but only a lawful purchase of notes at a discount,
905 *the mere form of the transaction will not involve the party in the penalties of usury, which, in point of fact, he has not been guilty of.

Moreover, the law does not hold that the true relations between the parties to a negotiable instrument are conclusively indicated by its form. Thus, if it appears on the face of the bill or note sued on that the plaintiff was the immediate promisee of the defendant, it is admissible for the plaintiff to show by evidence aliunde that he was not such immediate promisee in point of fact, but that the paper came to him through other hands, and thus exclude evidence that might otherwise be given to impeach the consideration. 1 Pars. Notes and Bills, 180-183; Leading Cases on Pleading, notes to Peacock v. Rhodes & al. This principle is recognized in Nelson v. Cowing, 6 Hill R. 336. In Pindar v. Barlow, 31 Verm. R. 529, the note was given by the defendant for the price of intoxicating liquors sold to him by one Meech, who had no license to sell liquor. Meech took the note payable to the plaintiff, be-

cause he intended to transfer it to him in payment of a debt which he owed him; which he did two days after its date; the plaintiff not knowing that the note was given for intoxicating liquor. The defendant insisted that the note was void in the hands of the plaintiff under the statute of Vermont. It was held that a note given for the price of intoxicating liquor was void, under the statute, in the hands of the original party, but not in the hands of a bona fide holder for value. And it was held that as the plaintiff, in point of fact, received the note by transfer from Meech, he was entitled to recover, though the note was payable, on its face, to him or bearer.

I am of opinion, therefore, that no reason has been shown why the principles of Whitworth v. Adams should not be applied
906 to this case. The case of *Williams v. Reynolds, 10 Maryland R. 57, which was cited to show that those principles should not be applied to the purchase of a note blank as to the payee, has no such bearing. That case was decided in conformity with the doctrine of the New York cases, which were repudiated in Whitworth v. Adams.

It has been strenuously insisted that Enders, Sutton & Co. were not authorized to insert their names in the notes as payees, because they were not bona fide holders. If they acquired the notes through a usurious transaction, they were not bona fide holders. But the purchaser of a note from one whose name is not upon it, at any discount, however great, is not, of itself, usurious. Such a purchaser, if he does not violate the usury law, may be a bona fide holder, as well as if he had bought the note at its face value. To say that Enders, Sutton & Co. acquired these notes through a usurious transaction, is to assume the very point in controversy. No other ground has been alleged to impeach their title as bona fide holders.

It has been urged that if we sustain the present transaction, we shall give our sanction to an easy device by which a man may sell his own note, and evade the statute of usury. I reply that this objection applies, as do most of the arguments urged in this case, to the case of Whitworth v. Adams. Under the decision in that case a man may make a note payable to his own order, and endorse it and sell it through a third person at any price, without involving a violation of the usury law, provided the purchaser does not know that the note is sold for the benefit of the maker. So a man may make his note to a friend who endorses it for his accommodation, and sell it in the same way. The present case only illustrates another mode of doing substantially the same thing. The blame, if
907 any *is due, must rest upon the case of Whitworth v. Adams, which I do not feel at liberty to overrule, for the reasons already mentioned.

The instruction of the court in this case was in strict accordance with Whitworth v. Adams. The instructions moved by the

defendants and refused by the court, were inconsistent with that case, and were, therefore, properly refused.

I am of opinion that the judgment of the District Court should be affirmed.

Brummel & Co. v. James Gray's Sons.

This case depends on the same legal principles as *Brummel & Co. v. Enders, Sutton & Co.*, just decided. It differs in the facts in this, that the evidence in this case was that one of the plaintiffs purchased the note from a broker, who told him that it had been given by the defendants for wheat sold to them by a person who wished to leave town, and left it with the broker for sale. The jury have found that the purchaser did not know that this representation was untrue, and there does not appear from the evidence certified, to have been anything to excite his suspicion that it was not so, unless the mere fact that the note was blank as to the name of the payee was sufficient of itself to put him upon enquiry, notwithstanding the representation. Such a principle would destroy the circulation of such notes altogether.

The judgment should be affirmed.

Brummel & Co. v. Hill's Ex'or.

This case depends on the same principles as the other two cases just decided. It differs on the facts in these particulars: 1. That Hill applied to Green to know if he had any of Brummel's notes, saying that he wanted to buy one; that Green said 908 that he could get one, and did *so.

2. That Green owed Hill a note, the amount of which was allowed by Green to Hill as part of the proceeds of the note sold to him; and that Green promised to endorse the note if requested. The first of these facts may be supposed to indicate that Hill expected to get a note that was made for sale, but the others have a tendency to show that he understood that the note he was buying was the property of Green. But the jury have found that Hill did not know that the note was made to be sold for the benefit of the makers.

The judgment should be affirmed.

MONCURE, P., concurred in the opinion of Joynes, J.

Judgments affirmed.

909 *Drake's Ex'or v. Chandler & als.

June Term, 1868, Richmond.

[98 Am. Dec. 702.]

1. **Usurious Loans*—Change of Parties†—Effect.**—A, B and C execute a bond for one thousand dollars to P for a loan of money at usurious interest. Subsequently O, J and W, with B, who signs himself

***Usurious Loans—Change of Securities—Effect.**—Nothing is better settled than that the mere change of securities for the same usurious loan to the same party who received the usury, or to a person having notice of the usury, does not purge the original illegal consideration, so as to give a right of action on the new security. Every subsequent security

security, execute their bond to P for the amount, principal and interest, of the first bond, and another small bond of A. in lieu of these bonds. The usury is purged by the change of the parties, and the last bond executed is valid.

This was an action of debt in the Circuit Court of New Kent county, brought in September, 1866, by Robert Drake's ex'or against O. M. Chandler, James M. Apperson and Wm. C. Cooke, on a bond for \$1,454.58, in which they were obligors with R. B. Chandler, deceased, who signed himself as security. The defendants put in two pleas of usury, to the second of which the plaintiff demurred; and the court sustained the demurrer. On the first plea issue was joined; and the parties agreed to dispense with a jury and submit the whole question of law and fact to the court.

The facts on which the defendants relied as constituting the usury, and which they introduced evidence to establish, are, that the bond sued on was for the amount of two bonds which Robert A. Chandler and others had executed to Robert Drake. One of these bonds was for one thousand dollars, and was executed by Robert A. Chandler, *Robert B. Chandler and Braxton Garlick, the consideration of which was for money loaned, at a rate of interest above six per cent. per annum.

The Circuit Court gave a judgment for the plaintiff; and the defendants thereupon applied to the District Court of Appeals at Williamsburg for a supersedeas, which was awarded; and that court reversed the judgment. Drake's executor thereupon obtained a writ of error from a judge of this court.

Branch, for the appellant.

Gregory & Tel. Taylor, for the appellee.

RIVES, J. The enquiry in this case is whether there has been such a substitution of a new security for an old one that was tainted with usury, as to make it equally void with the old one, and subject it to the same defence. The general principle is a

given for a loan originally usurious, however remote or often removed, is void. *Coffman v. Miller*, 26 Gratt. 701, citing the principal case, and *Walker v. Bank of Washington*, 8 Howard 63, 11 L. Ed. 494. See also, in accord, *Vaught v. Rider*, 83 Va. 600, 8 S. E. Rep. 293; *note to Walker v. The Bank*, 8 Howard 63, 11 L. Ed. 494.

†**Same—Change of Parties—Effect.**—Although every subsequent security, however remote, given for a note originally usurious, is void, yet a new note given upon a new consideration and forming a new and different obligation of different parties, although arising out of an usurious transaction, is purged of the taint of usury unless it be shown that it was a colorable shift to evade the statute.

The principal case was cited as authorizing this proposition in *Coffman v. Miller*, 26 Gratt. 701; *Keckley v. The Bank*, 79 Va. 464; *Vaught v. Rider*, 83 Va. 602, 8 S. E. Rep. 293; *Mathews v. Traders' Bank (Va.)*, 27 S. E. Rep. 610. See also, *Stone v. Ware*, 6 Munf. 541; *Law v. Sutherland*, 5 Gratt. 367.

See generally, monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 698.

familiar one, and is thus clearly stated in *Walker v. Bank of Washington*, 3 How. U. S. R. 62: "The mere change of securities for the same usurious loan to the same party who received the usury, or to a person having notice of the usury, does not purge the original illegal consideration, so as to give a right of action on the new security. Every subsequent security given for a loan originally usurious, however remote or often renewed, is void." This doctrine, however, does not apply where third persons, strangers in whole or part to the original security, intervene, and for motives peculiar to themselves and unaffected by the usurious consideration, supersede or supplant it by a new obligation of their own creation. To which class we refer the bond which is the subject of this suit? Is it the mere substitution between the same parties of a new bond in the place of one void for usury, and therefore open to the same defence? or is it a totally new and different obligation of third persons, and, though arising out of the original illegal contract, thereby purged of this taint?

Let it be conceded that the \$1,000 bond of R. A. Chandler and R. B. Chandler was void for usury, and formed part or the consideration of the bond in this record and the subject of this suit. Such a concession, I think, is due to the evidence in this cause; but here it is noticeable that the renewed bond is given neither by R. A. Chandler (for he was dead), nor by R. B. Chandler as a principal obligor. On the contrary, R. B. Chandler, the survivor, prevails on strangers to the old bond to lift it by an obligation of their own, on which he goes as security. How can such an act on the part of R. B. Chandler, one of the original obligors in the old bond, be reasonably construed but as a voluntary waiver on his part of the statute? The statement of the appellees' counsel, in a written argument that has been laid before us, goes far to favor this construction. We are informed, that of the new obligors, O. M. Chandler was the only son, and Apperson and Cooke were the son-in-law of R. B. Chandler; and that the new transaction was a family arrangement by which the debt was lifted from the aged father, and assumed by those who would be his heirs, and destined soon to succeed to his property and their inheritance. It is, therefore, very much as if R. B. Chandler had paid the debt and then united with his children in borrowing of Drake the money thus paid; in which case no one can doubt that the new transaction would be free of usury. The actual contract is closely, and, as it seems to me, purposely, assimilated to this. The recital in the bond is that it was for "this amount borrowed of Robert Drake" by these parties.

This view of this transaction is abundantly sustained by authority. Comyn on the Law of Usury, p. 186, admits that "where third persons are mixed up with the new transaction, the courts regard it with a favorable eye. Thus, where

a man makes an usurious agreement, and gives a bond, and afterwards, by a subsequent agreement, gives a new bond for the sum lent to I S, to whom the lender owes so much, in satisfaction of his debt; this last bond is not voidable under the statute. *Reginia v. Seewel*, alias *Beans*, 7 Mod. R. 118. And so, where A, for a usurious consideration, had given his promissory note to B, who transferred it to C for a valuable consideration, without any notice of the usury; and A afterwards gave his bond to C for the amount of the note, the court of King's Bench held that this bond was not vitiated by the original usury to which C was no party. *Cuthbert v. Haley*, 8 T. R. 390."

A decision of *Ld. Kenyon*, Chief Justice, in *Hulme v. Turner*, 4 Esp. N. P. C. 11, is very pertinent to the case at bar. There, the payee of a note given for a usurious consideration, arrested the maker, and to procure his liberation, a third person joined the maker of the note in another note for the amount of the debt; and the Chief Justice said, "he was clearly of opinion that the consideration of the first note could not be questioned in an action on the second, unless it could be shown that it was a colorable shift to evade the statute, devised when the money was originally lent and the first note granted."

The case in our own reports of *Stone & Ware v. Smith*, 6 Munf. 541, is very similar to the foregoing case. Ware, a debtor of Charles Smith, and an execution creditor of William G. Stone, prevailed on the last, in consideration of forbearance, to procure of his father as principal a bond with security, &c., to Charles Smith for Ware's debt, and in such adjustment to allow Ware fifteen per cent. on Stone's debt to him. It was held that the defence of usury would not lie against this third party Charles

Smith, who knew nothing of the usurious agreement between Ware & Stone. To the same effect is the case of *Law's ex'ors v. Sutherland & als.*, 5 Gratt. 357. Two friends, at the instance of Sutherland, and for his accommodation, had interchanged notes, and by the sale of them raised money for him and remitted the proceeds to him to relieve him of a pressing embarrassment; whereupon Sutherland, to save them harmless, executed a bond to them for the amount of their bonds, and secured the same by a deed of trust. It was held that the bond and deed aforesaid of Sutherland were unaffected by usury. So, again, in a Connecticut case—*Wales v. Webb*, 5 Conn. R. 154—a similar principle was announced. A took the promissory note of B, on a usurious consideration, and afterwards, in pursuance of an agreement between them, B substituted the bond of C, procured from C, in consideration of B's promising to pay him the amount thereof, which B in fact paid. It was held that this transaction amounted to a voluntary waiver of the statute by B, and that such bond, executed on a new consideration and with no design in any one to evade the statute,

was valid. In his opinion in this case, Hosmer, Ch. J., said: "It may be considered an established principle, that whenever a man, whether the surety or a stranger, receives the amount of the usurious note from the debtor that the usury is purged, and that the new note is valid, unless such an arrangement was made with an intent to defeat and defraud the statute."

This citation of authority bears me out in the conclusion that this bond of strangers to the old one, stands on a very different footing from a renewal or substitution by R. B. Chandler in character of principal. So far as the old note entered into the consideration of the new, its usurious taint was, in the language of these authorities, purged thereby; and R. B. Chandler, in shifting his position from that of principal to that of security, and substituting new parties to his old obligation, must be taken as waiving for *himself and others the benefit of the statute, so far as it applied to his original agreement. For these reasons, the Circuit Court did not err in sustaining the demurrer to the 2d plea, and in giving judgment for the debt; wherefore the judgment of the District Court must be reversed, and that of the Circuit Court affirmed.

The other judges concurred in the opinion of Rives, J.

Judgment of the District Court reversed.

915 *Old v. The Commonwealth.

October Term, 1867, Richmond.

1. **Criminal Law—Statute—Bribery of Officer.**—The Code (1860), ch. 194, § 6, p. 799, punishes the omitting or delaying to perform any duty pertaining to the officer of one who is authorized to serve legal process.*
2. **Same—Same—Same.**—The offence punishable by the act, is the omitting or delaying to perform any duty, &c.; not the doing any act.
3. **Same—Presentment under Statute—Case at Bar.**—The presentment should follow the terms of the statute, or must use terms which show conclusively, or beyond any rational doubt to the contrary, that the accused is guilty of the offence described in the statute; and unless this is done, the addition that "so the accused did receive money for omitting and delaying to perform a duty pertaining to his office of constable," &c., will not cure the defect.
4. **Same—Appellate Practice—Failure of Presentment to Charge Offence.**—Where the presentment does not charge the offence, the appellate court will reverse the judgment against the accused, though

*Code, ch. 194, § 6, p. 799. If any officer authorized to serve legal process, receive any money or other thing of value, for omitting or delaying to perform any duty pertaining to his office, he shall be confined in jail not more than six months, and be fined not exceeding one hundred dollars.

Indictment under Statute.—See *Cousins v. Com.*, 19 Gratt. 807, and *foot-note*; *Taylor v. Com.*, 20 Gratt. 825, and *foot-note*. See generally, monographic note on "Indictments."

no motion in arrest of judgment was made in the court below.

5. **Same—Same—Judgment Paid—Reversal of Judgment.**—Where a pecuniary judgment has been rendered against a defendant in a criminal case, and he pays it, and upon appeal the judgment is reversed, the cause will be remanded to the court below, for an order of restitution to be made therein, if the money is yet in the hands or power of the court.

916 *At the May term for 1866 of the Circuit Court of Halifax county, the grand jury made a presentment against William J. Old, in the words following:

"We present William J. Old, a constable of the first magisterial district in the county of Halifax, for this, that he did on the 7th day of September, 1865, in the county of Halifax, then and there acting as constable as aforesaid, and authorized by law to serve legal process, unlawfully receive twenty-five dollars from James M. Moore, in consideration of which, he then and there unlawfully undertook and agreed to dismiss a warrant then pending for a claim which had been put into his hands as constable as aforesaid for collection, by John R. New, in behalf of said New against the said James M. Moore, at the cost of the said New, and that he did afterwards, to wit: on the day and year last aforesaid, unlawfully dismiss and procure to be dismissed, without the knowledge or consent of said New, the said warrant; so we the jurors say, that the said William J. Old did, on the said 7th day of September, 1865, in the county aforesaid, receive money for omitting and delaying to perform a duty pertaining to his office as constable as aforesaid, fraudulently and corruptly, against the peace and dignity of the commonwealth of Virginia, upon the evidence of James M. Moore, John R. New and John Buntin, Jr., witnesses sworn in open court and sent to the grand jury to testify."

At the October term of the court, Old appeared and filed the plea of "not guilty." The case was tried, and the jury found him guilty and assessed his fine at fifty dollars. Old thereupon moved the court for a new trial, on the ground that the verdict was contrary to the evidence. But the court overruled the motion, and entered a judgment upon the verdict for the fine of fifty dollars and costs; and also that he should be imprisoned in the county jail for ten days.

917 *Old excepted to the opinion of the court overruling his motion for a new trial; and the court certified the facts upon the record, in substance as follows:

Prior to, and on the 7th of September, 1865, in the county of Halifax, the defendant was a duly qualified constable in said county, and was acting as such. John R. New, of said county, prior to the said 7th September, 1865, gave to the said constable a claim which he set up against one James M. Moore, of said county, to collect—said claim being for eighteen dollars, which he alleged was the value of two hogs belonging to him, which had been killed by said

Moore—and the defendant afterwards saw Moore, and informed him that he had a warrant against him, Moore, for the sum of eighteen dollars, in behalf of New. At that meeting Moore did not make known to the defendant whether he intended to resist the claim or not; but several days after, Moore and defendant met at Ballow & Hankins' foundry, in said county; and the defendant and Moore had a further conversation about said warrant; which having been heard by J. D. Hankins, who was present, Hankins suggested to Moore, that as the hogs, which were killed by him, had destroyed a quantity of his growing crop of wheat, he ought to file an offset to New's claim for the amount of damages so done his crop; and proceeded to make out an account of said damage, at which the charge made was twenty dollars. While the persons present (the defendant being one of them) were talking on the subject, Moore expressed himself as anxious to get rid of the warrant, and of New and his family, who occupied premises near his plantation; and thereupon the defendant proposed, for the sum of twenty-five dollars, to get him rid of the warrant, and to have New and his family removed from the place then occupied by them. Moore had no money with him then, but ascertained that he could get it from Hankins, who, how-

918 ever, suggested that "he might set up the offset aforesaid. He told the defendant that he was so anxious to get rid of the warrant and the News, that he would give the sum demanded, if he would dismiss the warrant at New's costs, and would bind himself to get them away from the premises then occupied by them. The defendant then hesitated, and declined at that time to accept the said sum and undertake so to do; but next day, at a sale in the neighborhood, and in the county of Halifax, the defendant and Moore met, when Moore again offered the defendant the same sum; and the defendant agreed to accept it, and then prepared a writing and signed the same, in these words: "Received of James M. Moore the sum of twenty-five dollars, to be applied to the removal of John R. New from the place where he now resides; and in the case the said New is not removed, after the 1st of January, 1866, the above amount of twenty-five dollars is to be returned to the said J. M. Moore—this the 7th day of September, 1865"—and handed it to Moore, who, after reading it, told him that he had left out the main thing, and that was the agreement to dismiss the warrant; and then the defendant added the words signed by him on the same paper, in these words: "The warrant of John R. New against J. M. Moore is to be dismissed at the costs of the said New;" and handed it, so amended, to Moore, who then paid him the sum of twenty-five dollars. Moore distinctly stated to the defendant at the time, that the principal inducement to him to pay the said sum, was to get rid of the warrant. Afterwards, John R. New, finding that nothing had been done, as he supposed, by the de-

fendant against Moore, gave the claim to another constable to warrant upon; but before he went to serve the warrant upon Moore, New ascertained that Moore had settled said claim with the defendant; told the constable to warrant the defendant; and the constable did accordingly serve a warrant upon the defendant at Halifax 919 fax court-house; *who at the time said he owed New nothing, and had nothing in his hands belonging to him, and objected to being warranted out of his magisterial district; and thereupon the constable made the same returnable at a place within the magisterial district in which the defendant resided; and then he went to Moore to summon him as a witness; but Moore refused to go unless forced to do so; but at last gave up to him the paper hereinbefore copied; which, when shown to New by said constable, he told the constable not to carry on the warrant against the defendant any longer; and went to the attorney for the commonwealth of this county, who, after reading the paper, and hearing the evidence of Moore, sent them in before the grand jury, to state the facts as they occurred. Not long after the presentment was made on the evidence of New and Moore, John R. New died. The justice of the peace of the county of Halifax, who was in the habit of trying the warrants tried in the district of which the defendant was constable, was in the habit of signing blank warrants and giving them to the defendant, who was in the habit of filling them up as occasion demanded; and nearly all the warrants tried by him were issued in blank, and filled up by the constable aforesaid; and such blanks were placed in the hands of the defendant; and Moore never was afterwards cited to appear, at any time or place by the defendant, to answer for said claim so given to him by New as aforesaid.

Old paid the fine and costs, and the judge of the court suspended the judgment until the first day of the next term of the court. And Old obtained a writ of error from this court.

Barksdale, Mayo and Haymond, for the appellant, insisted:

1st. That the presentment was defective. It does not *allege that the warrant was pending before any certain justice or court. If it is necessary to prove that the warrant was pending, then it was necessary to allege it; nothing can be supplied by intendment. They referred to 2 Hawkins' Pleas of the Crown, p. 310, § 57; p. 313, § 60; Newell v. The Commonwealth, 2 Wash. 88; 2 Rob. Pr. (old ed.) 64, 73; Conner v. Commonwealth, 2 Va. Cas. 30.

2d. The Commonwealth must prove the charge as laid in the presentment. Commonwealth v. Hickman, 2 Va. Cas. 323; Tate v. Berry, 2 Bailey S. C. R. And there is no proof that a warrant was issued, or that it was dismissed. The only proof that can be relied on to show that a warrant

had been issued is the statement of the appellant to Moore that he had a warrant. But he is not estopped by his admissions from disproving the fact; and it is disproved. And there is not even an admission that the warrant had been dismissed.

The Attorney-General, for the Commonwealth, insisted:

1st. That no objection having been taken to the presentment in the Circuit Court, either before the verdict, or in arrest of judgment, it was too late to take it in this court. But if this court will consider the question, it must be as if in arrest of judgment; and if there is enough in the presentment to enable the court to give judgment thereon according to the very right of the case, the objection will not be sustained.

This prosecution is under the sixth section of ch. 194 of the Code, ed. of 1860, p. 799. The presentment charges that Old was an officer authorized to serve legal process, and that he received a certain sum of money for dismissing a warrant in his hands, which he did dismiss. This is all which the statute requires to constitute the offence; and though it may not be formally set out, that cannot avail in arrest of judgment to defeat the prosecution.

921 *2d. He insisted that the admissions of Old were sufficient to sustain the prosecution. 1 Greenl. Ev. p. 628, § 521, 4th ed.; 13 John. R. 529. The admission was several times repeated; and its truth is not disproved by any evidence.

RIVES, J. The petitioner in this case was convicted at the October term, 1866, of the Circuit Court for the county of Halifax, of having received a bribe for the non-performance of a duty pertaining to his office as constable. The case is brought to this court upon a bill of exceptions to the court's refusal of a new trial on the ground that the verdict was contrary to the evidence. This is the whole and only case presented by the record. If there be, as it is now alleged any defect in the indictment, it escaped the notice of the petitioner's counsel below, and was not availed of either by demurrer before trial, or by plea in arrest of judgment after verdict. I propose, therefore, first to confine myself to the issue made by the pleadings in this cause, namely, the sufficiency of the evidence to sustain the verdict.

The principle which governs this court on questions of new trial, has been so repeatedly settled as to render it unnecessary to cite the various cases in which it has been determined. For obvious reasons, this court invariably declines to set aside verdicts, unless the evidence is plainly insufficient to sustain them. Juries are the appropriate triers of facts, and authorized to draw from them all proper inferences and presumptions; and the whole scheme and policy of our law forbid the inference of the court with their verdicts, unless they are manifestly unsupported by or contrary to the testimony.

The first allegation here, of the insuffi-

ciency of the evidence, is, that there was no proof of a pending warrant. Not being a matter of record, it was to be proved by parol, and in such a manner as to satisfy the jury of the fact. Now, then, it was shown that it was the practice of the justice trying warrants in the district of which the petitioner was constable, to issue them in blank with his signature, and leave the constable to fill them up as suitors required—a practice so prevalent as to make it the ordinary procedure in cases triable by single justices. It was further proved that the constable told Moore that he had such a warrant against him; and afterwards, in his corrupt agreement with Moore, he undertook, with all the formality of writing, and under his own hand, that "the warrant of J. R. New against J. M. Moore should be dismissed at the costs of the said New." The jury, therefore, in my opinion, were well warranted by this state of proofs, in finding not only the existence of the warrant, but the further and material fact, that it was in his hands and under his control.

Again, it is said, no warrant could have been maintained on a claim for damages for killing hogs; but such was not New's claim, as set forth in the evidence; he was suing for the value of his hogs, waiving the trespass, &c.; but even had it been otherwise, the warrant would have been good under the act of the restored government, 1863-4, § 3, p. 32.

The third and last ground of objection is that it does not appear that the claim was to have been collected by warrant; and if so, that such warrant could have been dismissed by the justice only, and not by the constable. It is clear that the claim was put into his hands for collection; and it is equally clear, by his verbal and written admission, that he elected, as he had a right to do, to warrant for it. He did not say to Moore, "I have a claim against you from J. R. New for the value of two hogs you had killed;" but, on the contrary, "I have a warrant against you for the sum of eighteen dollars in behalf of

923 *J. R. New." And when he received the money he did not acknowledge it to be in satisfaction of a claim of New, but agreed therefor to "dismiss the warrant of J. R. New;" nor did he pay over this money or any part thereof to New, but left him, in ignorance of the transaction, to seek new process and employ another constable to assert a claim which he, the petitioner had so unlawfully and corruptly delayed and defeated. There is not a particle of testimony in this cause to extenuate the conduct of the petitioner; he permits New to descend to his grave without any account of this unwarrantable and criminal abandonment of his suit, and without any apology for the contumely and insult of undertaking, for a pecuniary reward, to remove him from his home at the instance and upon the representations of his adversary.

It does not seem to me correct or fair to

impute to the term "dismission" any of that technical force or meaning which it might have when applied to cases in a court of record. Used in the connection in which it is here employed, it is tantamount to "abandonment," "failure to prosecute," or "a destruction or non-return of the warrant;" and in my view any one of these acts of misfeasance or non-feasance would constitute that official delinquency denounced and punished by this statute. The constable is in some measure the agent of those placing claims in his hands for collection; and when acting fairly and bona fide, might be well authorized to dismiss their warrants, or procure them to be dismissed; nor could the justice entrusting him with warrants signed in blank object to the constable's disposition of them; or arrogate to himself the exclusive and empty formality of dismissing warrants, of whose existence he had not been cognizant; nor in such a case of corrupt practice as that at

924 bar could it be expected of the constable to return his process and ask *the justice for a dismission upon the disclosure of his guilty bargain with the defendant to the warrant.

I have thus endeavored to consider and dispose of this case as it is made out by the record, and I cannot refrain from saying that, in my judgment, there could be no clearer case for this court's refusal to interfere with the verdict and judgment below.

But it is now contended here, for the first time, that the verdict of guilty does not ascertain an offence, because the indictment sets out none. I may be excused for saying that, in my view, the value of this discovery is impaired, and its reality discredited, by the noticeable fact that it eluded the vigilance of the counsel who prepared the case for appeal, and neither demurred or removed an arrest of judgment on account of this alleged defect.

Concede, however, that this case is now to be construed as if pending on a plea in arrest of judgment because of the insufficiency of the indictment. Our present Code briefly declares, that "judgment in any criminal case after a verdict shall not be arrested nor reversed upon any exception to the indictment or other accusation, if the offence be charged therein with sufficient certainty for judgment to be given thereon according to the very right of the case." Code, ch. 207, § 12, p. 832. This is a condensation or abbreviation of the Stat. 1 Rev. Code 1819, ch. 169, § 44, and involves no discrepancy in meaning or substance. The only condition required to obviate such exception after verdict (which, under the over-nice practice of former times, had become, in the language of Lord Hale, "a disease of the law,") was such a certainty in the charge as to warrant a judgment thereon according to the very right of the case. To ascertain whether this condition is met by this indictment, we must first fix the exact requisites of this statutory

925 offence. Code, ch. 194, *§ 6, p. 799.

First, the subject of the charge must be "an officer authorized to serve legal process." Secondly, there must be "the receipt of money or other thing of value;" and thirdly, for his bribe there must be an "omitting or delaying to perform a duty pertaining to his office." These are all the ingredients of the offence. As to the first two, no question is made or doubt expressed of the sufficiency with which they are set forth in the indictment; but a difficulty is suggested as to the mode in which the non-performance of the official duty is alleged. It is stated as consisting in "the dismission of a pending warrant" without a distinct averment that the warrant was in the petitioner's custody, or without mentioning the justice before whom it was pending. Now, if the official delinquency was only predicated of the service of the process, there would be some plausibility in the objection; but the statute lays it more broadly and comprehensively, as a neglect of "any duty pertaining to his office." Hence what relates to the service of the process attaches only to the description of the officer; and the indictable offence embraces the omission on the part of such officer, for a bribe, of any duty whatsoever pertaining to his office. I have heretofore given my reasons for treating the charge of dismissing the warrant under the circumstances, as equivalent to the charge of failing to serve or to return or to prosecute it to judgment; and therefore, I deem this part of the indictment a sufficient and certain charge of the official non-feasance, of which the petitioner was convicted and sentenced.

A leading authority as to the character of the defects not cured by the statute is the case of *The Commonwealth v. Peas*, 2 Gratt. 629. In that case there was no averment of one of the requisites of the statutory offence, namely, that the slave was carried from one county to another without the consent of the owner; and it was 926 *properly held, that such a defect was fatal after verdict, and was not cured by the statute. But how dissimilar is that case from this? Here there is no one ingredient of this offence left to rest upon intentment or implication; but it is specially set forth by a direct, positive, and clear averment, needing no other aid in its construction than what may be derived from a right and reasonable understanding of the terms and language used. There is no such lack of circumstantial description of the offence as to expose the petitioner to the danger of surprise on the trial; to disable him from his defence, or to deprive him, after trial, of the full protection of the verdict to shield him from another prosecution; all of which are obvious mischiefs relied on to avert the statutory cure of jeofails.

I do not deem it necessary or material to consider and analyze other decisions that have been made by this court upon this question; they all turn upon the palpable absence of averments to establish and characterize the offence. I confess myself unable to discern the substance of the

objections taken to this indictment. They are of that over-nice description which, however they might have availed on demurrer while the defendant could have been held over to another indictment—a question I do not decide—ought not now, in my opinion, to enure to his acquittal.

For these reasons, I conclude that this indictment should be adjudged sufficient upon a plea in arrest of judgment, if such a one had been made in this record; and I feel a greater safety and confidence in arriving at this result, because sustained by the petitioner's counsel below, who made no point of this sort.

Upon all these grounds of review, I am for affirming the judgment.

MONCURE, P. The offence intended to be charged in "the presentment in this case, was that created by the Code, ch. 194, § 6, p. 799; which declares that "if any officer authorized to serve legal process, receive any money or other thing of value, for omitting or delaying to perform any duty pertaining to his office, he shall be confined," &c. As the terms of the statute are expressly confined to "any officer authorized to serve legal process," it might plausibly be contended, that the only duty the omission or delay to perform which was therein referred to was, the duty to serve legal process. But if that had been the intention of the Legislature, they would probably have plainly said, "for omitting or delaying to serve any such process coming to his hands for execution," instead of, "to perform any duty pertaining to his office." These general terms literally embrace any duty pertaining to the office of one who is authorized to serve legal process; and such, I think, is the true construction of the statute.

The natural and proper mode of charging a violation of this statute is, to aver that the accused was an officer authorized to serve legal process, as for example, a constable; that while he was such officer, it became his duty, as such, to perform a certain act, as for example, to warrant for a claim entrusted to him for that purpose and recoverable by warrant, or to serve a warrant which had been issued on such claim, and placed in his hands for execution, &c.; and that he unlawfully received a certain sum of money, or a certain other thing of value, for omitting or delaying to perform his said duty.

While this would be the natural and proper mode of making the charge, and would conform to the very terms of the statute, it might be sufficiently made in other terms which are substantially the same with those used in the statute, or which show conclusively or beyond a rational doubt to the contrary, that the accused is guilty of the offence described in the statute; at least such a defect would be cured by the verdict.

In this case the presentment does not make the charge in the natural and proper mode. The statute prohibits the receiving

of money, &c., for a nonfeasance, for omitting or delaying to perform a duty. The presentment charges the receiving of money for doing an act—a malfeasance it may be—that is, it charges the accused with unlawfully receiving twenty-five dollars from James M. Moore, in consideration of which he unlawfully agreed to dismiss a warrant then pending for a claim which had been put into his hands as constable for collection by John R. New, in behalf of said New against the said Moore, at the cost of said New, and that he did afterwards unlawfully dismiss and procure to be dismissed the said warrant, without the knowledge or consent of said New.

To be sure, the presentment concludes, and so the accused did "receive money for omitting and delaying to perform a duty pertaining to his office as constable," &c. But this general conclusion in the word of the statute, is certainly not sufficient, of itself, to require the accused to answer the charge, and therefore the specification contained in the preceding part of the presentment cannot be stricken out as surplusage, so as to leave enough to make a substantial and sufficient charge of the offence created by the statute. It was necessary to specify the offence; and therefore the specification in the presentment was made.

But does that specification charge the offence? It does not do it expressly, as we have seen. It does it argumentatively, or by implication only, if at all. Is the implication necessary or inevitable? Does the specification show conclusively, or beyond a rational doubt to the contrary, that the accused is guilty of the offence created by the statute? I think not.

The accused might have done the act he is charged with having done by the presentment, and still not have been guilty of the statutory offence. His agreeing to dismiss a warrant, and afterwards dismissing and procuring it to be dismissed, was not, necessarily, "omitting and delaying to perform a duty pertaining to his office." It may be argued that his dismissing, or procuring to be dismissed, the warrant, was, in effect, omitting or delaying to execute the warrant. But this is not so—at least in legal contemplation. The warrant, consistently with the presentment, may never have come to his hands for execution. No averment that it ever did is contained in the presentment. The claim was put into his hands for collection, and it is probable that the warrant also was, if any warrant was ever issued. But it is possible that a warrant may have been issued on the claim and put in the hands of another constable. Or it is possible that the warrant may have been served and then pending for trial before a justice, waiting for the parties to be ready with the witness to go to trial in a disputed case. If in such a state of the case the accused had received twenty-five dollars for dismissing the warrant, or procuring it to be dismissed, what duty pertaining to his office would he thereby omit or delay to perform? With what duty would

he be charged in such a case? The warrant would have been executed and returned, the witness summoned, and the whole matter would have been in the hands and under the control of the justice, who, alone, could dismiss the warrant. The constable or any body else might procure it to be dismissed, and thereby be guilty of a criminal act; but it is not perceived how he could be guilty of an omission or delay of duty under the statute in question. Again, the claim being entrusted to the accused as constable to warrant for, he had authority to collect it, I suppose even after warrant issued, and he and his sureties would
 930 have been liable for the money so *received, as for money collected under execution. Code, ch. 150, § 13, p. 643. He might, therefore, lawfully have received the twenty-five dollars in payment of the claim and costs, and to have the warrant dismissed, and afterwards procured the warrant to be dismissed. The charge of these facts, therefore, is not a charge of a criminal offence, much less the offence created by the statute. It is true the acts are charged to have been unlawfully done; but the word "unlawful" is not sufficient, in such a case, to bring it within the terms of the statute.

I do not think the defect in the presentment in this case is cured by the statute of jeofails; Code 832, ch. 207, § 12; as I think will plainly appear by reference to the authorities cited in the margin of the Code. 2 Virginia Cas. 122; 2 Leigh 709; 4 Id. 675; 2 Gratt. 629. That statute was not intended, as was well said by the court in Barker's case, 2 Va. Cas. 122, to introduce a carelessness or laxity in pleading, but merely to cure those defects which the over-nicety of the courts had introduced into the common law, and which did not put the rights of the Commonwealth or the accused into jeopardy. Trimble v. The Commonwealth, 2 Va. Cas. 143, gives an instance of a defect which was cured after verdict by the statute of jeofails. The statute creating the offence which was prosecuted in that case, used the word "voluntarily," in describing the offence. The indictment omitted that word, and used the word "willfully" in lieu thereof. This would have been a fatal defect on demurrer, though cured by the statute after verdict. According to the very terms of the statute, the offence must be charged with sufficient certainty in the indictment or other accusation, for judgment to be given thereon according to the very right of the case. There must still be some certainty in the charge. But here the objection is that there is no certainty in the charge; indeed, that the offence created by the statute on
 931 *which the presentment is founded is not charged in the presentment at all. I take it to be a true rule of law, that wherever the facts stated in an indictment or other accusation may all be true, and yet the accused not be guilty of the offence intended to be charged against him, he cannot be thereon lawfully convicted of such offence; and that, I think I have shown, is the case here.

I do not mean to say that if the offence created by the statute had been properly charged in the presentment, the jury would not have been warranted in finding the accused guilty; much less do I mean to say, that if the court below had refused to set aside a verdict of guilty in such a case, this court ought to reverse the judgment on that ground. What I mean to say is, that when we look at the presentment, and see that the offence is not charged therein at all, much less charged with sufficient certainty for judgment to be given thereon, according to the very right of the case, we cannot look to the evidence to see whether the offence has been proved; but must render judgment in favor of the accused, whatever offence he may have committed, and however clearly his guilt may have been proved.

Upon the whole, I think that the judgment ought to be reversed, and judgment rendered for the plaintiff in error, non obstante verdicto.

JOYNES, J., concurred in the opinion of Moncure, P.

The judgment was as follows:

It seems to the court, for reasons stated in writing and filed with the record, that there is error in the said judgment in this—that no offence is charged in the presentment with sufficient certainty for judgment to be given thereon according to the very right of the case; therefore, it is considered that the said judgment be re-
 932 versed and *annulled. And this court proceeding to enter such judgment as the said Circuit Court ought to have entered, it is further considered that, notwithstanding the verdict, the said indictment be quashed and the plaintiff in error be discharged from further prosecution under the same, and go thereof without day. And it appearing that the amount of the fine and costs of the prosecution have been paid into the said Circuit Court, it is ordered that the cause be remanded to the said court for an order of restitution to be made therein, if the said amount be yet in the hands or power of the court; which is ordered to be certified to the said Circuit Court.

Judgment reversed.

933 *Jett v. The Commonwealth.

October Term, 1867, Richmond.

1. Crimes Punishable by Federal Courts—Jurisdiction of State Courts.—A State court has jurisdiction to punish an act made an offence by the laws of the State, though the same act is made an offence by a law of the Congress of the United States.

*Crimes Punishable by Federal Courts—Jurisdiction of State Courts.—In *Ex parte Houghton*, 8 Fed. Rep. 901, the court said: "The act of passing these counterfeited bills, made punishable under the statute of the state under which the relator was indicted, might, and often would, concur with others to constitute a cheat which would be punishable by laws of the state of long standing against obtaining

2. Same—Same—Case at Bar.—A State court has jurisdiction to punish the offence of attempting to pass a forged note purporting to be a note of one of the national banks of the United States.

At the May term 1867 of the Circuit Court of Pittsylvania county, William P. Jett was indicted for feloniously uttering and attempting to employ as true a forged bank note of one of the national banks. The indictment is as follows:

The jurors for the Commonwealth of Virginia, empanelled and sworn in said court for the body of the county aforesaid, upon their oath present: That William P. Jett, late of the county aforesaid, on the 26th day of January, 1867, and in the said county of Pittsylvania, feloniously did utter and attempt to employ as true to John L. Hurt a certain false and forged note, commonly called a bank note or national currency, purporting to be a true and genuine note of the denomination of twenty dollars, number 37,838, dated Philadelphia, Pa., March 7th, 1864; and also purporting that the Fourth National Bank of Philadelphia will pay twenty dollars to bearer on demand—Pennsylvania; and also purporting to be signed by William P. Hamm, president, and Samuel J. Hoe Mellan,
934 *cashier, with intent to defraud the said John L. Hurt; he, the said William P. Jett, at the time he uttered and attempted to employ as true the said last mentioned forged note, to wit: on the day and year aforesaid, in the county aforesaid, well knowing the same to be forged, against the peace and dignity of the Commonwealth.

And the jurors aforesaid, upon their oath aforesaid, do further present: that the said William P. Jett, heretofore, to wit: on the 26th day of January, in the year 1867, at the county aforesaid, feloniously did utter and attempt to employ as true to John L. Hurt, a certain false and forged bank note for the payment of twenty dollars, purporting to be a true and genuine note for the payment of twenty dollars of the Fourth National Bank of Philadelphia, the same being a banking company authorized by law, with intent to defraud the said John L. Hurt; he, the said William P. Jett, then and there knowing, to wit: on the year and

money or goods by privy or false tokens. Gen. St. Vt. 671, § 23.

"It was upon this ground, that the passing the counterfeited national bank bill was a mere private cheat under the laws of Virginia, that the conviction was upheld by the majority of the court in *Jett v. Virginia*. 18 Gratt. 933, (Am. Law Reg. 200.) cited at this hearing."

See also, *Hendricks' Case*, 5 Leigh 708 (where it was held that though the offender be indictable in the courts of the United States for the offence against the laws of the United States, he is also indictable in the courts of Virginia for the offence against the laws of the state); and see the cases reviewed, and the discussion in the principal case.

†See generally, monographic *note* on "Forgery and Counterfeiting" appended to *Coleman v. Commonwealth*, 25 Gratt. 865.

day last aforesaid, the said false and forged note to be false and forged, against the peace and dignity of the Commonwealth.

At the same term of the court he was tried, and on the trial the Commonwealth, having proved that the prisoner had passed to John L. Hurt the note mentioned in the indictment, called John M. Johnson as a witness. He stated that he had been a bank officer for a long time, and had been in the habit of receiving and paying out large sums of bank notes of different banks in and out of the State. That he only knew by reputation that there was such a bank as the Fourth National Bank of Philadelphia; that he could not say certainly he had ever seen any of the notes of that bank; had had no correspondence with its officers, and did not know the signature of its president and cashier; but that the plates of the bank notes of all the national banks are kept in the Treasury Department of the

United States, and that all their notes
935 *are issued from the Treasury Department to the several banks; and the only difference in the notes of the different banks is in the signatures of their respective officers. That he was a judge of the genuine notes of the national banks, and could distinguish them from spurious notes on said banks without knowing the signatures of the officers; and that he had frequently seen genuine notes on different national banks of the same plate as that of which the note in question purports to be assimilated.

The Commonwealth then offered to prove by the witness that the note described in the indictment was a forged and spurious note. But the prisoner objected to the evidence, on the ground that the witness did not have sufficient knowledge of the notes of the Fourth National Bank of Philadelphia to speak upon the subject. But the court overruled the objection, and permitted the proof to go to the jury, to have such weight with them as they might think it entitled to have from the knowledge of the witness on the subject. And thereupon the prisoner excepted.

The jury found the prisoner guilty, and fixed the term of his imprisonment in the penitentiary at three years. And then the prisoner moved in arrest of judgment on the grounds:

1. Because it appears upon the face of the indictment, that the offence charged is one of which the United States courts have exclusive cognizance under the act of Congress, entitled "an act to establish the judicial courts of the United States," approved 24th September, 1789; and under a further act of Congress, entitled "an act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved 3d June, 1864; and that the courts of the State of Virginia have therefore no jurisdiction to try and punish said offence.

2d. Because the note, as to which the
936 said false uttering *is charged in said

indictment to have been committed is insufficiently described in the second count thereof, and that therefore no judgment can be legally entered therein; and for these reasons, he prays that judgment against him may be arrested.

But the court overruled the motion, and sentenced the prisoner in accordance with the verdict. And he thereupon applied to this court for a writ of error; which was awarded.

C. E. Dabney and Barksdale, for the prisoner.

The Attorney General and Turner, for the Commonwealth.

The case is so fully argued by the judges that the argument of the counsel is omitted.

RIVES, J. The indictment in this case sets forth the offence of passing a counterfeit note of the Fourth National Bank of Philadelphia, knowing it to be so, under the Code, ch. 193, § 3, p. 797, making "the uttering of a forged note or bill of a banking company, knowing it to be, &c.," punishable by confinement in the penitentiary not less than two nor more than ten years.

In an act of Congress entitled "an act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," the same act thus indicted is made punishable by "imprisonment at hard labor for a period not less than five nor more than seven years, and by fine in a sum not exceeding one thousand dollars." Acts Thirty-eighth Cong. Sess. 1, ch. 106, § 59.

This collocation of these separate enactments shows, at a glance, that the same act—namely, the passing, with a guilty knowledge of, forged bank bills, has been made an offence, both by this State and the Congress of the United States. The State law, though anterior to the creation of the national banks, and consequently to the existence of their notes, employs nevertheless language of such general and comprehensive import as to embrace the note of a banking company, whensoever or by whomsoever created, or wheresoever situated.

If this act of passing this counterfeit bank bill is to be deemed one and the same offence, whether viewed in reference to the criminal code of the States or the criminal laws of the United States, then it would be conceded, I presume, that it was exclusively cognizable by the United States courts. The constitution of the United States, in Art. 111, § 2, ch. 1, extends "the judicial power to all cases, in law and equity, arising under this constitution, the laws of the United States," &c. The judiciary act of 24th September, 1789, after giving to the circuit courts jurisdiction concurrently with the several States of civil suits, &c., declares, they "shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States,

except where this act otherwise provides, or the laws of the United States shall otherwise direct," &c.

Now, if this offence is defined and punished by the law of the United States of 3d June, 1864, it follows, as a necessary consequence, that it is within the exclusive jurisdiction of the Federal courts. Feely's case, 1 Va. Cas. 321, is an authority for this position. It was an indictment for larceny of packages out of the mail of the United States, "contrary to the form of the act of Congress of the United States in such case made and provided, and against the peace and dignity of the Commonwealth." It was a solecism on the face of the indictment; and the court unanimously decided "that, as the offence described in the indictment was created by act of Congress, *the State court had not jurisdiction thereof." And I presume the same judgment would have been given if the indictment had been differently and more adroitly framed, so as to aver a larceny out of facts really constituting a robbery of the mail.

The principle of exclusive jurisdiction in the Federal courts, however, allows of this exception, that the laws of Congress may save to the State courts a concurrent jurisdiction. When this is done, it is not to be considered as a grant of jurisdiction from Congress, and therefore null, as in *Jackson v. Rose*, 2 Va. Cas. 34; but simply as restoring to the States a jurisdiction originally possessed by them concurrently with the Federal courts; and by virtue of the express provision in the judiciary act of 1789, enabling Congress to make such exception to "the exclusive cognizance of crimes," &c. Notable instances of this saving under the acts of Congress existed in relation to the offences of counterfeiting coin and forging notes of the United States Bank, &c. Thus, in *Rasnick's case*, 2 Va. Cas. 356, no question was raised as to the rightfulness of the State jurisdiction over the offence of counterfeiting coin, doubtless because of the proviso to the act of Congress denouncing the offence. The cases of *Pitman*, 1 Brevard's R. 32, and *Tuit*, 2 Bailey's R. 44, rest upon the same saving in the act of Congress against the counterfeiting bills of the United States Bank. A case from Georgia, *Rouse v. State*, 4 Georgia R. 136, was cited, but while the question was raised, it was not decided, and Judge Lumpkin evidently inclined against the assumption of State jurisdiction. In the case of *Antonio*, 3 Brevard's R. 562, on an indictment for passing counterfeit coin, the question of State jurisdiction was considered, and the jurisdiction entertained under the clause of the act of Congress declaring, "nothing in this act

shall be construed to deprive the individual States of jurisdiction, *under the laws of the several States, over offences made punishable by this act." Judge Colcock treats this as a "legislative construction of the constitution," and Judge Bay as a "saving and reservation of the

right of the State courts to punish this offence under State laws, if any such salvo or reservation was necessary." Hendrick's case, 5 Leigh 707. "Without these provisos," says Chancellor Kent, (1 Com. 399,) "the State courts could not have exercised concurrent jurisdiction over those offences consistently with the judiciary act of 1789." This class of cases, therefore, does not apply where the laws of Congress make no reservation of jurisdiction to the State courts.

No doubt exists as to the exclusive jurisdiction of the United States in cases affecting ambassadors, &c., cases of admiralty and maritime jurisdiction, &c., and that it rests with Congress at its election to extend this exclusive jurisdiction to all cases arising under the constitution and laws of the United States, &c. 1 Kent's Com. pp. 426, 8-9, and 2 Story on Const. § 1740, p. 560. This avoids the repugnancy and interference of two legislative wills being exercised over one and the same subject, as shown by Judge Washington in his opinion in the case of *Houston v. Moore*, 5 Wheat. R. 1; and wherever the concurrent jurisdiction remains in both courts, it would seem to follow, as this able judge holds, that the plea of *autrefois acquit* or *convict* would lay to either tribunal. But the existence of this concurrent jurisdiction must be traced in cases of crimes "cognizable under the authority of the United States" to some express Congressional enactment, and is not a matter left to inference. Any legislation by Congress in a case within its jurisdiction supersedes all State legislation and impliedly prohibits it. *Prigg v. Commonwealth of Pennsylvania*, 16 Peters U. S. R. 539; *Sturges v. Crowningshield*, 4 Wheat. R. 122, 193.

940 *Thus the law seemed to stand until the decision of the Supreme Court in 1847, in the case of *Fox v. The State of Ohio*, 5 How. U. S. R. 410. This decision was based chiefly on the idea that the constitutional function of Congress was limited to the counterfeiting of coin; and did not extend to the separate and different offence of uttering counterfeit coin. "We think it manifest," say the court, "that the language of the constitution, by its proper signification, is limited to the facts or to the faculty in Congress of coining and of stamping the standard value upon what the government creates or shall adopt, and of punishing the offence of producing a false representation of what may have been so created or adopted. The imposture of passing a false coin creates, produces or alters nothing; it leaves the coin where it was; affects its intrinsic value in no wise whatsoever."

This decision seems to have been differently interpreted to the District Courts of the United States. Judge Conkling, of New York, construed it as denying jurisdiction to the United States Courts of the offence of passing counterfeit coin; and concluded by saying: "Perhaps the subject may, hereafter, upon maturer consideration,

be placed by the Supreme Court on a more satisfactory footing; either by deciding the power to punish all offences against the coin to be concurrent in the nation and the States; or, which would still more effectually remove the difficulty, by reconsidering the decision of *Fox v. The State of Ohio*, and adopting the doctrine maintained by Mr. Justice McLean. But so long as that doctrine remains unshaken by the authority from which it emanated, I must decline to exercise jurisdiction of the offence of passing counterfeit coin." Monthly Law Reporter, May, 1849, p. 90.

This opinion of the Supreme Court came under the review and consideration of Judge Brockenbrough, at the September term, 1847, of his court for the Western District* of Virginia. The Law Reporter for January, 1848, p. 401. He combatted the position of Judge Daniel, that "the language of the constitution was limited to the facts or to the faculty in Congress of coining," &c.; or, in plainer language, "that the term counterfeiting has a perfectly definite signification, and can only be applied, by any just interpretation of its meaning, to the act of making and forging, and not to the act of circulating counterfeit coin;" and sustained the constitutionality of a law of the United States, prohibiting the circulation of counterfeit coin, as the exercise of an implied, not an express power. Unlike Judge Conkling, he did not deem the case of *Malinda Fox* in the way of this conclusion; but to reconcile its authority with his position, invoked the reasoning of Judge Daniel against the objection of a liability to be tried for one and the same crime before the separate courts of two governments; and resolved that reasoning in favor of a concurrent jurisdiction in both the State and Federal courts. But the gist of that case was a plain denial of the power to punish the circulation under the grant "to provide for the punishment of counterfeiting the coin of the United States;" and Judge Daniel, while resting that denial on "the established import of the phrase, counterfeiting the coin, and the description of the acts to which that phrase is restricted," adds with emphasis, "that if within the power conferred by the clauses of the constitution above quoted, can be drawn the power to punish a private cheat effected by means of a base dollar, that power certainly cannot be deduced from either the common sense or the adjudicated meaning of the language used in the constitution, or from any apparent or probable conflict which might arise between the Federal and State authorities, operating each upon these distinct characters of offence." Had the court in this case held that the passing of counterfeit money was cognizable under

942 the *constitution and laws of the United States, they need not have gone further to sustain the concurrent jurisdiction of Ohio, than a simple citation of the saving of "jurisdiction to the courts of the individual States, under the laws of

the several States, over offences punishable by this act;" 4 Stat. at Large 121; which was specially dwelt upon in the argument of the case. That this was not done, corroborates the interpretation I have placed upon it.

This case has provoked much controversy as to its meaning. On the 3d of March, 1825, Congress passed an act (4 Stat. at Large 121,) for the punishment of persons who shall bring into the United States, with intent to pass, any counterfeit coin; and also for the punishment of persons of passing such counterfeit coin. In 1848, at a Circuit Court for the Northern District of New York, an indictment was found, before Justices Nelson and Conkling, against Peter Marigold, for a violation of this act; and upon a disagreement of the justices upon a demurrer to the indictment, questions affecting the constitutionality of this law, were certified to the Supreme Court. It was contended by the counsel for the defendant, that the whole question had been adjudicated in the case of *Fox v. The State of Ohio*; and that by virtue of that decision, the law of Congress must be held to be unconstitutional. But such was not the opinion of the court. The law was held to be constitutional; and this decision was said not to conflict with the case of *Fox v. The State of Ohio*. In referring to this latter case, Judge Daniel rested it upon this position, namely: "that the same act might, as to its character and tendencies and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each." *The United States v.*

Marigold, 9 How. U. S. R. 560. Hence 943 the deduction of Conkling, *J., from Fox's case against the power of Congress to punish the uttering of counterfeited coin; and the conclusion of Brockenbrough, J., from the same case, in favor of a concurrent jurisdiction over such an offence, are alike erroneous; and the Supreme Court has finally settled down in this last case, upon a separate and independent jurisdiction over the same offence in both the State and Federal courts, if we are to accept the reasoning of Judge Daniel in his effort to reconcile these two cases, as not obiter, but *res adjudicata*. But I am constrained to believe that the assertion in this last case, of the power of Congress to punish the uttering of counterfeit coin, is scarcely reconcilable with the declaration, heretofore quoted from Fox's case, "that the language of the constitution, by its proper signification, is limited to the facts or to the faculty in Congress of coining," &c.

This doctrine of parting offences so as to be triable before separate tribunals, and rendering offenders for the same act amenable both to State and Federal authorities, is for the first time hinted at in Fox's case, and distinctly enunciated in *Marigold's*. In view of the conceded fact that the judicial power of the United States exclusively

embraces offences created by Congress, it would seem strange that that jurisdiction could be invaded by a State law taking cognizance of the same offence, under the pretext that it bears a special relation to the citizens of the State. The Federal government, as well as the State government, acts directly upon the citizen; and by the constitution, "the citizens of each State are entitled to all privileges and immunities of citizens in the several States." The people of the United States are thus citizens of two governments; but these governments act in different and well-defined spheres. "The constitution of the United States," however, "is the supreme

law of the land; and the judges in 944 every State are bound thereby, "anything in the constitution or laws of any State to the contrary notwithstanding." It does not, therefore, consist with the theory of our governments, State and Federal, to attribute to the latter an exclusive cognizance of an offence while you tolerate jurisdiction of it in the former, on the plea that the same act is resolvable into an offence also against the State. This is a virtual conflict of authority forbidden by our written constitutions. The judicial power extends to all cases affecting ambassadors; can any State punish them for infractions of its laws? to all cases of admiralty and maritime jurisdiction; can such cases be transmuted by any legal alchemy into subjects of State jurisdiction? Shall the exclusive cognizance of Congress and the exclusive jurisdiction of the United States courts be ousted and defeated by this ingenious device of treating the same act as also coming within the purview of State laws? If this doctrine be correct, such results must follow. All the provisions of the constitution securing to Congress an exclusive power, or vesting in its courts an exclusive jurisdiction, may be set at naught and nullified by State laws. It would be in vain for Congress to have the power of punishing the counterfeiting of its securities and coin; the States, under this doctrine, could divest it by laws against the same offences. In like manner, the offence of robbing the mail might be treated as "larceny" in a State court; and the penalties affixed by Congress, as in the case at bar, to the passing of counterfeited bills of the national banks, be exchanged for the penalties under State laws upon the passing of any forged bills. This difficulty is not obviated by the comity of leaving the jurisdiction finally to the tribunal that first assumes it; 16 Mass. R. 171; 3 Yerg. 167; Payne's Cir. Ct. R. 621; nor, when the danger arises in this way of being punished twice for the same offence, by an application to the President to order a nolle

prosequi, or grant a pardon. Such 945 resorts or securities for personal protection are too frail, as resting in the discretion and practice of courts. A higher guarantee exists in the constitution under the fifth article of the amendments. While it imports a restriction upon the govern-

ment of the United States, and not of the separate States, it is nevertheless a part of that "supreme law of the land," to which we, as judges, are bound to conform. I do not feel at liberty, therefore, to sustain any doctrine like this, which seems to me to contravene the fundamental polity of the United States, and especially this great constitutional guaranty of the citizen against the harassment of repeated prosecutions for the same offence.

But I must admit that this doctrine, in all its breadth and consequences, is avowed and maintained by Chief Justice Taney in the Circuit Court at Richmond, May term, 1849, in the case of *United States v. Amy*, reported in the quarterly *Law Journal* (A. B. Guigon, editor), for July, 1859, p. 163. The direct and material point decided in that case was that the slave Amy came under the designation of "a person" in the 22d section of the act of Congress, passed March 3d, 1825, which provides, that if "any person shall steal a letter from the mail, the offender shall, upon conviction, be imprisoned not less than two nor more than ten years." Collateral questions as to the competency of Congress to deprive the owner of his slave by imprisonment and without compensation, were also discussed and disposed of by this eminent judge. In the conclusion of his opinion, he uses this strong and decisive language: "In maintaining the power of the United States to pass this law, it is, however, proper to say, that as these letters with the money in them were stolen in Virginia, the party might undoubtedly have been punished in the State tribunals, according to the laws of the State, without any reference

to the postoffice or the act of Congress, 946 "because, from the nature of our government, the same act may be an offence against the laws of the United States and also of a State, and be punishable in both. This was considered and decided in the case of *Fox v. State of Ohio*, 5 How. U. S. R. 410, and in the case of *United States v. Peter Marigold*, 9 How. U. S. R. 560; and his punishment in one sovereignty is no bar to his punishment in the other. Yet, in all civilized countries, it is recognized as a fundamental principle of justice, that a man ought not to be punished twice for the same offence. And if this party had been punished for the larceny in the State tribunal, the court would have felt it to be its duty to suspend sentence, and to represent the facts to the President, to give him an opportunity of ordering a nolle prosequi or granting a pardon. But there does not appear to have been any proceeding in the State tribunals or under the State laws to punish the offence."

This language is strong and persuasive, but does not attain to that authority and obligation which attach to the judgment of a court of final resort. Authorities to the contrary, however, abound, and especially on the point on which this case turns, namely, that the State courts cannot take

jurisdiction of a prosecution for an offence against an act of Congress, or for the recovery of a penalty for the violation of the penal laws of the United States. *Commonwealth v. Feeley*, 1 Va. Cas. 321; *Jackson v. Rose*, 2 *Ibid.* 34; *United States v. Lathrop*, 17 Johns. R. 4; *Haney v. Sharp*, 1 Dana's R. 442; *State v. McBride*, 1 Rice's So. Ca. R. 400; *Mattison v. Missouri*, 3 Missouri R. 421, &c.

The manner in which this question is stated by that eminent jurist, Chancellor Kent, shows the inclination of his mind. He says: "And here the enquiry naturally suggests itself, can the State courts, consistently with those decisions, sustain a criminal prosecution for forging the 947 *paper of the Bank of the United States, or for counterfeiting the coin of the United States? These are cases arising under acts of Congress declaring the offence. The State courts have exercised criminal jurisdiction over these offences as offences against the State; but it is difficult to maintain the jurisdiction upon the doctrine of the Supreme Court of New York in the case of *Lathrop*; and if it be entertained, there are difficulties remaining to be definitely cleared. These difficulties relate to the effect of a prosecution in one jurisdiction upon the jurisdiction of the concurrent court, and to the effect of the executive power of pardon of the crime under one government, upon the claim of concurrent jurisdiction." 1 Kent's Com. 404 (marg.).

Amid this conflict of authorities upon a matter of constitutional construction, where I owe something to my own convictions, however humble, I feel at liberty to adopt the reasoning and conclusion most consistent with the views I have obtained from patient study and careful examination. Convinced as I am of the repugnancy of this doctrine of a dual jurisdiction and punishment of the same act to the frame of our complex government, the orderly and harmonious working of all its parts, the co-ordinate efficiency and action, without jostling, of its different sets of courts, and above all, to the constitutional prohibition of two arraignments for the same offence, I am constrained, though with extreme reluctance and diffidence, to express my dissent, however unimportant, and to declare myself, for the reasons given, for a reversal of the judgment below.

JOYNES, J. The plaintiff in error was prosecuted and convicted under the statute (Code ch. 193, § 3, p. 797), for the offence of uttering and attempting to employ as true a forged bank note, purporting to be a note of one of the national banks of Philadelphia. It was objected, on a motion to arrest the judgment, that the courts 948 of the *State have no jurisdiction to entertain a prosecution for that offence. The reason assigned is, that the uttering a forged note of a national bank has, by the act of Congress under which those banks have been established, been

declared to be an offence against the United States; and that, by the provisions of the act of Congress passed September 24, 1789, known as the Judiciary act, the courts of the United States have exclusive cognizance of that offence.

The judiciary act of 1789, section 11, provides that the Circuit Courts of the United States "shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States," unless the laws of the United States otherwise direct. The argument is, that when Congress, declares any act to be an offence against the United States, and provides for its punishment as such, it is not competent for the court of a State to entertain a prosecution founded upon the same act under the law of a State making it an offence against the State, unless the express consent of Congress has been given for that purpose. Congress has not given such consent in respect to the offence of uttering forged notes of the national banks.

The act described in the indictment is simply a cheat practiced or attempted by one citizen of Virginia upon another, by means of a forged paper purporting to be a bank note. Whether the forged paper by which such a cheat is effected or attempted, purports to be the note of a State bank or the note of a national bank, the offence pertains equally to those matters of internal police which, by the acknowledged theory of our institutions, belong generally to the jurisdiction of the States. This jurisdiction of the States constitutes a cardinal feature of our system of government. Whether, in respect to the particular offence described in the indictment, it is suspended and displaced by the paramount jurisdiction

949 of the United States, is the question now before us. It is a grave and important question. It involves the relative rights and powers of the State and Federal governments, and the rights and liabilities of the citizen in respect to both. And it is also a question of practical importance. The authorities of the State are dispersed throughout all parts of the Commonwealth; and it is reasonable to suppose that the detection and punishment of this class of offences will be more effectually secured by them than they can be if confided only to the authorities of the United States, which are few in number, and confined to a few localities. If, however, the jurisdiction over this class of offences belongs exclusively to the United States, we ought not to usurp it, and have no disposition to do so. If, on the other hand, it belongs to the State, we have no right to surrender it. In the language of the Supreme Court: "The duties of this court to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and the law are to be expounded without leaning the one way or the other." *Bank of United States v. Deveaux*, 5 Cranch R. 87.

It is not necessary in this case to consider at large the construction of section 2, arti-

cle 3, of the constitution of the United States in relation to the judicial power, or the cases in which the jurisdiction of the courts of the United States is exclusive, or those in which a concurrent jurisdiction may be exercised by the courts of the several States. The rules by which these two classes of cases are to be discriminated do not appear to be precisely determined by the decisions of the Supreme Court, as may be seen from the case of *The Moses Taylor*, decided at the last term of that court, and reported in 4 Wall. U. S. R. 411. That case, however, affirms it to be a general rule, that while the judicial power of 950 the United States is, in some cases, unavoidably exclusive of all State authority, it may be made so in all others, at the election of Congress.

It cannot be questioned that the class of offences to which that now before us belongs, was within the jurisdiction exercised by the States before the adoption of the Federal constitution. The jurisdiction over this class of offences still belongs to the States, unless they surrendered or lost it in the formation of that constitution. To show that they did so, it is not enough, according to the acknowledged rule of construction, to show, that jurisdiction over the same class of offences was granted to the United States by the constitution. To deprive the States of an authority or jurisdiction which they had before the adoption of the constitution there must be either an express grant of exclusive authority or jurisdiction over the same subject or class of cases to the United States; or there must be a grant of authority or jurisdiction to the United States not in terms exclusive, and an express prohibition against the exercise of like authority or jurisdiction by the States; or there must be authority or jurisdiction granted to the United States, to which a similar authority or jurisdiction in the States would be absolutely and totally contradictory and repugnant. *Federalist* No. 32; *Ibid.* No. 82; *Houston v. Moore*, 5 Wheat. R. 1; 1 Kent Com. 400; *Story* on Const. §§ 436-447.

In the present case there is no express grant of exclusive jurisdiction to the United States, nor any express prohibition to the States. If, therefore, the States have lost their ancient jurisdiction over any offence of this class, it must be because jurisdiction over the offence has been given to the United States, to which a like jurisdiction in the States would be wholly contradictory and repugnant.

Congress having, as must be assumed, authority to establish the 951 system of national banks, had the authority to protect their circulation from being discredited by counterfeits, in order to secure the usefulness of the system. When, therefore, the forged note employed in effecting a cheat purports to be the note of a national bank, Congress has a right to declare the act of uttering or attempting to pass such note to be an offence against the United States; and has accordingly

done so. Literally speaking, the act of Congress and the statute of the State punish the same identical act, namely, the act of uttering or attempting to pass as true the forged note. But the two statutes aim at the accomplishment of different objects; the authority under which they were enacted is derived from different sources, and though the offence which each of them punishes is comprised in one and the same act, there is really an essential difference in the character of the two offences.

There is nothing peculiar in respect to the law of the State, as to the offence now in question, to render the jurisdiction of the State courts under the law of the State incompatible with that of the Federal courts under the act of Congress, if it would not be so upon general principles in all cases whatever. The law of the State is in entire harmony with the act of Congress, and seeks, though for different reasons and in pursuance of a different policy, to effect the same object, to wit, the suppression of counterfeits.

A conflict of jurisdiction between the Federal and State courts may occur under different circumstances. Thus, an act of Congress and the statute of a State may declare the same identical act to be an offence; as, for example, the act of counterfeiting the coin, or the act of uttering and passing counterfeit coin. In other cases the act of Congress and the law of the State are aimed at different offences, but in doing an act prohibited by the act of Congress the offender also does an
952 act prohibited by the law of the State.

For instance, a party may commit the offence of robbing the mail, and commit, at the same time, the offence of assault and battery. In the discussions to which this subject has given rise, these and probably other distinctions have been claimed to make a difference in the principle governing the cases. At an early period after the adoption of the constitution, an eminent jurist expressed the opinion, that a man could not, by doing any one act, violate, at the same time, the laws of the United States and the laws of any one of the States, and that where a party in the course of doing an act which violates a law of the United States, also does an act which violates the law of a State, he really commits but one offence, and that the offence against the United States; on the ground that the greater crime includes and swallows up the less. Letter of Judge Chase to the Governor of Maryland, October 6, 1794. *Journal of Jurisprudence*, 262. An able writer at a much more recent period (1845), advocated a similar view in respect to certain offences, on the ground that an offence against one State ought to be considered as merged in an offence against all the States. 4 *Am. Law Magazine*, 318 (334-340). Others, while admitting that the same act may be declared an offence both by act of Congress and by State law, and punished under either one, have contended that a judgment of conviction or acquittal under either one may be

pleaded in bar of a prosecution under the other, and that, according to the rules of comity which prevail between concurrent jurisdictions, the one which first attaches should be allowed to proceed to judgment. Per Washington, J. *Houston v. Moore*, 5 Wheat. R. 1; *Rawle on Constitution*, 205, 206.

Others again have contended, as a general proposition, that when any act has been declared by Congress to be an offence against the United States, it is incompatible and *repugnant for a State
953 Legislature to declare the same act to be an offence against the State. This has been maintained chiefly on the ground that the offender would thereby be exposed to be twice punished, or twice put in jeopardy, for the same offence. This view was maintained by the Supreme Court of Missouri in the case of *Mattison v. The State*, 3 Missouri R. 421; and by Mr. Justice McLean, in the two cases hereafter cited from 5 Howard and 14 Howard.

The conflict and variety of opinions on this subject may be further seen by reference to the following cases: *State v. Antonio*, 3 Brevard R. 562; *State v. Tutt*, 2 Bailey R. 44; *Commonwealth v. Fuller*, 8 Metc. R. 313; *State v. Wells*, 2 Hill S. C. R. 687; *State v. Harlan*, 1 Doug. Mich. R. 207; *Rouse v. State*, 4 Georgia R. 136; *Hendrick's case*, 5 Leigh 709.

I have made this brief allusion to some of the conflicting views which have been entertained on this subject, in order to show the confusion and perplexity in which it has, until recently, been involved, and the importance and value of the decisions of the Supreme Court to which I shall now refer.

The first of the cases alluded to is that of *Fox v. State of Ohio*, 5 How. U. S. R. 410, decided in 1847. The precise question in that case was, whether the State of Ohio had authority to provide by law for punishing the offence of passing counterfeit coin. The case was very fully and ably argued. Mr. Justice McLean was of opinion, that such a power could not be exercised by Ohio, because it would be incompatible with the exercise of the same power by the United States; which he thought clearly existed. But all the other judges concurred in holding that the State possessed the power.

There are some expressions in the opinion in that case, which throw doubt upon the power of Congress to provide
954 *for punishing the offence of passing counterfeit coin. But the case was not put on that ground, and subsequent parts of the opinion affirm the right of the State to provide for punishing the act of passing counterfeit coin, as an offence against the State, even though Congress should provide, and have the right to do so, for punishing it as an offence against the United States. The court further held, that if the party should be punished twice for the same act, he could not complain that the fifth article of the amendments to the constitution had been violated, which pro-

vides that no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb; but that, in point of fact, the benignant spirit in which both the State and Federal systems are administered, would preclude all danger of such double convictions, unless it might be in cases of special enormity, or demanding unusual rigor.

In *United States v. Marigold*, 9 How. U. S. R. 506, it was held that Congress had the power to protect the coin by providing for the punishment of persons who bring counterfeit coin into the United States with intent to pass it, and also for the punishment of persons who utter and pass any such counterfeit coin. The court expressly re-affirms what it was said was laid down in *Fox v. State of Ohio*, "with a view of avoiding conflict between the State and Federal jurisdictions," namely, "that the same act may, as to its character and tendencies, and the consequences it involves, constitute an offence against both the State and Federal governments, and may draw to its commission the penalties denounced by either, as appropriate to its character in reference to each.

The same principle was again affirmed in *Moore v. People of Illinois*, 14 How. U. S. R. 13. That was an indictment in a court of the State of Illinois, under a statute of that State, for harboring a fugitive 955 slave. It was contended *that the statute of the State was void because it provided for the punishment of the same act for which, by the act of Congress of 1793, the offender was subjected to a penalty of \$500, to be recovered by the owner of the slave; and that so the party would be subject to a double punishment for the same offence. The court held, that the two statutes did not provide for the punishment of the same identical acts; but that even if they had done so, the consequences insisted on would not have followed. The language of the court on this point is very clear and emphatic. "But admitting," said the court, "that the plaintiff in error may be liable to an action under the act of Congress for the same acts of harboring and preventing the owner from retaking his slave, it does not follow that he would be twice punished for the same offence. An offence, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offence. Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for the infraction of the laws of either. The same act may be an offence [under] or transgression of the laws of both. Thus an assault upon the Marshal of the United States, and hindering him in the execution of legal process, is a high offence against the United States,

for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State, a riot, assault, or murder, and subject the same person to punishment, under the State laws, for a misdemeanor or felony. That either or both may, if they see fit, punish such an offender, cannot be doubted. Yet

it cannot be truly averred that the 956 offender *has been twice punished for the same offence, but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this court has decided, in *Fox v. The State of Ohio*, that a State may punish the offence of uttering or passing false coin, as a cheat or fraud practiced on its citizens; and in the case of the *United States v. Marigold*, that Congress, in the proper exercise of its authority, may punish the same act as an offence against the United States."

This case was decided in 1852, since which time the question does not appear to have been raised in the Supreme Court.

In the case of *United States v. Amy*, a slave prosecuted for the offence of robbing the mail, and tried in the Circuit Court of the United States for the Eastern District of Virginia, before Chief Justice Taney and Judge Halyburton, at May term, 1859, the Chief Justice laid down the very same principles in very strong terms as the clear and settled law. He said: "In maintaining the power of the United States to pass this law [punishing a slave by imprisonment for robbing the mail] it is, however, proper to say, that as these letters with the money in them were stolen in Virginia, the party might undoubtedly have been punished in the State tribunals, according to the laws of the State, without any reference to the postoffice or the act of Congress; because, from the nature of our government, the same act may be an offence against the laws of the United States and also of a State, and be punishable in both. This was considered and decided in the Supreme Court of the United States in the case of *Fox v. State of Ohio*, and in the case of *United States v. Marigold*, and the punishment in one sovereignty is no bar to his punishment in the other."

957 *"Yet, in all civilized countries, it is recognized as a fundamental principle of justice that a man ought not to be punished twice for the same offence. And if this party had been punished for the larceny in the State tribunal, the court would have felt it to be its duty to suspend sentence, and to represent the facts to the President, to give him an opportunity of ordering a nolle prosequi or granting a pardon." *Richmond Law Journal*, July, 1859, pp. 201, 202.

These principles must be regarded as the settled doctrine of the Supreme Court. They ought to set at rest the disputed questions to which they apply. They appear to me to be reasonable and just. But if I thought otherwise, I should feel no hesitation in

yielding to the decisions of the Supreme Court on a question of this character as authority binding upon me. They are in conformity with the decision of the General Court of Virginia in Hendrick's case, 5 Leigh 707. That was a prosecution for passing a forged check purporting to be a check of the cashier of the Bank of the United States. In delivering the opinion of the court, Judge Daniel said: "It was urged by the prisoner's counsel, that the judgment ought to have been arrested on the ground that the courts of Virginia ought not to punish criminally any forgery of the notes, bills or checks of or upon the Bank of the United States, because this is an offence punishable by the courts of the United States; and if a State court, which cannot oust the courts of the United States of their jurisdiction, should proceed, it might happen that a man might be punished twice for the same offence. The answer to this is, that the law of Virginia punishes the forgery, not because it is an offence against the United States, but because it is an offence against this Commonwealth, committed within its limits, and the punishment of it is designed for the protection of our own citizens."

958 *The act of Congress by which the forging of checks, &c., of the Bank of the United States was made punishable as an offence against the United States, contained a provision to the effect that nothing therein should prevent the courts of the several States from taking cognizance of the same acts as offences under State laws. But that proviso did not, as is conceded on all hands, confer jurisdiction upon the State courts, and is immaterial therefore to the purpose for which I now cite this case. The only effect claimed for such a proviso, as we shall see hereafter, is, that it relinquishes, as to the particular class of offences, the exclusive jurisdiction of the courts of the United States under the provisions of the preceding act, and allows the courts of the States to exercise a jurisdiction which they might have exercised if not prohibited by the grant of exclusive jurisdiction to the courts of the United States by the judiciary act.

This case, therefore, and every other which holds that a prosecution may be maintained in a State court, under a State law, for the offence of counterfeiting the coin, or for passing counterfeit coin, or for any other offence against the coin provided for by act of Congress, or for the offence of forging a note or check of the Bank of the United States, or of passing such forged note or check, is an authority for the proposition which I have been maintaining, that there is no incompatibility or repugnance between the jurisdiction of the courts of the United States to punish a man for a particular act, as an offence against the United States under an act of Congress, and the jurisdiction of the courts of a State to punish the same man for the same act, as an offence against the State under the laws of the State. The cases of this sort

are numerous, and many of them are cited in a former part of this opinion.

I do not see how the allowance of such a concurrent jurisdiction to the State courts can lead to any collision 959 *between them and the Federal courts, unless it should arise from a disregard of the rule of comity which prevails between concurrent jurisdictions, that the one which first takes cognizance of a subject matter shall be allowed to proceed without interference by the other. Taylor & al. v. Carryl, 20 How. U. S. R. 583; Freeman v. Howe & al., 24 How. U. S. R. 450. Such a concurrent jurisdiction has long been exercised in respect to certain classes of criminal acts, and I am not aware that it has led to any such collision. We must suppose that the Federal and State authorities will be exercised in good faith, without jealousy, and with a view to the general good. So exercised, there need be no sort of conflict between them. But if there should be more ground than I think really exists to apprehend such a collision, it would only present an instance of those "occasional interferences" spoken of in the Federalist, which are no ground, in the absence of absolute incompatibility and repugnance, for ousting the States of an authority which they exercised before the formation of the constitution. No. 32.

I do not think there is any solid ground for the objection that this doctrine would, in its practical working, lead to injustice and oppression, by subjecting offenders to double punishment for the same act. We must suppose that the criminal laws will be administered, as they should be, in a spirit of justice and benignity to the citizen, and that those who are entrusted with their execution will interpose to protect offenders against double punishment, whenever their interposition is necessary to prevent injustice or oppression; and that if, in any case, they should fail to do so, the wrong will be redressed by the pardoning power. We may safely assume that there will be no cases of double punishment hereafter, as, I presume, there have been none heretofore, except, perhaps, in cases of great enormity, or in cases attended by some peculiar circumstances, *in which the ends of justice could not be otherwise secured.

It is said that the security thus afforded to the liberty of the citizen is altogether too precarious. But it is not more so than in any other case where no absolute rule has been prescribed, which is to govern in all cases. Whenever a power is bestowed which may be exercised or not exercised, according to the discretion of the court, or where the manner or extent of its exercise depends on the discretion of the court, injustice may be done by an abuse of the discretion; and it may not be possible to prevent or correct it. The law in every such case confides, of necessity, in the integrity and justice of the courts.

It must be remembered, however, that these objections to the practical conse-

quences of allowing such a concurrent jurisdiction to the State courts, if well-founded, do not afford a conclusive argument against the existence of the jurisdiction. They could, at most, only turn the scale, if the argument, on other grounds, left the question in doubt.

I conclude, therefore, that there is nothing in the relation between the State and Federal governments, or in the nature of the jurisdiction itself, which makes the jurisdiction of the courts of the United States to punish the act of passing a forged note of a National Bank as an offence against the United States, necessarily exclusive of the jurisdiction of the State courts to punish the same act as an offence against the State. It remains to consider whether it has been made so by act of Congress.

As I have said before, the offence in this case belongs to a class over which the States and their courts exercised jurisdiction before the adoption of the Federal constitution. How far it is competent for Congress to prohibit the State courts from exercising jurisdiction, under State
961 *laws, over any such class of criminal acts, by giving exclusive cognizance of them to the courts of the United States, has not been determined by the Supreme Court; and it is not necessary for me to express an opinion on the question. This question was not in the mind of the court when it was said in *Martin v. Hunter's lessee*, 1 Wheat. R. 304, (337,) and in *The Moses Taylor*, 4 Wall. U. S. R. 411, "that the judicial power of the United States is unavoidably, in some cases, exclusive of all State authority, and in all others may be made so at the election of Congress." This is evident from the context of this passage in the former case. The court had just adverted with approbation to an argument which had been urged, that it is imperative on "Congress to vest all the judicial power of the United States in the shape of original jurisdiction, in the supreme and inferior courts created under its own authority." And immediately after the passage above quoted, and showing its meaning, are the following passages: "No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to State tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases where, previous to the constitution, State tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction. Congress throughout the judicial act, and particularly in the ninth, eleventh and thirteenth sections, has legislated upon the supposition, that in all the cases to which the judicial power of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts."

The opinion of Mr. Justice Washington in *Houston v. Moore*, 5 Wheat R. 1, is relied upon by the counsel for the plaintiff in error, to sustain the proposition, that Con-

gress may thus exclude the jurisdiction of the *State courts under State laws; and that it did so by the provision of the judiciary act giving to the courts of the United States exclusive cognizance of all crimes and offences cognizable under authority of the United States, unless otherwise provided by that act, or by some other act of Congress; so that the express consent of Congress was necessary to enable the State courts to exercise jurisdiction under State laws, over acts declared by Congress to be offences against the United States.

It does not appear to what extent the views in question received the concurrence of the other judges, one of whom declared in his opinion, that the views of the judges composing the majority, coincided in but one thing, namely: that there was no error in the judgment appealed from, and that no point whatever was decided, except that the fine was constitutionally imposed upon the plaintiff in error. Per Johnson, J., p. 47.

The single opinion of this eminent judge, however, is entitled to great weight, and deserves further consideration.

It must be observed that Mr. Justice Washington regarded the case then before him as involving the jurisdiction of the State courts to "enforce the laws of Congress," as he said in one place; or as he said in another place, to "adjudicate in a case which depends on a law of Congress and to enforce it." The case before us, on the other hand, involves the question, whether the State courts can take jurisdiction of an offence against the State created by a statute of the State.

Houston, in that case, had been tried by a court-martial of the State of Pennsylvania, under an act of that State passed in 1814, providing that officers and privates of the militia neglecting or refusing to serve when called into actual service in pursuance of an order or requisition of the President of the United States, shall be
963 liable to the *penalties defined in the act of Congress passed February 28, 1795, or to any penalty which may have been prescribed since the date of that act, or to any which might be thereafter prescribed by any law of the United States, and providing for the trial of such delinquents by a State court-martial, &c. The learned judge, after stating the character of the case in the general terms above quoted, says that "the offence to be punished grows out of the constitution and laws of the United States, and is, therefore, clearly a case which might have been withdrawn from the concurrent jurisdiction of the State tribunals."

Proceeding to consider the question whether, as Congress has not given exclusive jurisdiction to courts-martial deriving their authority from the United States, the courts-martial of the State can exercise jurisdiction, the learned judge refers to the doctrine of the Federalist, that Congress "may commit the decision of causes arising

upon a particular regulation, to the Federal courts only, yet that in every case in which the State tribunals should not be expressly excluded by the acts of the national legislature, they would, of course, take cognizance of the causes to which those acts might give birth." The judge says that he perceives no objection to this doctrine, so long as the power of Congress to withdraw the whole or any part of these cases from the jurisdiction of the State courts is, as he thinks it must be, admitted.

This part of the opinion has no reference to prosecutions in the State courts for offences against the State under State laws. It has reference to cases arising under acts of Congress, and affirms the right of the State courts to take cognizance of them, unless the jurisdiction of the courts of the United States is made exclusive. This is sufficiently obvious from the language of the judge. But it will appear perhaps even more clearly from the eighty-second number of the *Federalist*, to which the judge refers.

964 *The learned judge then refers to the practice of the general government as confirming this doctrine. He cites the judiciary act as showing the opinion of Congress, that a mere grant of jurisdiction generally to the courts of the United States was not sufficient to vest the exclusive jurisdiction. He then proceeds as follows: "In particular, this law grants exclusive jurisdiction to the Circuit Courts of all crimes and offences cognizable under the authority of the United States, except where the laws of the United States should otherwise provide; and this will account for the proviso in the act of the 24th of February, 1807, ch. 75, concerning the forgery of the notes of the Bank of the United States, that nothing in that act contained should be construed to deprive the courts of the individual States of jurisdiction, under the laws of the several States, over offences made punishable by that act. A similar proviso is to be found in the act of the 21st of April, 1806, ch. 49, concerning the counterfeiters of the current coin of the United States. It is clear that, in the opinion of Congress, this saving was necessary in order to authorize the existence of concurrent jurisdiction by the State courts over those offences, and there can be very little doubt but that this opinion was well founded. The judiciary act had vested in the Federal courts exclusive jurisdiction of all offences cognizable under the authority of the United States, unless where the laws of the United States should otherwise direct. The States could not, therefore, exercise a concurrent jurisdiction in those cases, without coming into direct conflict with the act of Congress. But by these savings Congress did provide, that the jurisdiction of the Federal courts in the specified cases should not be exclusive; and the concurrent jurisdiction of the State courts was instantly restored so far as, under State authority, it could be exercised by them."

With deference to the authority of this

965 eminent judge, *I submit that this reasoning is not satisfactory. The object of the judiciary act was to establish the judiciary system of the United States, and to regulate the jurisdiction of the courts of the United States, as far as this was not done by the constitution. In respect to crimes, the object was to regulate the jurisdiction of those courts over such crimes as could be prosecuted and punished under the authority of the United States. It was thought by many, and doubtless by the framers of that act, though it has since been settled otherwise, that the courts of the United States might take cognizance of offences at common law, without the authority of an act of Congress; and hence it was, I apprehend, that they used the general expression, "cognizable under the authority of the United States." But the courts of the United States could not take cognizance of any offence that was not a violation of some law of the United States, whether common law or statute, and it was of such violations of the laws of the United States that exclusive cognizance was given to the Circuit courts, unless otherwise provided by law. If so otherwise provided, the jurisdiction of the Circuit courts thus declared to be exclusive, might be exercised equally by the courts of the States. It was long a subject of controversy and doubt whether Congress might not thus confer jurisdiction upon the courts of the States to enforce the laws of the United States. See *Jackson v. Rose*, 2 Va. Cas. 34; 1 Kent Com. 401-405. But what has this to do with the jurisdiction of the State courts to punish offences against State laws, even though the offences consist in acts declared by Congress to be offences against the United States? The object of this act of Congress had no reference to offences against the laws of the States, which were the concern of the States, and not of the United States, and could not be made cognizable by the courts of the United States. It was

966 no part of the object of that act *to regulate the jurisdiction of State courts under State laws, which belonged to the State Legislatures, and not to Congress; and the act makes no reference to State courts, except to say when they may and when they may not exercise the same jurisdiction that is vested in the courts of the United States.

It is obvious that the learned judge construed the terms "crimes and offences," in the eleventh section of the judiciary act, as signifying the acts by the doing of which crimes and offences are committed. It this way he reaches the conclusion that the act of Congress vests in the courts of the United States exclusive cognizance of those acts; and I apprehend it could be reached in no other way. But this is not the proper sense of these words. A crime or offence is the transgression of a law; and the same act may constitute several offences. We have seen that the same act may be an offence against the United States, and at the same time an offence against the State. So the

same act may constitute several offences against the laws of the State; of which numerous illustrations are collected in 2 Leading Criminal Cases, 555. The terms, "crimes and offences," therefore, do not properly signify the acts by which the laws are violated, but they signify the violations of law which those acts produce. And I see no reason for holding that they were not used in this sense in the judiciary act. Congress could give, and intended to give, to the courts of the United States cognizance of criminal acts, only so far as they constitute violations of the laws of the United States. So far as such acts violate the laws of the States, it was not in the power of Congress to confer the cognizance of them upon the Federal courts.

The learned judge did not fail to see that an act done by a party may violate a law of the United States, and so be an offence against the United States, and, at the same time, violate a law of the State, and 967 so be an offence against the State.

But he did not clearly distinguish between the act and the offence. Hence he says, in a subsequent part of the opinion, that when Congress allows the State courts to punish under State laws, the same acts that are made offences against the United States, the sentence of conviction or acquittal in either court (State or Federal), may be pleaded in bar of a prosecution before the other. And so he thinks that where Congress has vested in the courts of the United States exclusive cognizance of crimes and offences against the United States, the courts of the States cannot exercise jurisdiction over the same acts, under State laws, as offences against the State, without coming into conflict with the act of Congress. But we have seen that there is no incompatibility or conflict between such an exercise of jurisdiction by State courts, under State laws, and by the courts of the United States, under acts of Congress.

I think these observations are sufficient to show that the views of Mr. Justice Washington are not well founded, and that the act of 1789 does not exclude the State courts from taking jurisdiction of an offence against the State under a State law, committed by the same act which constitutes an offence against the United States, under an act of Congress. It follows, that such a saving proviso as we have been considering, is not necessary to enable the courts of the States to exercise their jurisdiction in the cases alluded to.

This conclusion is fully sustained by the cases of *Fox v. State of Ohio*; *Moore v. People of Illinois*; *United States v. Amy*; and *Hendrick's case*, before cited. In the first and last of these cases, the acts of Congress contained provisos to save the jurisdiction of State courts under State laws. But the existence of the provisos was not noticed, and the cases were decided on the ground of a separate and independent 968 authority in the States to punish offences against their own laws. In the other two cases, the acts of Congress

contained no such savings, and yet the State courts were held to have jurisdiction under State laws. See also *State v. Tuff*, 2 Bailey S. C. R. 44.

I see no reason to believe that Congress really intended, by the act of 1864, to exclude the jurisdiction of State courts, under State laws, to punish the circulation of forged notes of National Banks. The act exhibits no jealousy or distrust of the State courts. On the contrary, that act amended the act of 1863, so as to give to the State courts concurrent jurisdiction with the Federal courts, of the important suits and proceedings which may, under that act, be instituted against National Banks, the jurisdiction of which was, by the act of 1863, confined to the Federal courts. And I presume that no good reason can be suggested, why a State court should be allowed to punish, under a law of the State, a cheat effected by means of a counterfeit coin, and not be allowed to punish, under a law of the State, a cheat effected by means of a forged National Bank note?

Upon the whole, I think that the objection of a want of jurisdiction in the court was properly overruled. I think, also, that there is no foundation for the other errors assigned in the petition, and that the judgment should be affirmed.

MONCURE, P., concurred in the opinion of Joynes, J.

Judgment affirmed.

969 *Kemp & als. v. The Commonwealth.

January Term, 1868, Richmond.

1. **Criminal Law—Failure to Insert Justice's Warrant in Record—Effect.**—After an indictment for a felony, the indictment will not be quashed, because the clerk of the examining court has not inserted the Justice's warrant of commitment of the prisoner in the record.
2. **Same—Examination of Prisoner—Regular Term of Court.**—A Justice who commits a prisoner for felony may direct him to be tried by an examining court called for the purpose, or by the county court at its regular term. And if he commits the prisoner without directing a called court, the trial is to be at a regular term.
3. **Same—Same—On Day of Commitment.**—The examination of a prisoner may be on the same day on which he was committed, when it is at the regular term of the county court.
4. **Same—Indictment—Previous Proceedings.***—After a prisoner has been indicted for a felony, the only question which is open upon the previous proceedings, is whether he has been examined for the offence for which he has been indicted.
5. **Same—Prisoners Tried Together—Convicted—New Trial Granted to One.**—Several prisoners having been tried together for the same felony, and found guilty, the court may grant a new trial to one of them, and render a judgment against the others.

*See principal case cited in *Chahoon v. Com.*, 20 Gratt. 777, 784.

Appellate Practice—Verdict Contrary to Weight of Evidence.—See *foot-note* to *Kates v. Com.*, 17 Gratt. 561, where the principal case is cited.

At the March term, 1867, of the Circuit Court for the county of Warwick, the grand jury found an indictment against Robert Kemp, Charles Press, Abel Williams, Harrison Young and James Chapman, freedmen, for the murder of John Wootten. At a special term of the court in June, 1867,

the attorney for the commonwealth entered a *nolle prosequi as to James Chapman; and he was discharged. At the same time the other prisoners were arraigned; and before pleading, they moved to have the record of the examining court produced; which was done. And they then moved the court to quash the indictment, upon the ground that said record does not show under what authority the said examining court examined the prisoners; and they insisted, that the warrant, if any, of the justice or other person who committed the prisoners for examination, ought to have been made a part of the record of the examining court; which had not been done. And thereupon the attorney for the Commonwealth produced in court as the warrant of such authority, a paper, signed Nelson Smith, J. P., and directed to the clerk of the county court of Warwick, in which he says: That he, a justice of the peace for said county, had that day committed the prisoners and others (naming them) to the jail of said county, that they might be examined before the county court for a felony committed by them; in this, that they did, on the 2d of November, 1866, murder one John Wootten. This paper is dated the 13th of December, 1866.

Upon the production of this paper the prisoners also moved the court to quash the indictment, because, as appeared by the record of the examining court and this paper, they were examined by the county court on the same day on which they were committed to jail by the justice. The examination was at a regular term of the county court, and the dates of the record and of the warrant of the justice of the peace were the same. But the court overruled the motion; and the prisoners excepted.

The prisoners were tried together; and on the trial the jury found each of them guilty of murder in the first degree. And thereupon the prisoners moved the court to set aside the verdict and grant them a new trial. And the *court did, on this motion, set aside the verdict as to the prisoner Charles Press, and grant him a new trial; but overruled the motion as to the others, and sentenced them to be hung. To the opinion of the court overruling their motion for a new trial, the prisoners Kemp, Williams and Young excepted. The exception contains the facts proved, and the instructions given by the judge. To the last, no exception was taken in this court. Upon the facts there was no doubt that the murder had been committed, and that a number of persons had been engaged in it; and the only question was, whether the prisoners were of the number. There was some proof of an alibi by Press; and the court below granted him a new trial.

All the proof tended to connect the other prisoners with the murder, though there was no positive evidence of their being seen at the place. On the application of Kemp, Williams and Young, a judge of this court allowed a writ of error, to operate as a super-seedeas; the prisoners to remain in custody.

Mallory, for the prisoners.

The Attorney-General, for the Commonwealth.

JOYNES, J. The prisoners, who were tried jointly, before pleading to the indictment, moved the court to have the record of the examining court produced; and the record having been produced, they moved the court to quash the indictment, on the ground that the record of the examining court did not show by what authority the said court examined the prisoners, and that the warrant by which the prisoners were committed for examination, if any there was, ought to have been made a part of the said record. Thereupon the attorney for the Commonwealth produced in court, as the warrant for the examination, a paper purporting to be signed by a justice of the peace, *dated December 13, 1866, and certifying, in due form, that he had that day committed the prisoners (naming them) that they and each of them might be examined by the county court for the murder of one John Wootten. And then the prisoners assigned another ground for their motion, to wit, that there was a variance between the record of the examining court "so produced" and the counts of said indictment, and each of them, because the prisoners were examined at a regular term of the county court, held on the same day on which they were committed for examination, as appeared by the warrant of the justice. -

To maintain the first of these grounds, the counsel for the plaintiffs in error relies upon the decision of the General Court in McCaul's case, 1 Va. Cas. 271, which has since been adhered to, in which it was held, that the warrant for summoning an examining court is part of the record of that court. But the court did not decide that an examination will be insufficient, if the clerk, in making up the record of the examining court, omits to embrace in it the warrant by which that court was summoned. The point decided was, that where the record of the proceedings of the examining court states that the prisoner was examined for felony, in general terms, not describing the particular offence, the Circuit Court may, on a motion to quash the indictment, or on a plea in abatement, on the ground that the prisoner has not been examined for the offence for which he is indicted, look into the warrant summoning the justices for the purpose of identifying the offence. In this case, the offence for which the prisoners were examined was fully described in the record of the proceeding of the examining court, so that there was no occasion to

look at the certificate of the justice for the purpose of identifying the offence.

When the examination is had before 973 a special session of *the court called for the purpose, the warrant of the justice is the authority, and the only authority, under which the court is held. But the regular monthly term sits by authority of the general law. It has authority to examine a prisoner committed for examination, unless the justice, in his discretion, determines to call a special session of the court. If he commits the prisoner generally for examination, without issuing his warrant for a special session, he must be understood as determining, in his discretion, that there shall be no special session, and that the examination shall be at the regular term.

The provision of the Code requiring that the justice shall certify the commitment to the clerk, and the provision requiring the clerk to inform the Attorney for the Commonwealth of such certificate, seem to have been designed to bring the case to the notice of the court and the attorney, and thus to avoid the possibility of its being overlooked. They are analogous to the provision of chapter 205, section 10, requiring the clerk of the examining court to certify the order, depositions, &c., to the attorney for the Commonwealth in the Circuit Court. It may be contended, with great force, that they are merely directory, the one to the clerk and the other to the justice, and that the omission to observe them in any case would not vitiate the proceedings. It would hardly be contended that the omission of the clerk to give information of the certificate to the Commonwealth's attorney would have that effect. If not, why should that effect be produced by the failure of the justice to certify the commitment to the clerk? It is not necessary, however, to decide this point.

It has often been decided that the warrant of commitment is no part of the record, and cannot be looked to by the Circuit Court for any purpose. In McCaul's case, above cited, it was held that it could not be looked to on a motion to quash, for the purpose of identifying the offence

974 *for which the prisoner was examined. It is also well settled that after the prisoner has been indicted, there can be no enquiry into the sufficiency of the warrant, or into the regularity of the commitment. In Murray's case, 2 Va. Cas. 504, the warrant of commitment was made part of the record by the prisoner, and was, therefore, looked to for the purpose of identifying the offence. But it was insisted that the warrant of commitment thus made part of the record, was fatally defective in not stating that the party was charged on oath, and that the indictment should be quashed for that reason. The general court, after overruling the objection to the warrant, held, that even if the warrant had been bad, "it would be no ground to quash the indictment, because the indictment charged the prisoner with an offence for

which he had been previously examined; and whether the original mittimus was legal or not, yet clearly, after he had been remanded to jail by the examining court, his second commitment was entirely regular. In Cloer's case, 8 Gratt. R. 606, the prisoner pleaded in abatement, that he was committed by the justice without an enquiry or examination into the truth of the offence where-with he was charged, or for which he was committed. The plea was rejected; and he moved to quash on the same ground. The general court approving the decision in Murray's case, held that the plea was properly rejected, and the motion to quash properly overruled. Judge Lomax delivering the opinion of the court, said: "Whatever inconvenience he [the prisoner] may complain of as to the examination, or want of examination, before the justice, they can have no relevancy as objections to the indictment, which has given the sanction of the grand inquest of the county to the charge for which the justice committed him. At that stage of the proceedings, after the finding of the grand jury upon the examinations and proofs before them, charging him with the murder, what

975 *defence in reason or in law, can or ought it to be to the prisoner, that the justice who committed him for the crime with which the grand jury have charged him, did not, in his prior examination, examine the case according to the legal rules of evidence?" The doctrine of these cases was approved and followed by this court in Wormeley's case, 10 Gratt. 658, where there was a motion to quash the indictment on the ground that the commitment was made by a person who had no authority to make it.

The principle thus established applies to this case. If the prisoner could not, on a motion to quash, be allowed to show that the original commitment was by an illegal warrant, or without investigation, or by a person without authority, they cannot be allowed to show that the commitment was not duly certified to the clerk, however essential that may be to the regularity or legality of the commitment. The essential thing into which alone, of all the proceedings before the indictment, the court can enquire, is, whether the prisoners were duly examined and committed by the examining court for the same offence for which they were indicted.

In the present case, however, it does appear that the prisoner was duly committed, and that the commitment was duly certified to the clerk. The certificate, though not incorporated by the clerk into the record of the examining court, was produced by the attorney for the commonwealth. Its genuineness was not disputed. On the contrary, its genuineness was conceded, by making it the ground of an objection to the indictment, to be presently considered. The court, in the bill of exceptions, speaks of it as "the warrant of Nelson Smith, a justice of the peace, herein inserted," and thus, in effect, declare it to be authentic.

The other ground of the motion to quash is, that the commitment; as shown by

the certificate of the justice, was
976 *made on the 13th December, 1866, and that the examination was had by the county court, at a regular term held on the same day. This objection is based on the authority of *Mendum's case*, 6 Rand. 704. That decision, however, was made under the law as it stood in the Revised Code of 1819, and has no application to the provisions of the present Code. By the Code of 1819, ch. 169, the committing justice was required to issue his warrant summoning the justices to meet for the examination of the fact, on a certain day not less than five, nor more than ten days after the date of the warrant. If the justices failed to meet, the examination stood adjourned to the next regular term of the county court. The court might continue the examination from term to term, provided such continuance, unless on the application of the prisoner, should not be beyond the third term after his commitment for examination. *Mendum* was committed two days before the December term. The examining court was called to meet seven days after the December court day. It failed to meet, and so stood adjourned to the January term. The general court held, that the January term was to be counted as the first term after the commitment, so that the examination at the March term was regular. This, of course, involved a decision that the examination could not regularly have been had at the December term; and obviously it could not, because five days did not intervene between the day of the commitment and December court day, and also because an examination could not be had at a regular term, unless the called court failed to meet, or adjourned to the regular term.

By the Code of 1849, ch. 205, §§ 2, 3, the examination might be had at a regular term, in the discretion of the justice, and in that case no particular length of time was required to intervene between the commitment and the examination. That requirement was made only when a
977 *special session was called. It is argued that the Legislature must have intended to allow a prisoner some time for preparation. To this it may be replied, 1. That the statute makes no such provision; and 2. That the Legislature doubtless thought that all injustice might be avoided by an application to the court for a postponement of the examination.

The remaining ground of error assigned is the refusal of the court to grant a new trial to the plaintiffs in error. Two grounds for a new trial have been suggested: 1. That the verdict was contrary to the law and the evidence; and 2. The fact that the court granted a new trial to Charles Press, who was indicted and tried jointly with the plaintiffs in error, and who was likewise found guilty by the jury.

No question has been made as to the law applicable to the facts, so that the first

ground must be considered with reference to the evidence alone.

It has been long settled as the rule of this court, that a judgment refusing a new trial will not be reversed, unless the evidence is plainly insufficient to warrant the verdict. *Vaiden's case*, 12 Gratt. 717; *Kate's case*, 17 Gratt. 561. It is very clear that this is not a case in which a new trial ought to be granted under this rule. On the contrary, the murder was expressly proved, and the facts and circumstances given in evidence pointed strongly, if not unmistakably, to the plaintiffs in error as guilty parties. And indeed, this ground was not relied on in the argument.

The other ground relied on for a new trial involves an important question, and one which does not appear from any reported case to have been decided in Virginia.

In *The King v. Mowbry*, 6 T. R. 619, several defendants were tried jointly for a misdemeanor, some of whom were convicted and others acquitted, and a question was made, and elaborately argued, whether
978 the court could *grant a new trial to those who had been convicted. It was contended that, according to the forms of law and the course of practice, the new venire facias which would issue after the allowance of a new trial, must correspond with the first, and be for the trial of all the defendants; and that as that could not be, because some had been acquitted, there could not be a new venire facias at all. In support of the motion, *Fern's case* was quoted from *Buller's Nisi Prius*, 326, where "an information was exhibited against three, and a verdict against all three, and a new trial granted as to Fern, because he had not sufficient notice given him, and this special cause entered on the record, and judgment was against the other two." The other side disputed the authority of this case, and quoted the comments of the author, who says, after stating the case as above: "Yet the authority of this case may well be doubted; for where there were several defendants, and the verdict as to some was against evidence, yet the court would not grant a new trial, for they said the verdict must stand or fall in toto."

The court held, that a new trial might be granted to the convicted defendants, notwithstanding the acquittal of the others, and put their decision on the ground, that it was essential to secure the ends of justice. They held that the usual forms must be moulded to suit the purpose, and several modes were suggested in which that might be done. Lord Kenyon referred to *Fern's case* as an authority in point.

It is laid down in many of the books, that if there be two defendants in a civil action, and there is a verdict in favor of one and against the other, a new trial cannot be granted to the latter, because the verdict, if set aside as to one, must be set aside as to both. That was the view taken by this court in *Boswell v. Jones*, 1 Wash. 322; though it held otherwise in *Guerrant v. Tindor*, Gilm. 36. *See also opin-

ion of the General court in *Lithgow's case*, 2 Va. Cases, 297. This question arose in *Bricknell v. Dorion*, 16 Pick. R. 478, where it was elaborately discussed by Chief Justice Shaw, with a reference to all the English cases up to that time, both in civil and criminal cases. It was held that a new trial might be granted to the defendant against whom the verdict had been rendered, without disturbing the verdict in favor of the other defendant.

If there is no legal obstacle to the granting of a new trial to one of several defendants in a criminal case, who has been convicted, where another has been acquitted, I do not perceive what legal obstacle there can be to granting a new trial to one, where all have been convicted. The severance of the original joint proceedings is no greater in one case than in the other, and the same power that could mould the ordinary forms to suit the purpose in one case, could do the same in the other. The necessity is not the same where all have been convicted, because a new trial may be had as to all. But the ends of justice demand that the guilty should be punished, as well as that the innocent should be protected. Why should not the ordinary forms be moulded to effect this purpose, when it can involve no injustice to the party to whom the new trial is awarded?

Fern's case is an authority in point. And Lord Kenyon evidently thought that there was no distinction in principle between a case in which all are found guilty, and a case in which some are found guilty and others not guilty. For in deciding a case of the latter kind, he cites one of the former kind as an authority in point. And the same view seems to have been taken by the author of *Buller's Nisi Prius*. He refers to a case in which a new trial was refused to one defendant where another was acquitted, as an authority in conflict with Fern's case, where a new trial was granted to one of three, all of whom had been convicted.

I have found no subsequent case in which a new trial was allowed on the motion of one of several defendants, where all had been found guilty, except *The Queen v. Gomperty & als.*, 9 Queen's Bench R. 824 (58 Eng. C. L. R.). In that case Gomperty and several others were indicted and tried jointly for conspiracy, and were all found guilty. Gomperty and Witham severally moved for a new trial, no such motion being made by either of the other defendants. Upon the affidavits filed by Witham, the court thought that there was sufficient ground for a new trial, and a new trial was granted as to all the defendants. Lord Denman said: "We might perhaps see no ground for disturbing the verdict so far as it affects Gomperty, but into this we do not inquire; for we cannot grant a new trial as to one conspirator, without granting it to all who are convicted. As, therefore, we cannot separate the defendants, there must be a new trial as to all." *Cole-*

culty if some had been acquitted and some convicted. That was so in *Rex v. Mawbry*, 6 T. R. 619, and this court held that a new trial might be granted in favor of those convicted, without disturbing the verdict as to those acquitted."

This is all that was said by the judges in reference to the new trial. If the decision was not founded on the peculiar character of the offence of conspiracy, the case must be considered as holding, that while the court will mould the ordinary forms of law so as to give a new trial to those who are convicted where some are acquitted, because justice to the convicted parties cannot otherwise be done; they will not do so where all have been convicted, because in that case the ends of justice may be attained *in reference to the parties improperly convicted, by granting a new trial to all.

But whatever may be the true rule on this subject under the common law, and the practice in England, the case before us must be decided upon the law of Virginia.

At common law, a new trial properly so called, and as distinguished from a *venire de novo*, cannot be granted in any case of felony; and such, I believe, is still the law of England. In Virginia new trials are granted in cases of felony as well as in cases of misdemeanor. Our modes of proceeding differ from those of the common law. By our law, persons jointly indicted for felony may elect to be tried separately, as matter of right. Code, ch. 208, §§ 14, 15. At common law, no such right exists; but it rests in the discretion of the court, in such case, to allow or refuse separate trials. *United States v. Marchant*, 12 Wheat R. 480. By our statute, where two or more persons are charged and tried jointly, the jury may render a verdict as to any of them as to whom they agree, whereupon judgment shall be entered according to the verdict; and as to the others, the case shall be tried by another jury. Code, ch. 208, § 35. Upon the principles of the common law, a verdict cannot be received which does not respond one way or the other to the whole issue. By our law, the *venire facias* issues according to the necessity of each case, and without reference to any previous *venire facias* in the same case. When several persons have been examined and remanded for trial jointly, a single *venire facias* issues for the trial of all of them. If they elect to be tried separately, the *venire* summoned for all, is used for the one first tried, and a several *venire facias* issues for trial of each of the others. Code, ch. 208, §§ 13-15. And any court in which a person accused of felony is to be tried, may at any time cause a *venire facias* to issue for his trial. Code, ch. 208, § 6. In a case under section 35, where the jury have not agreed as to some of the defendants, a new *venire facias* will, of course, issue for the trial of the others.

The formal difficulty urged in *Rex v. Mawbry* as a reason why a new trial could

not be granted to one of several defendants, and which could only be gotten over by moulding the forms to suit the justice of the case, does not therefore exist in Virginia. Our forms of proceeding present no obstacle to granting a new trial to one, whether the others have been convicted or acquitted. That being so, there is no reason why the court should grant a new trial to one who does not show himself entitled to it, when it grants it to one who does show himself entitled to it. The whole object of a new trial is to secure justice to persons improperly convicted, and there is no reason why it should be extended farther than is necessary to effect that object.

Upon the whole case, I am of opinion that there is no error in the judgment, and that it should be affirmed.

The other judges concurred in the opinion of Joynes, J.

Judgments affirmed.

983 *Trim v. The Commonwealth.

[98 Am. Dec. 765.]

January Term, 1868, Richmond.

1. **Criminal Law—Murder—Constructive Presence—Question for Jury.**—Several persons murder a merchant and rob his store, at night and in the country. It is proved that the prisoner went with them to a short distance from the store, where he remained whilst the murder and robbery was committed, and that the goods taken were brought to where he was; and some of them were afterwards found in possession of his wife. It was for the jury to decide upon the evidence whether the prisoner was constructively present aiding and abetting in the murder committed; and they having found the prisoner guilty, the appellate court will not set aside the verdict, and grant him a new trial.

2. **Same—Same—Separation of Jury—Misconduct—Case at Bar.**—On a trial for murder, during a recess, the jury is committed to the keeping of the high sheriff, who is sworn to keep them; but his deputy is not sworn. The high sheriff goes out with a part of the jury, leaving the others in the jury room with the deputy, and with the door locked or closed. This is not misconduct of the jury which will entitle the prisoner to a new trial.

At the March term of the Circuit Court of the county of Warwick, Samuel Trim was indicted for the murder of John Wootten. When brought into court, before pleading, he moved the court to quash the indictment upon the same ground stated in the preceding case of Kemp and others. And it appears that he was committed at the same time, and examined and sent on

to be tried at the same time that they were. The court overruled the motion; and he excepted.

On the trial, the jury found him guilty of murder in the first degree. And he thereupon moved the court for a new trial: 1st. On the ground that the verdict was contrary to the law and the evidence; and 2. For misbehavior of the jury. The facts on both points are stated by Judge Joynes in his opinion. The court overruled the motion, and sentenced the prisoner to be hung. And he excepted to the opinion of the court; and obtained a writ of error from this court.

Mallory, for the prisoner.

The Attorney General, for the Commonwealth.

JOYNES, J. The plaintiff in error was indicted jointly with Kemp & als., whose case has just been decided, but tried separately. He moved to quash the indictment, on the same grounds on which a like motion was made in that case, and for the reasons stated in that case this motion was properly overruled.

After the verdict was rendered, a motion was made for a new trial on two grounds: 1. That the verdict was against the law and the evidence. 2. The misconduct of the jury. No question has been made in reference to the law applicable to the facts, and the first ground must be considered with reference to the evidence alone.

It was clearly proved that the deceased was murdered in the night, and his store robbed at the same time. The plaintiff in error confessed that he was one of the party who robbed the store. He stated, however, that he did not go to the store, but stopped about two hundred yards off; that he remained there until the other parties returned with the goods; that he received his share of the goods; that while he was there he heard two guns fire, (it was proved that two guns were fired at the store at the time of the murder,) and that he did not "go in," because he "was afraid there would be some harm done." Part of the stolen goods were found in the possession of the prisoner's wife.

985 *Now, when several persons are concerned in the commission of a felony, or other unlawful act, and in the execution of the common purpose, any one of them commits a murder, all who are present aiding and abetting in the unlawful purpose are guilty of the murder. 1 Wharton Crim. Law, § 127; 1 Russell on Crimes 29. And it is not necessary, in order to make a party liable, that he should be actually and immediately present at the commission of the offence. If he co-operates in the execution of the common purpose by watching at a proper distance, to prevent surprise, or the like; or if, with the intention of giving assistance, he remains near enough to afford it, if the occasion for it should arise, he is constructively present, and is equally guilty with those who are actually present and do the act. 1

*See Bennett's Case, 8 Leigh 745, when it was held that the sheriff is *ex officio* bound to keep the jury when adjourned in a criminal cause, and it is not indispensably necessary that he should be sworn.

See generally, monographic note on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

Whart. Crim. Law, § 124; 1 Russell on Crimes 27.

It was for the jury to say, upon the confession of the prisoner and the other evidence, a part of which only I have mentioned, whether the plaintiff in error was, according to these principles, constructively present, aiding and abetting in the murder which was actually committed by some one or more of the others. By their verdict they, in effect, found that he was, and we cannot say that the evidence was plainly insufficient to warrant that finding, so as to entitle the plaintiff in error to a new trial.

The facts in relation to the other ground assigned for a new trial are, in substance, that the trial occupied but one day; that the court took a recess for dinner, and before doing so committed the jury to the charge of the sheriff, who was duly sworn and charged by the court, though his deputy was not sworn, to take charge of the jury; that while the sheriff had the jury so under his charge in a jury room, he took three of the jurors, at their request, to their conveyances about a hundred yards off, to get their provisions; that when they got 986 their provisions, he went *immediately back with them to the jury room; that when he took the three jurors from the jury room he left the rest behind in charge of his deputy; that after taking those three back to the jury room, the sheriff took four of the jury to the tavern about one hundred yards off; that two of them seated themselves at the dinner table, and the other two were in the act of doing so, when the judge, who was at the table, ordered the sheriff to take them back to the jury room, which was immediately done; that they did not remain at the table more than half a minute; that on both occasions the jurors who were absent from the jury room were always in the presence and under the eye of the sheriff, and held no communication with any one else; that while the four jurors were absent, the others were in the jury room in charge of the deputy sheriff; that the door was closed, and that no person had any communication with them during the absence of the sheriff.

It is well settled, that where some of the jurors separate from the rest for an innocent purpose, being accompanied by an officer, while the others are left in charge of another officer, both officers being duly sworn and charged to keep the jury, the separation will not vitiate the verdict. Massey Thomas' case, 2 Va. Cas. 479. See Thompson's case, 8 Gratt. 637. And this is in accordance with every day's practice. The question therefore is, whether it was indispensable, in this case, that the deputy sheriff, as well as the sheriff, should be specially sworn to keep the jury.

In Bennett's case, 8 Leigh 745, it was held by the General Court, that though it is proper that the sheriff should always be sworn to keep a jury committed to his

charge, according to the common practice, it is not indispensable, it being the duty of the sheriff ex-officio to keep the jury when committed to his charge by the court. The same must be true of a deputy sheriff. And so I think that, on the same principle, where, as in this case, a sheriff is 987 *specially sworn and charged to keep the jury, it is not indispensable that a deputy, whom he calls to his assistance, should be specially sworn. A contrary doctrine would imply a suspicion which ought not to be indulged against a public officer engaged in the discharge of his appropriate duty, and might lead often to great inconvenience, without any compensating advantage.

Moreover, the jurors who were left by the sheriff were, on both occasions, left by him in the jury room. On the last occasion, the door of the jury room was locked.

It does not appear whether it was or not locked on the first occasion, though it may fairly be presumed that it was closed, if not locked. Now it must often happen that some of the jurors will be left in the jury room for a short time while others are absent, for necessary purposes, in company with an officer. This is unavoidable where only one officer is present. The jurors in such a case are still in the custody of the officer, who, though absent from them for the time, maintains his custody, and secures the substantial object of the law by shutting them up in the jury room. Why may not the sheriff, while he thus maintains his charge and custody, have his deputy at the door of the jury room, or even inside of the room, to see that the jurors do not leave, or that the door is kept shut, even though it were indispensable that a sheriff or deputy sheriff charged with the custody of a jury should be specially sworn? That is substantially what was done in this case. The sheriff, no doubt, supposed that he had a right to do so; he had no intention of relinquishing his own custody; he honestly designed, through his deputy, the more certainly to maintain his custody, and every purpose of the law has been accomplished. We should go far beyond any former case in this court, or the General Court, if we should hold the verdict to be vitiated under such circumstances. This is not at 988 all inconsistent with *what was held in Wormley's case, 8 Gratt. 712. The jury in that case were taken out of the jury room and to the house of a citizen in the neighborhood. The sheriff, in effect, abandoned his custody of them by going into another part of the house, and leaving them in the company of several other persons, and not in charge of a deputy.

Upon the whole case, I think there is no error in the judgment, and that it ought to be affirmed.

The other judges concurred in the opinion of Joynes, J.

Judgment affirmed.

989 *Matthews v. The Commonwealth.

Garner v. The Commonwealth.

January Term, 1868, Richmond.

1. **Statute—To Revise Criminal Procedure—Construction of.**—The act of April 27, 1867, to revise and amend the criminal procedure, Sess. Acts 1866-67, p. 915, ch. 128, does not authorize the trial of a prisoner for felony, except upon an indictment found by a grand jury in a court of competent jurisdiction.
2. **Statutes—Rule of Construction.**†—A statute will be construed according to its obvious intention, though the collocation of the different branches of the provision are so arranged, by mistake, as to lead to a different conclusion.
3. **Reversal of Judgment—No Motion in Arrest.**‡—Anything which is good cause for arresting a judgment, is good cause for reversing it, though no motion in arrest is made.

At the September term, 1867, of the County court of Fairfax, the attorney for the Commonwealth, upon his oath of office, filed an information against Samuel Matthews and Cordelia Garner for the murder of Thomas Garner. Thomas Garner was the husband of Cordelia, and they were negroes. When brought into court, they demanded to be tried before the Circuit

Court; and in the Circuit Court they elected to be tried separately.

Matthews being first tried, the jury found him guilty of murder in the first degree; and the court sentenced him to be hung. In his case no exception was taken during the trial; nor was there a motion in arrest of judgment.

Cordelia Garner was then put upon 990 her trial, and the *jury found the prisoner guilty of murder in the second degree, and ascertained her term of imprisonment in the penitentiary at five years. She thereupon moved the court for a new trial, on the ground that the dying declarations of Thomas Garner, who was her husband, had been introduced by the Commonwealth as evidence against her, which she insisted was illegal; and if admissible, the proof was insufficient to maintain the issue on behalf of the Commonwealth. But the court overruled the motion, and sentenced her in accordance with the verdict; and this prisoner excepted. The question as to the evidence was not considered by the court. On the application of the prisoners, writs of error were awarded them.

Brent and Dulaney, for the prisoners.

The Attorney General, for the Commonwealth.

***Felony—Indictment Necessary.**—For the proposition that under the act of April 27, 1867, a person could not be prosecuted for felony except upon an indictment found by a grand jury in a court of competent jurisdiction, the principal case is cited in *Jones v. Com.*, 19 Gratt. 481; *Chahoon v. Com.*, 20 Gratt. 755.

See generally, monographic note on "Indictments."

†**Statutes—General Rule of Construction.**—The cardinal rule in the construction of statutes is to extract the intention of the legislature, and, when a doubt arises, although apparently the doubt attaches only to a particular clause, the whole statute is to be taken together, and to be examined, to arrive at the legislative intent. *Chalmers v. Funk*, 76 Va. 722.

In *Pharis v. Dice*, 21 Gratt. 810, it was said: "In construing statutes the leading object will always be to carry out the manifest legislative will and intent, and if it be necessary for that purpose the courts will not only transpose sentences, but rearrange sections. This has been done even in criminal cases, by this court, in the construction of statutes regulating criminal trials, where the greatest strictness of construction is required. *Matthews' Case* and *Garner's Case*, 18 Gratt. 989."

The decision of the principal case was also approved as to this subject in *Chalmers v. Funk*, 76 Va. 722; *Burks v. Hinton*, 77 Va. 13, 36; *Hutchings v. Commercial Bank*, 91 Va. 74, 20 S. E. Rep. 950.

See also, foot-note to *Fox v. Com.*, 16 Gratt. 1; *Orange, etc., R. Co. v. Alexandria*, 17 Gratt. 176.

‡**Reversal of Judgment—No Motion in Arrest.**—The proposition that anything which is good cause for arresting a judgment is good cause for reversing it, though no motion in arrest is made, was approved in *Randall v. The Com.*, 24 Gratt. 646; *Lemons v. The State*, 4 W. Va. 757; *State v. Miller*, 6 W. Va. 609; *State v. McClung*, 35 W. Va. 286, 13 S. E. Rep. 656.

MONCURE, P., delivered the opinion of the court:

These cases come up on writs of error to judgments of the Circuit Court of Fairfax county, rendered on the 7th and 9th days of November, 1867, convicting the plaintiffs in error of the murder of one Thomas Garner—Samuel Matthews being convicted of murder in the first degree, and Cordelia Garner of murder in the second degree. An information had been filed against them in the county court of Fairfax in September, 1867, by the Commonwealth's attorney for that county "upon his oath of office," charging them jointly with the commission of the murder. Upon their arraignment in the county court, they demanded to be tried in the Circuit Court of the county, and they were thereupon remanded for trial in that court. In the Circuit Court they elected to be tried severally, and accordingly were so tried, upon the said information, to which each of them pleaded not guilty. Samuel

Matthews was first tried and then 991 Cordelia Garner, and they were *severally convicted as aforesaid; the former being condemned to be hung, and the latter to imprisonment in the penitentiary for five years. On the trial in the Circuit Court, no question was raised by Matthews, and the only question raised by Cordelia Garner was by an exception to a decision of the court overruling her motion for a new trial. Neither party moved in arrest of judgment. The main question presented for the decision of this court in these cases, and that on which alone they will be decided, is, whether a person can be put upon trial for any felony unless an indictment shall have first been found

against him therefor, by a grand jury in a court of competent jurisdiction?

If he can be, it is alone in virtue of an act of Assembly passed April 27, 1867, entitled "an act to revise and amend the criminal procedure." Sess. Acts 1866-7, pp. 915-946, ch. 118. By that act all the chapters, twelve in number, from 201 to 212 inclusive, of Title 55 of the Code of 1860, pp. 817-849, were either repealed or amended and re-enacted—chapters 205 (of examining courts), and 212 (of proceedings against negroes), being repealed, and the others amended and re-enacted. The amendment of the first two sections of chapter 207 is that on which the question we are now considering arises. Those two sections, as they stand in the Code, p. 831, are as follows:

"1. Prosecutions for offences against the Commonwealth, unless otherwise provided, shall be by presentment, indictment or information. The trial of a white person, on a charge of felony, or of a free negro for a felonious homicide or a felony punishable with death, shall always be by indictment.

"2. No information shall be filed unless by leave of the court entered of record, nor unless the accused, being summoned for that purpose, fail to show good cause to the contrary."

992 *In lieu of these two sections, which were stricken out, the two following were adopted in the amended act, p. 926 of the session acts 1866-7:

"1. Prosecutions for offences against the Commonwealth, unless otherwise provided, shall be by presentment, indictment or information.

"2. An information may be filed upon a presentment or indictment by a grand jury, or upon a complaint in writing verified by the oath of a competent witness; but no person shall be put upon trial for any felony, unless an indictment shall have first been found by a grand jury in a court of competent jurisdiction, or upon the certificate of the committing justice. If the accused be in custody, or has been recognized or summoned to answer such presentment, indictment or complaint, no other process shall be necessary; but the court may, at its discretion, issue process to compel the appearance of the accused."

Now if we construe this amendment literally, it is evident that no person can be put upon trial for any felony unless upon an indictment found by a grand jury, or upon the certificate of the committing justice; and as the plaintiffs in error were not put upon their trial, either upon an indictment found by a grand jury, or upon a certificate of a committing justice, but upon an information filed by the Commonwealth's Attorney, and filed too, not "upon a presentment or indictment by a grand jury, or upon a complaint in writing verified by the oath of a competent witness," but merely "upon his oath of office," the judgments might, on that ground, be reversed. But we think the amendments

ought not to be so construed; and that, according to the true and proper construction thereof, no person can be put upon trial for any felony, unless an indictment against him therefor shall have first been found by a grand jury in a court of competent jurisdiction. A mistake was manifestly made in the location of some

993 of the words of the second section, as is apt to be the case in the process of making amendments in the course of legislation. The mistake consisted in inserting the words, "but no person shall be put upon trial for any felony unless an indictment shall have been first found by a grand jury in a court of competent jurisdiction," before instead of after the words, "or upon the certificate of the committing justice." By a simple transposition of a few words in the same sentence, and without altering, supplying or omitting a single word, the manifest intention of the Legislature will be effectuated; and we therefore think the transposition ought to be made, and that the former part of the section ought to be construed and read as if it were written thus: "An information may be filed upon a presentment or indictment by a grand jury, or upon a complaint in writing, verified by the oath of a competent witness, or upon the certificate of the committing justice; but no person shall be put upon trial for any felony, unless an indictment shall have first been found by a grand jury in a court of competent jurisdiction."

That this is the meaning of the Legislature, we think is shown, first, by the reason of the thing; secondly, by the rules of grammatical construction, as applied to the words of the section as they now stand; and thirdly, by the context. And first, it is shown by the reason of the thing. It is impossible to suppose that the Legislature, after carefully providing that no person should be put upon trial for any felony, upon a presentment of a grand jury, or upon a complaint in writing verified by the oath of a competent witness, or upon an information though filed upon such a presentment or complaint, intended to authorize a person to be put upon trial for a felony without being indicted therefor, and merely upon the certificate of the committing justice; thus making the certificate a form of accusation for felony,

and exalting it, in dignity, even 994 above a presentment *of a grand jury. The nature of this certificate is shown by the Code, p. 826, § 16, and in the amended act in the Session Acts, p. 924, § 16, in each of which a provision is made that when a person charged before a justice with a criminal offence is committed or recognized by him for trial in the county or corporation court, "the justice shall return to the clerk of such court, as soon as may be, a certificate of the nature of the offence, showing whether the accused was committed or recognized therefor; and the clerk, as soon as may be, shall inform the Attorney for the Commonwealth in said court of such certificate." The only object

in view in requiring the certificate was, to inform the court and Commonwealth's Attorney of the accusation, in order that it might be put in proper form, and that preparation might be made for the trial. See what is said on this subject in the opinion delivered by Judge Joy nes a few days ago in the case of *Kemp & als. v. The Commonwealth*. The Legislature no doubt thought that this certificate might safely be made the foundation of an information to be filed therein by the Attorney for the Commonwealth, and therefore so provided; a function, however, which it had never before performed; but certainly could not have intended to place it on the same footing, in cases of felony, with an indictment found by a grand jury. Construing the section literally as it now stands, the manifest intention would be doubly disappointed. An information for a misdemeanor could not be filed upon the certificate, which the Legislature intended might be done; while a person might be put upon trial for any felony upon the certificate, which the Legislature intended might not be done. The construction we have adopted effectuates the intention in both respects. Secondly. This is the grammatical construction of the words as they now stand. The words, "or upon the certificate of the committing justice," naturally, and in the form

995 of "expression, follow the words, "or upon a complaint in writing verified by the oath of a competent witness;" while they unnaturally, and in unlike form of expression, follow the words, "but no person shall be put upon trial for any felony, unless indictment shall have first been found by a grand jury in a court of competent jurisdiction." A literal construction in the order in which the words now stand, would be forced and difficult, as well as unreasonable. Thirdly. Our construction is sustained by the context. In many subsequent sections of the act, *indictment* alone is mentioned in regard to felony; thus excluding the *certificate* as a form of accusation for that grade of offence. This is the case in sections 14, 15, 27, 28, 29 and 31 of chapter 208, Session Acts, pp. 934-936.

We have looked to the printed Journal of the House of Delegates for 1866-67, during which this act was passed, and it conclusively shows that our construction is correct. The second section of chapter 207 as the bill was originally presented in the House, was in these words: "2. An information may be filed upon a presentment or indictment by a grand jury, or upon a complaint in writing, verified by the oath of a competent witness. If the accused be in custody," &c., as in the act. So that there was then in the section nothing in regard to either an indictment for felony, or to the certificate of the committing justice. On the 19th of February, 1867, Mr. Booker moved an amendment, by inserting after the word "witness," in section 2, line 3, the words, "but no person shall be put on trial for any felony *punishable with death or confinement in the penitentiary*

for a longer time than five years, unless an indictment shall have first been found by a grand jury in a court of competent jurisdiction; *provided, however, that the accused can, by consent entered of record, waive this privilege.*" This amendment was rejected. Journal, p. 310. Afterwards, on the same day, Mr. Straughan moved precisely

996 *the same amendment, except the proviso, which was stricken out; but it also was rejected. Id. 311. On the next day, on motion of Mr. Evans, the section was amended by inserting after the same word "witness," in the third line, the words, "or upon the certificate of the committing justice." Id. 317. The section, as so amended, then ran thus: "An information may be filed upon a presentment or indictment by a grand jury, or upon a complaint in writing verified by the oath of a competent witness, *or upon the certificate of the committing justice,*" &c. Afterwards the bill was laid upon the table, and nothing more was done with it during that session. But at the extra session, which followed immediately thereafter, the same bill was reported to the House by the Committee for Courts of Justice, with an amendment as follows: In chapter 207, section 2, line 3, after the word "witness," insert the words, "But no person shall be put upon trial for any felony unless an indictment shall have first been found by a grand jury in a court of competent jurisdiction." On the 15th day of March, 1867, this amendment was agreed to. Id. p. 48. And the bill was afterwards, during the same session, passed into a law, without any further change of the section, which was left as it now stands in the act. The amendment made by the committee, and agreed to by the House as aforesaid, corresponded precisely with the amendment as proposed by Messrs. Booker and Straughan respectively, as before stated, with the exception of some words (being those in italics,) which were stricken out of each successively; and was obviously proposed and agreed to without noticing the fact that in the meantime the section had been amended by inserting the words, "or upon the certificate of the committing justice," after the word "witness," in the third line. Had that fact been noticed, there can be no doubt but that the amendment reported by the com-

997 mittee *would have been inserted after those words, instead of being inserted before them, and after the word "witness," as originally proposed. Thus, by a too literal pursuance of the terms of the original proposition, arising from an oversight of the amendment made in the meantime, a mistake has occurred in the location of the words of the section. Still the intention of the Legislature can be ascertained, even from the words as they stand in the act. But viewed in the light of surrounding circumstances, and especially in the light of their proceedings in regard to this act as recorded in their published Journal, there can be no doubt as to the true meaning of the section.

To exclude a conclusion, it may be proper to notice a question which was raised in the argument of these cases; whether the Legislature has power to dispense with the necessity of an indictment in cases of felony? Article V of the amendments to the constitution of the United States provides, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." It was rightly conceded in the argument that this article applies only to the Federal government, and has no application to that of the States. But it at least serves to show the importance which was attached to the subject by the States, and that as they deemed it necessary to engraft this provision on the Federal constitution, they would not be apt to disregard the principle in moulding their State constitutions. There is in the constitution of Virginia no such express provision. The only express reference which it makes to the subject of indictments, is in a provision which was engrafted on the original constitution, and has been literally copied into every amended constitution since; and which declares that "indictments shall conclude against the peace and dignity of the commonwealth." Constitution of 1851, art. 6, sec. 24, Code p. 54. There are some 998 *provisions in the Bill of Rights which had their origin in Magna Charta, which have been supposed to embrace, among other things, a declaration that no citizen shall be put upon trial for felony unless upon an indictment found by a grand jury. This is certainly the rule of the common law, which authorizes the Attorney General to exhibit an ex-officio information for any misdemeanor whatever, but not for felony; it being required in all cases of felony that the accusation should be warranted by the oath of twelve men before the defendant can be put to answer it. Cole on criminal informations, p. 9, and authorities cited, 56 Law Library.

This constitutional question is an important one, and will deserve and receive full consideration by this court whenever, if ever, it shall become necessary for the court to decide it. It is not necessary for us

to do so now, and we therefore express no opinion upon it. The suggestions we have made on the subject ought at least to have some weight in the construction of the statute we have been considering, and require that we should not impute to the Legislature an intention to change a rule of the common law which has received so many solemn sanctions, without the clearest evidence of such intention; especially a rule which was established for the protection of life, liberty and character.

It was argued by the Attorney General, that if the plaintiffs in error were entitled to require that they should not be put upon trial for the murder of which they were accused unless an indictment should have first been found against them therefor by a grand jury, yet that it was a personal privilege, intended for their benefit, which they might therefore waive; and that they did waive it, by pleading not guilty to the information without objection, and by omitting to make any motion in arrest of judgment. There may be some doubt

999 whether the privilege is *such a one as that they could waive it, especially if it be a constitutional right. (See what is said on this subject in *Carcemi v. The People*, 18 New York R. 129, a case cited by the counsel for the plaintiff in error.) But certainly, if they could waive the privilege, they ought not to be considered as having done so, without the clearest evidence of their having well understood that they had the privilege, and of their having intended to waive it. There is no such evidence in this case. They were not bound to make the objection by motion in arrest of judgment, but may make it for the first time in this court, notwithstanding their omission to make such motion. Anything which is good cause for arresting a judgment, is good cause for reversing it, though no motion in arrest be made.

We therefore think the judgments ought to be reversed, the information and all the proceedings subsequent thereto set aside, and the causes remanded for further proceedings to be had therein, in conformity with the foregoing opinion.

Judgment reversed.

INDEX.

ABATEMENT.

When annual payments are agreed to be paid for a life estate in lands and slaves, and the slaves are emancipated by the proclamation of the President of the United States, no abatement from the amount of the annual payments will be allowed on this account. See *Estates*, No. 2, and

Scott's ex'x v. Scott, 150

ABSENT DEFENDANTS.

1. In a suit in which there is an absent defendant, there is a decree against the home defendant, from which he appeals. Pending the appeal, the absent defendant may file his petition in the court below, to be permitted to appear and file his answer in the cause, and may have the decree reheard and set aside, if it is erroneous as to him.

James River & Kan. Co. v. Littlejohn, 53
Littlejohn v. Ferguson & als., 53

2. If upon such rehearing, the decree, or so much of it as is the subject of appeal, is wholly set aside, the appeal will generally be dismissed. But if an appeal is taken from the decree on the rehearing, before the dismissal of the first appeal, the appellate court may refuse to dismiss it. *Idem*, 53

3. *QUERE*: Whether the statute limiting the period in which an absent defendant may answer, and have the decree corrected, applies to the time of presenting the petition, or of filing the answer, or of the decree upon the rehearing. *Idem*, 53

4. What laches of a party in a pending suit will not conclude him. *Idem*, 53

ACCOUNTS.

1. The statute, Code ch. 175, § 4, does not limit the class of cases in which the court may direct that notice may be given by publication; and it is no valid objection, by a party upon whom process in the suit has been served, that he did not see or hear of the notice by publication, of the taking an account by a commissioner under the order of the court.

Hill & als. v. Bowyer & als., 364

2. In the absence of objection in the court below that the commissioner had not regularly adjourned from time to time, the taking the accounts, an appellate court would presume that they were regular; and the objection is not therefore available under § 5, ch. 181 of the Code. *Idem*, 364

AMBIGUITIES.

1. What is a latent ambiguity, which may be explained by a parol evidence. See *Leases*, No. 5, and

Midlothian Coal Mining Co. v. Finney & als., 304

ANSWER.

1. In a suit by the vendee for the specific execution of a contract for the purchase of land, the defendant denies the contract as stated in the bill. The fact that the answer is disproved as to some facts which are denied, does not destroy the weight ascribed to it by law, in respect to other facts, as to which it is not disproved by the required amount of evidence. *Broughton v. Coffey*, 184

APPELLATE COURT.

1. When the appellate court will, and when it will not, dismiss an appeal by a home defendant, from a decree which is set aside by the court below, upon a rehearing at the instance of the absent defendant. See *Absent Defendants*, No. 2, and

Jas. Riv. & Kan. Co. v. Littlejohn, 53
Littlejohn v. Ferguson & als., 53

2. A plaintiff files with his bill, as the ground of his claim, an order on one of the defendants, which has not been accepted.

No proof of the execution of the 1002 order is given; but its genuineness is not questioned in the court below, and it is made the basis of a decree in favor of the plaintiff. It is too late to make the objection in the appellate court, to the want of proof of the order. *Idem*, 53

3. If it appears affirmatively that a person, if made a party in a chancery suit, would have been a mere formal party, against whom no decree would have been asked, and whose presence was not necessary for the protection of any of the defendants, the appellate court will not reverse a decree for his absence. *Idem*, 53

4. When the court below refuses to give an instruction to the jury asked by the defendant, and gives an instruction which, after the refusal of the first, was calculated to mislead the jury, the judgment will be reversed.

Ragland & Co. v. Butler, 323

5. In the absence of objection in the court below, that the commissioner had not regularly adjourned from time to time, the taking an account, an appellate court will presume that they were regular; and the objection is not therefore available under § 5, ch. 181, of the Code, upon an original bill to set aside a decree by default.

Hill & als. v. Bowyer & als., 364

6. When the appellate court will not reverse a decree which is correct upon the merits, made upon overruling a demurrer without giving the defendant time to file an answer. See *Practice in Chancery*, No. 17, and

Brent v. Washington's adm'r, 526

7. Where a copy of a paper has been properly introduced in evidence, the admission of another copy of the same paper is no ground for reversing the judgment.

Corbett v. Null, trustee, 624

8. In a common law cause, a question having been decided in the court below against the appellee, the appellate court will consider it, and if it is erroneous, reverse it.

Boulware v. Newton, 708

9. When a cause is heard by the judge, and there is an exception to his decision, the whole evidence is spread upon the record, and the appellate court must regard the case as upon a demurrer to evidence, considering the appellant as demurrant.

Clafin & Co. v. Steenbock & Co., 841

10. Where a presentment does not charge the offence, the appellate court will reverse the judgment against the accused, though no motion in arrest of judgment was made in the court below.

Old's case, 915

11. When a pecuniary judgment has been rendered against a defendant in a criminal case, and he pays it, and upon appeal the judgment is reversed, the cause will be remanded to the court below, for an order of restitution to be made therein, if the money is yet in the hands or power of the court.

Idem, 915

12. On a conviction for murder in the first degree, the appellate court will not reverse the judgment unless the evidence was plainly insufficient to warrant the finding of the jury.

Trim's case, 983

13. Anything which is good cause for arresting a judgment, is good cause for reversing it, though no motion in arrest is made.

Matthew's case, 989

Garner's case, 989

ASSIGNOR AND ASSIGNEE.

1. To a bill filed by an assignee of a chose in action, if the assignment purports to transfer the whole interest to the assignor, and there is nothing in the pleadings and proofs to induce the belief that it did not really do so, the assignor is not a necessary party.

James River & Kan. Co. v.

Littlejohn, 53

Littlejohn v. Ferguson & als., 53

ATTACHMENTS.

1. Where an attachment has been sued out under § 2 of ch. 151 of the Code, ed. of 1860, in a suit pending in a county or corporation court, though the defendant has given a forthcoming bond, the court has jurisdiction at a monthly term of the court, to abate the attachment.

Clafin & Co. v. Steenbock & Co., 842

2. On a motion to abate an attachment on the ground that it was issued on false suggestions and without sufficient cause, the plaintiff declining to express any wish for a jury, and the defendant expressing a wish that the jury might be dispensed with, and that the court should hear and decide the case; the court should hear and decide it without a jury.

Idem, 842

3. Though, in an action for maliciously suing out an attachment, the plaintiff

1003 *cannot recover, if it appears that the defendant, in suing out the attachment, acted *bona fide* and upon such apparent grounds as justified him in believing that the facts really existed which would authorize its issue; yet upon a motion under § 22, ch. 151 of Code, to abate the attachment, on the ground that it has been issued on false suggestions or without sufficient cause, the question is, whether, upon all the evidence, there was reasonable ground or probable cause to believe the defendant was doing the act which would authorize the attachment; and not whether the facts as they appeared to the affiant, though only a small part perhaps of the facts of the case, afforded him reasonable ground for the belief.

Idem, 842

ATTORNEYS AT LAW.

1. Decrees by default in favor of husbands and wives give interest upon interest; but the counsel of the parties direct the clerk to correct the error by endorsement on any executions that might be issued upon them; which is done. The counsel had full authority to direct the correction, and to bind the wives as well as their husbands; and thus to correct the error.

Hill & als. v. Bowyer & als., 364

BANKS.

1. Upon the true construction of the act of February 12, 1866, entitled "An act requiring the banks to go into liquidation," all the creditors of a bank, not having a specific lien upon property of the bank, are placed upon the same footing, and are entitled to share the assets ratably.

Robinson & als. v. Gardiner & als., 509

2. The General Assembly having reserved the right to alter or repeal the charter of the bank, the act is not obnoxious to the charge of interfering with vested rights, or impairing the obligation of contracts.

Idem, 509

3. A deposit of money in a bank is a loan, and not a bailment.

Idem, 509

BILL OF REVIEW.

1. A bill of review cannot be filed without leave of the court.

Hill & als. v. Bowyer & als., 364

BONDS.

1. See Forthcoming Bonds, *passim*, and *Ballard & als. v. Whitlock*, 235

2. For the liability of the city of Richmond for its bonds issued by its officers in violation of their instructions. See *Corporations*, No. 1, 2, 3, and

DeVoss & als. v. City of Richmond, 338

3. See *Coupon Bonds* and *Guaranty*, *passim*, and

Arents v. The Commonwealth, 750

4. A bond is drawn with the names of the principal and four persons as sureties inserted therein. The principal and three of

these sureties sign it. Two of these sureties sign and deliver it, upon the condition that a certain one of the other two named shall execute it; but he does not; and it is delivered to the obligee without his signature. **Held:**

1. That whether the bond was delivered to a third person, not a party to the bond, or to the principal or any other co-obligor, the parties so delivering it on condition are not bound by the said bond; and it is not necessary, to give effect to said condition, that the same should have been known by the obligee when the bond was delivered to him.

Ward & als. v. Churn, 801

2. The bond being void as to the two who delivered it on condition, it is void as the third surety, who executed it without any condition. *Idem,* 801

3. If the bond was delivered to the obligee on the condition stated, and the condition was known to him, he is not entitled to recover upon the bond. *Idem,* 801

4. In the absence of all evidence of a conditional delivery by the sureties who signed it, the presumption of law is, that they consented to the delivery of the bond without the signature of the other party whose name is in the bond. *Idem,* 801

5. When a bond given on a loan of Confederate money will bind the obligor to pay in good money, and is not usurious. See *Contracts*, No. 6, and

Boulware v. Newton, 708

6. When a bond for a usurious bond is not usurious. See *Usury*, No. 4, and

Drake's ex'or v. Chandler & als., 909

1004 *COLLATERAL LIMITATIONS.

See *Leases*, No. 1, and

Millan v. Kephart, 1

CONFEDERATE DEBTS.

1. Rows D for money received of or for D, at several periods before June 14th, 1862. On that day the account is stated, interest charged, amount ascertained, and check given for it, which if presented at bank would have been paid in Confederate money; and R makes entry on his books, closing the account. On the same day D returns the check and takes R's note for the amount. **Held:**

1. The bond is a new transaction, unaffected by the previous dealings between the parties; and is a bond for the loan of Confederate money.

Dearing's adm'x v. Rucker, 426

2. Under the act of March 3d, 1866, for scaling Confederate debts, the time for the payment of the debt is the date at which the scale of depreciation should be ascertained and applied. *Idem,* 426

3. To the value of Confederate notes, thus ascertained, nothing should be added on account of the present depreciation of current paper money compared with gold. *Idem,* 426

2. In November, 1861, C sells to O a tract of land, and O pays him one fourth cash, and gives his notes for the balance, payable in one, two and three years. Nothing is said at the time as to the currency in which the notes are to be paid; but C accepts payment of the first two notes in Confederate currency. C is not bound to take Confederate currency for the last note; but is entitled to be paid in the legal money of the country.

Omohundro's ex'or v. Crump, 703

3. When debt, the consideration of which is Confederate notes, will not be scaled. See *Contracts*, No. 6, and

Boulware v. Newton, 708

4. When such debt not usurious. See *Contracts*, No. 6, and *Idem,* 708

CONSTITUTIONALITY OF LAWS.

1. See *Taxes and Tax Sales, passim*, and

Martin v. Snowden, trustee, 100

Bennett v. Hunter, 100

Portner & Recker v. Cazenove, 100

2. A deed of trust to secure a debt, which provides for the time and terms of sale, upon the failure of the grantor to pay the debt, is of the obligation of the contract, and the act of March 2, 1866, to stay the collection of debts for a limited period, which forbids sales under deeds of trust until the 1st of January, 1868, is, in relation to such deeds of trust, unconstitutional.

Taylor v. Stearns & als., 244

3. The § 93, of the act of February, 1866, for the assessment of taxes, modifies the charter of an express company; and is constitutional.

Anderson v. The Commonwealth, 295

4. The General Assembly having reserved the right to alter or repeal the charters of the banks, the act of February 12, 1866, requiring them to go into liquidation, and distribute their assets ratably among all their creditors, is not unconstitutional.

Robinson & als. v. Gardiner & als., 509

5. The act, Sess. Acts, 1866-67, p. 635, extending the boundaries of the city of Richmond, is not unconstitutional in any of its provisions.

Wade & als. v. The City of Richmond, 583

Thomas & als. v. The Same, 583

6. The act operates upon the municipal relations of the inhabitants of the territory annexed to the city, but in political elections they are still to vote as a part of the county of Henrico. *Idem,* 583

7. That the tax-payers of the county may have the burthen of taxation increased, or the creditors may have their security lessened by the reduction of the value of the subject of taxation, or that the inhabitants of the annexed district may be subject to heavier taxation, does not affect the constitutionality of the act. *Idem,* 583

8. The General Assembly having the power to extend the boundaries of the city, the

justice or expediency of it is not a question of which the courts can take jurisdiction.

Idem, 583

CONSTITUTION OF VIRGINIA.

1. The 22d section of article VI, of the constitution of Virginia, applies to all State officers; and the Governor, whose term has expired, holds over until his successor is qualified. *Lawhorne, ex parte*, 25
1005 *2. For the power of the General Assembly to extend the boundaries of cities. See *Constitutionality of Laws*, No. 5, 6, 7, and

Wade & als. v. The City of Richmond,

583

Thomas & als. v. The Same,

583

CONSTRUCTION OF STATUTES.

A statute will be construed according to its obvious intention, though the collocation of the different branches of the provision are so arranged, by mistake, as to lead to a different conclusion.

Matthews' case, 989

Garner's case, 989

CONTRACTS.

1. If a deed conveying property has not been procured by fraud, or if it has been afterwards confirmed by the vendor, without coercion, and when he was competent, the vendee is entitled to the property without regard to the value of the consideration paid for it.

Mettert's adm'r v. Hagan, 231

2. If a contract is made for the purchase of property to be paid for on delivery, by a note at sixty days, this is, in legal intendment, an obligation to pay at that time, if there is a failure to give the note.

Ragland & Co. v. Buller, 323

3. A contract to sell the merchantable pine timber on a certain tract of land, to be sawed into lumber by the vendor, according to the directions of the purchaser, and to be delivered at Richmond, is a contract that the lumber shall be merchantable; and the usage at Richmond as to what constitutes a compliance with the directions of the purchaser, is to be the rule in determining the question.

Idem, 323

4. See *Pleading at Common Law*, No. 4, 5, and

Idem, 323

5. Rows D for money received of or for D at several periods before June 14th, 1862. On that day the account is stated, interest charged, amount ascertained, and check given for it, which if presented at the bank, would have been paid in Confederate money; and B makes entry on his books closing the account. On same day D returns the check and take R's note for the amount, payable June 1st, 1863. HELD:

1. The bond is a new transaction, unaffected by the previous dealings between the parties; and is a bond for the loan of Confederate money.

Dearing's adm'x v. Rucker, 426

2. Under the act of March 3, 1866, for scaling Confederate debts, the time for

the payment of the debt is the date at which the scale of depreciation is to be ascertained and applied. *Idem*, 426

3. To the value of Confederate notes thus ascertained, nothing should be added on account of the present depreciation of current paper money compared with gold.

Idem, 426

6. N gives his bond to B, dated January 29th, 1863, by which, on demand, three months after notice to pay, he promises to pay to B \$5,000, without interest, in current funds; the money to be punctually paid at the end of the three months after demand, and if not, to bear interest from demand; B not to be required to receive the money except at his pleasure. The bond is given for \$5,000 Confederate notes then delivered by B to N, which were then worth in gold but one-third of the amount. HELD:

1. The contract is valid, and B is entitled to recover \$5,000 in the currency of the day when the money is demanded.

Boulware v. Newton, 708

2. It is a contract in which the principal is at hazard, and therefore not usurious.

Idem, 708

7. When and how vendor of personal property may sell it when the purchaser refuses to take it and pay for it. See *Sales*, No. 1, 2, 3, and

Rosenbaums v. Weeden, Johnson & Co., 785

CONVEYANCES.

1. Whether a stipulation in a lease is a collateral limitation or a covenant. See *Leases*, No. 1, and

Millan v. Kephart, 1

2. Whether a conveyance operates as a lease or a surrender. See *Estates*, No. 2, and

Scott's ex'x v. Scott, 150

COPIES.

1. See *Evidence*, No. 7, 8, 9, and

Corbett v. Nutt, trustee, 624

1006

*CORPORATIONS.

1. In exercising the power to borrow money, a municipal corporation is not exercising sovereign powers, but is responsible for the acts of its agents as a private corporation.

DeVoss & als. v. The City of Richmond, 383

2. An individual purchasing the bonds of a municipal corporation, and having no actual notice of any special directions given to the officers of the corporation, in relation to the particular bonds purchased, will only be bound by such directions, if he has been wilfully ignorant of them, and not merely where there has been a want of caution.

Idem, 338

3. The District Court of the Confederate States confiscated certain bonds of the city of Richmond, and by its decree directed the City Council to issue bonds in lieu of those so confiscated, to its receiver. The Council,

by resolution, directed its officers to issue the bonds as directed by the decree; but to insert on the face of the bonds so issued, and on the books of the office, that it was so issued in lieu of a confiscated bond; and to do this upon every re-issue of the bond. The officer obeyed the directions of the first issue of the bonds, but failed to do it upon the re-issue of the bond; and it was purchased by a party having no knowledge that it was such a bond. The city is bound to pay it.

Idem, 338

4. On the 2d of April, 1865, in anticipation of the evacuation of the city of Richmond by the Confederate army, the Council of the city ordered the destruction of all the liquor in the city, and undertook to pay for it. The Council, under the charter of the city, had authority to make the order and the pledge; and the city of Richmond is responsible for the value of the liquor destroyed under the order of the Council.

Jones & Co. v. The City of Richmond, 517

COUNTERFEITING.

See *Criminal Jurisdiction and Proceedings*, No. 3, 4, and *Jett's case*, 933

COUPON BONDS.

1. For the liability of the guarantor of coupon bonds. See *Guaranty, passim*, and *Arents v. The Commonwealth*, 750

2. In coupon bonds, the contract to pay principal and interest is in the bond; and whatever the form of the coupon, it answers substantially the same purpose, which is to afford the holder evidence of his right to demand what is due on the bond, and a convenient mode of collecting it. *Idem*, 750

3. Though coupons are in the form of orders to pay money, they are not to be regarded as bills of exchange. *Idem*, 750

4. The degree of diligence required of the holder of a coupon is to be ascertained by reference to the relations of the parties. It must be presented for payment within a reasonable time after it becomes due and payable, so as to save the liability of the guarantor in case of any injury resulting from delay. *Idem*, 750

5. Though it is not required that a coupon shall be presented for payment on the day it becomes due, it is nevertheless regarded as due and payable on the day fixed for the payment of interest. *Idem*, 750

6. Though the coupon is made payable at a named banking house on presenting to them the proper coupon, it is still due and payable on the day when the interest is due, as specified in it. *Idem*, 750

7. Coupons stolen after the day when they had become due and payable, though they afterwards come into the hands of a *bona fide* holder for value, cannot be held by him against the rightful owner. *Idem*, 750

COURTS.

1. County and Corporation courts have jurisdiction at their monthly terms, to abate an attachment issued in a pending suit.

Claffin & Co. v. Steenbock & Co., 842

COVENANTS.

1. Whether a stipulation in a lease is a collateral limitation or a covenant. See *Leases*, No. 1, and

Millan v. Kephart, 1

CREDITORS AND DEBTORS.

1. A debtor in failing circumstances may convey the whole of his property for payment of his debts, giving preferences 1007 *among his creditors, and requiring a release from such as accept it.

Gordon & als. v. Cannon & als., 387

2. To render such a deed valid, the whole of the debtor's property must be conveyed by it; but this need not appear on the face of the deed. *Idem*, 387

3. A partnership in failing circumstances, has the same power; and if two of three partners convey all the effects of the firm and their individual property, and the third has none, they may require a release both of the firm and all the members, by the creditors who accept the deed. *Idem*, 387

4. When the debtor in such a deed requires a release, the deed should give to the creditors all the information in the power of the debtor, as to the nature and value of the property conveyed, and the amount of the debts intended to be provided for, and time to obtain information not given in the deed; and to determine whether they will accept or reject the offer made to them. In this case sixty days were allowed, and held sufficient. *Idem*, 387

5. See *Trusts and Trustees*, No. 9, and *Idem*, 387

6. Upon the true construction of the act of February 12, 1866, Sess. Acts 1865-66, p. 204, entitled "An act requiring the banks of this Commonwealth to go into liquidation," all the creditors of a bank not having a specific lien upon property of the bank, are placed upon the same footing, and are entitled to share the assets ratably.

Robinson & als. v. Gardiner & als., 509

7. A deposit of money in a bank is a loan and not a bailment. *Idem*, 509

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. Where a presentment does not charge an offence, the appellate court will reverse the judgment against the accused, though no motion in arrest of judgment was made in the court below. *Old's case*, 915

2. When a pecuniary judgment has been rendered in a criminal case, and he pays it, and upon appeal the judgment is reversed, the cause will be remanded to the court below, for an order of restitution to be made therein, if the money is yet in the hands or the power of the court. *Idem*, 915

3. A state court has jurisdiction to punish an act made an offence by the law of the State, though the same act is made an offence by a law of the Congress of the United States. *Jett's case*, 933

4. A State court has jurisdiction to punish

the offence of attempting to pass a forged note purporting to be a note of one of the national banks of the United States.

Idem, 933

5. After an indictment for a felony, the indictment will not be quashed, because the clerk of the examining court has not inserted the justice's warrant of commitment of the prisoner in the record.

Kemp & als. case, 969

6. A justice who commits a prisoner for a felony, may direct him to be tried by an examining court called for the purpose, or by the county court at its regular term. And if he commits the prisoner without directing a called court, the trial is to be at a regular term.

Idem, 969

7. The examination of a prisoner may be on the same day on which he was committed, when it is at the regular term of the county court.

Idem, 969

8. After a prisoner has been indicted for a felony, the only question which is open upon the previous proceedings, is whether he has been examined for the offence for which he has been indicted.

Idem, 969

9. Several prisoners having been tried together for the same felony, and found guilty, the court may grant a new trial to one of them, and render a judgment against others.

Idem, 969

10. On a trial for murder, during a recess, the jury is committed to the keeping of the high sheriff, who is sworn to keep them; but his deputy is not sworn. The high sheriff goes out with a part of the jury, leaving the others in the jury room with the deputy, and with the door locked or closed. This is not misconduct of the jury which will entitle the prisoner to a new trial.

Trim's case, 983

11. The act of April 27, 1867, to revise and amend the criminal procedure, Sess. Acts 1866-67, p. 915, ch. 128, does not authorize the trial of a prisoner for a felony, except upon an indictment found by a grand jury in a court of competent jurisdiction.

Matthew's case, 989

Garner's case, 989

12. Anything which is good cause for arresting a judgment is good cause for reversing it, though no motion in arrest is made.

Idem, 989

DECREES.

1. For the mode of proceeding for relief against decrees by default, and what relief will be given. See *Equity Jurisdiction and Relief*, No. 2, 3, 4, 5, 6, and

Hill & als. v. Bowyer & als., 364

2. Decrees by default in favor of husbands and wives give interest upon interest; but the counsel of the parties direct the clerk to correct the error by endorsement on any executions that might be issued upon them; which is done. The counsel had full authority to direct the correction, and to bind the wives as well as their husbands; and thus to correct the error.

Idem, 364

DEEDS.

1. A deed of trust to secure a debt, which provides for the time and terms of sale, upon the failure of the grantor to pay the debt, is of the obligation of the contract, and the act of March 2, 1866, to stay the collection of debts for a limited period, which forbids sales under such deeds of trust until the 1st of January, 1868, is, in relation to such deeds of trust, unconstitutional.

Taylor v. Stearns & als., 244

DEVISES.

1. Testator says—I devise all my estate, in possession, remainder, reversion or expectancy, to my beloved wife, B. C. M., for her maintenance and support, and for the maintenance and support of our children, during her life or widowhood. In the event of her marriage, she is to be restricted to her dower and distributable share, as in case of intestacy. HELD: Upon the language of the clause, the widow is entitled absolutely, during her widowhood, to the whole estate; and there is no trust for the children. And this construction is sustained in this case by the provisions of the will and the surrounding circumstances.

Rhett & wife v. Mason's ex'x & als., 541

2. Testatrix says: All my landed estate in W to be equally divided between my nephew E and the children of H, namely, L, S, W, M and W. E and H were the nephew and niece of the testatrix, to whom she was equally attached. H was dead when the will was made. By another clause, she gives other property to be divided between E and the surviving children of H; and she says: Should any of the children of H die without heirs, the property left them shall be divided among the survivors. HELD: E took one moiety, and the children of H the other moiety of the land in W.

Hoxton & als. v. Griffith & als., 574

3. Mrs. H was a resident of Alexandria at the breaking out of the late civil war; and after it commenced, voluntarily went into the Confederate lines, and resided therein until her death in 1863. By her will she devised certain land in the county of Alexandria to N in trust for Y and F, which lands were at all times in the military lines and within the jurisdiction of the United States. The devise is valid; and after the war N may maintain an action to recover the lands, though he too went into the Confederate lines, and held office under the Confederate government at the time of the death of Mrs. H.

Corbett v. Nutt, trustee, 624

DILIGENCE.

1. What diligence required of holders of coupons. See *Coupon Bonds*, No. 4, 5, and

Arents v. Commonwealth, 750

EQUITY JURISDICTION AND RELIEF.

1. When the chancery court has jurisdiction in a controversy between execution creditors, claiming under ch. 188, § 3, of the Code. See *Executions*, No. 10, and

Charron & Co. v. Boswell & al., 216

2. A party against whom a decree has been rendered without his appearance, may apply to have the decree opened either by petition or by original bill. In either form it is an original proceeding, and may be commenced without previous leave of the court.

Hill & als. v. Bowyer & als., 364

3. If application is made to the court for leave to file a petition to open a decree, and the application is rejected, this is not a legal adjudication upon the case presented in the petition, as it would be in the case of a refusal to allow a bill of review to be filed, in which case the leave is necessary to entitle the plaintiff to file it; and the party may therefore file his original bill to have the decree opened.

Idem, 364

4. An original bill which seeks to correct errors in a decree by default apparent on its face, and also set it aside on the ground of mistake and surprise, having been filed without leave, cannot be treated as a bill of review. But a copy of the original record being filed with the bill, the court may consider and correct any errors apparent on the face of the decree which may be corrected by the court under the Code, ch. 181, § 5.

Idem, 364

5. A decree by default is made against a guardian and his sureties, and the process has not been served on one of the sureties. Upon a bill by the guardian and the other sureties, to open the decree, no objection to the decree on this ground can be raised by them. Nor will the objection of multifariousness alone be granted for reversing the decree.

Idem, 364

6. A defendant upon whom process has been served, who wholly neglects his defence, or contents himself with merely writing to a lawyer who practices in the court, to defend him, without giving him any information about his defence, or enquiring whether he is attending to the case, is not entitled to relief against a decree by default, on the ground of surprise, however grossly unjust the decree may be.

Idem, 364

7. How equity will reform a deed conveying the property of several to pay their debts indiscriminately. See *Trusts and Trustees*, No. 9, and

Gordon & als. v. Cannon & als., 387

8. The General Assembly having the authority to extend the boundaries of a city, the justice or expediency of it is not a question of which the courts can take jurisdiction.

Wade & als. v. The City of Richmond, 583

Thomas & als. v. The Same, 583

9. A court of equity will enjoin a sale of land under a deed of trust given to secure the purchase money of land, where there is a cloud upon the title which would occasion a sacrifice at such sale.

Faulkner & als. v. Davis & als., 651

10. It seems that a court of equity has not authority, under its general jurisdiction as guardian of infants, to sell their real estate, whenever it is for the advantage of the infants so to do.

Idem, 651

11. The statutes in relation to the sale of infants' lands are remedial in their nature, and should be construed liberally.

Idem, 651

12. By the act of February 18, 1853, Sess. Acts, ch. 34, p. 39, and the previous acts on the subject, courts of equity had authority to sell the lands in which infants had no interest, whether in possession or remainder, vested or contingent, if the proper parties could be brought before the court.

Idem, 651

13. When a trust to sell continues, though the trustee is dead a court of equity will execute it. See *Trusts and Trustees*, No. 11, and

Idem, 651

14. When court may decree a sale of a trust subject or lands in which infants have a contingent interest, though parties not in being may have an interest. See *Trust and Trustees*, No. 12, and

Idem, 651

15. Although the bill was prepared with reference to the sale of the land of infants under the statute, yet all the facts having been stated in it, and all the proceedings having been regularly conducted, it was competent for the court to make a decree therein for the sale of the property, if upon these facts, upon any ground whatever, the court of chancery had authority to make the decree.

Idem, 651

16. Though a court of chancery will be reluctant to appoint a receiver to take charge of and manage a railroad, it is competent to do so when such a course is indispensable to secure the rights of the legitimate stockholders, and to prevent a failure of justice.

Stevens & al. v. Davison, 819

17. When papers filed with an answer are not evidence. See *Evidence*, No. 2.

ESTATES.

1. Whether a stipulation in a lease is a collateral limitation or a covenant. See *Leases*, No. 1, and

Millan v. Kephart, 1

2. E owns an estate for her life in property both real and personal, including slaves, and S owns the remainder in fee therein; and E and her trustee enter into a contract, called by the parties a lease, by which they convey to S the life estate of E in the whole of the property, and S, in consideration thereof, undertakes to pay E annually for her life, seven hundred dollars as rent, and to
1010 *pay all taxes and legal charges on the estate; and the usual remedies for the recovery of these annual sums were reserved. S was put into possession of the property, and held and treated it as his own. HELD:

1. Though the instrument was called a lease, and the sums reserved was called a rent, the contract was a surrender, and the life estate of E was merged in the estate of S.

Scott's ex'x v. Scott, 150

2. The instrument not being under seal, it was not as to the land, an express surrender; but it was a contract for a sur-

render, which was carried out by the parties, by the delivery of possession and the payment of money under it; and it, therefore, has all the legal effect of an express surrender by deed. As to the personal property no deed was necessary.

Idem, 150

3. The slaves having been emancipated by the proclamation of the President of the United States, this does not entitle S to any abatement from the amount of the annual payments which he contracted to make.

Idem, 150

3. Testator says—I devise all my estate, in possession, remainder, reversion or expectancy, to my beloved wife, B. C. M., for her maintenance and support, and for the maintenance and support of our children during her life or widowhood. In the event of her marriage, she is to be restricted to her dower and distributable share, as in the case of intestacy. **HOLD:** Upon the language of the devise, the widow is entitled absolutely during her widowhood to the whole estate; and there is no trust for the children. And this construction is sustained, in this case, by the other provisions of the will, and the surrounding circumstances.

Rhett & wife v. Mason's ex'x & als., 541

EVIDENCE.

1. When an appellate court will not reverse a decree for want of proof of the execution of a paper. See *Appellate Court*, No. 2, and *James River & Kan. Co. v. Littlejohn*, 53

Littlejohn v. Ferguson & als., 53

2. The written opinion of an attorney of a party, or the recitals in a bond, though the papers are filed with the answer of a defendant, and are not excepted to as evidence, are not competent proof of the facts recited in them.

Idem, 53

3. R gives to L, an order on J, his debtor, for a sum certain; much less than the whole debt; and he gives to F an order on J for the whole balance due from J to R. F's order having been lost, in a controversy between L and F, in the absence of any evidence on the subject, the presumption is that the order in favor of L was first given.

Idem, 53

4. On a parol contract for the sale of land, the vendor executes a deed by which he conveys a part of the land purchased by the vendee. It is not competent to prove by parol evidence that the deed was only in part execution of the contract, and the vendor had agreed at the time the deed was executed, that he would convey the remainder at another day.

Broughton v. Coffer, 184

5. In an action by an endorsee against his immediate endorser, upon a protested bill, parol evidence of an agreement between them, at the time of the endorsement, which would vary the legal liability of the endorser under his endorsement, is inadmissible.

Woodward, Baldwin & Co. v. Foster, 200

6. What is a case of latent ambiguity, in which parol evidence is admissible to prove

what was the intention of the parties. See *Leases*, No. 5, and

Midlothian Coal Mining Co. v. Finney & als., 304

7. Plaintiff in unlawful detainer proves he deposited the original will of his testatrix with the clerk of the Circuit Court of Richmond, in 1864. He also proves that the witness had enquired for said paper of the said clerk, at his office in the city of Richmond, in whose custody the said original paper had been left; that the said clerk, at his request, made search for said paper, and reported it had been lost out of his possession, and destroyed at the time of the fire in April, 1865. In the absence of all suspicion of unfair dealing, the testimony is sufficient to let in a copy of the will, of the accuracy of which copy there is no question.

Corbett v. Null, Trustee, 624

8. Upon proof that the will had been regularly admitted to probate in the Circuit Court of Richmond, such proof of the loss and destruction of record will authorize the admission of an official copy of the record certified by the clerk. And this official copy having been admitted to probate in the Orphans' Court of the District of Columbia, an official copy from that office is admissible.

Idem, 624

9. When the copy of a paper has been properly admitted in evidence, the admission of another copy of the same paper, if improper, cannot possibly do injury to the other party; and is therefore no cause for reversing the judgment.

Idem, 624

10. When no proof of the signature of a paper filed with a bill in chancery is necessary. See *Practice in Chancery*, No. 4, and *James River & Kan. Co. v. Littlejohn*, 53

Littlejohn v. Ferguson & als., 53

EXAMINING COURTS.

Where and when a prisoner committed for a felony may be examined. See *Criminal Jurisdiction and Proceedings*, No. 6, 7, 8 and *Kemp & als. case*, 669

EXECUTIONS.

1. The levy of an execution of *fi. fa.* does not divest the defendant in the execution of the property, and transfer it to the plaintiff or the sheriff. Only a special interest is vested in the sheriff as a mere bailee, to enable him to keep the property safely, and defend it against wrong-doers. It is in the custody of the law, and the sheriff has a naked power to sell it and pass the title of the owner to the purchaser.

Walker & als. v. The Commonwealth, 13

2. The plaintiff may always, with the consent of all the defendants, abandon a levy upon the property of all or any of them, and afterwards sue out a new execution.

Idem, 13

3. If the defendants in an execution be a principal and his sureties, and the property levied on be that of the sureties, the plaintiff may, with the assets of the sureties only,

abandon the levy, and afterwards sue out executions against all the defendants.

Idem, 13

4. If the levy be abandoned by the sheriff, with the consent of the defendants, without the concurrence or authority of the plaintiff, or if the property is eloigned or removed by the defendants out of the reach of the sheriff, without the consent of the sheriff or the plaintiff, the latter may sue out a new execution.

Idem, 13

5. But if the property levied on be lost to the defendant by the misconduct or neglect of the sheriff, the execution is thereby satisfied to the extent of the value of the property; and the plaintiff can then only look to the sheriff for indemnity.

Idem, 13

6. A mere suspension of proceedings on a levied execution, does not authorize a restoration of the property to the possession of the defendant, or release the levy. And if, by a misunderstanding of the directions of the plaintiff by the sheriff and the defendants, the property is released by the sheriff to them, the plaintiff may have a new execution.

Idem, 13

7. In a proceeding at law against several parties, judgments against one or more are entered at one time and against others at another time; one execution may be issued against all.

Idem, 13

8. Upon a motion to quash a second execution in vacation, the judge may, in vacation, allow the sheriff to amend his return on the first execution.

Idem, 13

9. A *fiери facias* placed in the hands of an officer for execution is a legal lien under ch. 188, § 3, of the Code, upon all the personal property and choses in action of the debtor, from the time it goes into the hands of the officer, except in the cases stated in said section. This lien continues after the return of the execution "no effects;" and has priority over a subsequent execution lien under the same law; even though there has been a proceeding by suggestion under the junior sooner than under the senior execution; and this though the executions issued from different courts.

Charron & Co. v. Boswell & al., 216

10. An order having been made upon the suggestion under the junior execution, directing a chose in action not yet due, to be delivered by the garnishee to the sheriff, and directing him to collect the amount when due, and after paying off a prior claim upon it, to pay the plaintiff his debt out of the proceeds; the creditor in the senior execution may proceed by petition filed in the court in which the order was made, and in that

1012 *proceeding to have the order corrected; or he may file his bill in equity to have it done.

Idem, 216

11. A forthcoming bond with condition to deliver property in execution on a day of sale occurring after the return day, is valid.

Ballard & als. v. Whitlock, 235

12. When a judgment is set aside, the execution which has issued upon it falls with it, without any express order to quash the execution.

Idem, 235

13. When court may set aside a judgment and award of execution, and render another judgment and award of execution on a forfeited forthcoming bond. See *Forthcoming Bonds*, No. 2, 3, and

Idem, 235

EXPRESS COMPANIES.

See *Joint Stock Companies*, No. 1, 2, 3, 4, and *Anderson v. The Commonwealth*, 295

FELONY.

1. The act of April 27, 1867, to revise and amend the criminal procedure, Sess. Acts, 1866-67, p. 915, ch. 128, does not authorize the trial of a prisoner for felony, except upon an indictment found by a grand jury in a court of competent jurisdiction.

Matthews' case, 989

Garner's case, 989

FORFEITURES.

1. The fourth section of the act of Congress of June 7, 1862, entitled "an act for the collection of taxes in the insurrectionary districts," 12 Stat. at Large 422, does not, and is not intended to, create such a forfeiture of the land to the United States as that it *ipso facto* ceases to be the property of the former owner, and becomes the absolute property of the United States.

Martin v. Snowden, trustee, 100

Bennett v. Hunter, 100

Portner & Recker v. Cazenove, 100

2. Congress has not the constitutional power to impose the penalty of forfeiture of lands for the non-payment of taxes assessed thereon.

Idem, 100

3. If the forfeiture provided by this act is to be regarded as absolute, and as a penalty on persons engaged in rebellion against the United States, then it is a legislative conviction and punishment without trial of all who fail to pay the tax, and is a violation of the provision of the constitution which forbids Congress to pass a bill of attainder.

Idem, 100

FORTHCOMING BONDS.

1. A forthcoming bond, with condition to deliver property taken in execution on a day of sale occurring after the return day, is valid.

Ballard & als. v. Whitlock, 235

2. A judgment and award of execution upon a forfeited forthcoming bond, having been entered by default, upon a day prior to that to which notice was given, the court in which the judgment and award of execution was rendered has jurisdiction, on the motion of the plaintiff, to set aside the judgment and quash the execution, upon reasonable notice to the defendants. Code, ch. 181, § 5; ch. 187, § 23.

Idem, 235

3. The plaintiff having given a second notice to the obligors in the forthcoming bond, for a judgment and award of execution thereon, and they appearing and objecting to the rendering of the judgment and award of execution asked, the court may at the same time quash the first judgment and execution, and render another judgment and

render, which was carried out by the parties, by the delivery of possession and the payment of money under it; and it, therefore, has all the legal effect of an express surrender by deed. As to the personal property no deed was necessary.

Idem, 150

3. The slaves having been emancipated by the proclamation of the President of the United States, this does not entitle S to any abatement from the amount of the annual payments which he contracted to make.

Idem, 150

3. Testator says—I devise all my estate, in possession, remainder, reversion or expectancy, to my beloved wife, B. C. M., for her maintenance and support, and for the maintenance and support of our children during her life or widowhood. In the event of her marriage, she is to be restricted to her dower and distributable share, as in the case of intestacy. **HOLD:** Upon the language of the devise, the widow is entitled absolutely during her widowhood to the whole estate; and there is no trust for the children. And this construction is sustained, in this case, by the other provisions of the will, and the surrounding circumstances.

Rhett & wife v. Mason's ex'x & als., 541

EVIDENCE.

1. When an appellate court will not reverse a decree for want of proof of the execution of a paper. See *Appellate Court*, No. 2, and *James River & Kan. Co. v. Littlejohn*, 53

Littlejohn v. Ferguson & als., 53

2. The written opinion of an attorney of a party, or the recitals in a bond, though the papers are filed with the answer of a defendant, and are not excepted to as evidence, are not competent proof of the facts recited in them.

Idem, 53

3. R gives to L, an order on J, his debtor, for a sum certain; much less than the whole debt; and he gives to F an order on J for the whole balance due from J to R. F's order having been lost, in a controversy between L and F, in the absence of any evidence on the subject, the presumption is that the order in favor of L was first given.

Idem, 53

4. On a parol contract for the sale of land, the vendor executes a deed by which he conveys a part of the land purchased by the vendee. It is not competent to prove by parol evidence that the deed was only in part execution of the contract, and the vendor had agreed at the time the deed was executed, that he would convey the remainder at another day.

Broughton v. Coffer, 184

5. In an action by an endorsee against his immediate endorser, upon a protested bill, parol evidence of an agreement between them, at the time of the endorsement, which would vary the legal liability of the endorser under his endorsement, is inadmissible.

Woodward, Baldwin & Co. v. Foster, 200

6. What is a case of latent ambiguity, in which parol evidence is admissible to prove

what was the intention of the parties. See *Leases*, No. 5, and

Midlothian Coal Mining Co. v. Finney & als., 304

7. Plaintiff in unlawful detainer proves he deposited the original will of his testatrix with the clerk of the Circuit Court of Richmond, in 1864. He also proves that the witness had enquired for said paper of the said clerk, at his office in the city of Richmond, in whose custody the said original paper had been left; that the said clerk, at his request, made search for said paper, and reported it had been lost out of his possession, and destroyed at the time of the fire in April, 1865. In the absence of all suspicion of unfair dealing, the testimony is sufficient to let in a copy of the will, of the accuracy of which copy there is no question.

Corbett v. Null, Trustee, 624

8. Upon proof that the will had been regularly admitted to probate in the Circuit Court of Richmond, such proof of the loss and destruction of record will authorize the admission of an official copy of the record certified by the clerk. And this official copy having been admitted to probate in the Orphans' Court of the District of Columbia, an official copy from that office is admissible.

Idem, 624

9. When the copy of a paper has been properly admitted in evidence, the admission of another copy of the same paper, if improper, cannot possibly do injury to the other party; and is therefore no cause for reversing the judgment.

Idem, 624

10. When no proof of the signature of a paper filed with a bill in chancery is necessary. See *Practice in Chancery*, No. 4, and *James River & Kan. Co. v. Littlejohn*, 53

Littlejohn v. Ferguson & als., 53

EXAMINING COURTS.

Where and when a prisoner committed for a felony may be examined. See *Criminal Jurisdiction and Proceedings*, No. 6, 7, 8 and *Kemp & als. case*, 669

EXECUTIONS.

1. The levy of an execution of *fi. fa.* does not divest the defendant in the execution of the property, and transfer it to the plaintiff or the sheriff. Only a special interest is vested in the sheriff as a mere bailee, to enable him to keep the property safely, and defend it against wrong-doers. It is in the custody of the law, and the sheriff has a naked power to sell it and pass the title of the owner to the purchaser.

Walker & als. v. The Commonwealth, 13

2. The plaintiff may always, with the consent of all the defendants, abandon a levy upon the property of all or any of them, and afterwards sue out a new execution.

Idem, 13

3. If the defendants in an execution be a principal and his sureties, and the property levied on be that of the sureties, the plaintiff may, with the assets of the sureties only,

abandon the levy, and afterwards sue out executions against all the defendants.

Idem, 13

4. If the levy be abandoned by the sheriff, with the consent of the defendants, without the concurrence or authority of the plaintiff, or if the property is eligned or removed by the defendants out of the reach of the sheriff, without the consent of the sheriff or the plaintiff, the latter may sue out a new execution.

Idem, 13

5. But if the property levied on be lost to the defendant by the misconduct or neglect of the sheriff, the execution is thereby satisfied to the extent of the value of the property; and the plaintiff can then only look to the sheriff for indemnity.

Idem, 13

6. A mere suspension of proceedings on a levied execution, does not authorize a restoration of the property to the possession of the defendant, or release the levy. And if, by a misunderstanding of the directions of the plaintiff by the sheriff and the defendants, the property is released by the sheriff to them, the plaintiff may have a new execution.

Idem, 13

7. In a proceeding at law against several parties, judgments against one or more are entered at one time and against others at another time; one execution may be issued against all.

Idem, 13

8. Upon a motion to quash a second execution in vacation, the judge may, in vacation, allow the sheriff to amend his return on the first execution.

Idem, 13

9. A *feri facias* placed in the hands of an officer for execution is a legal lien under ch. 188, § 3, of the Code, upon all the personal property and choses in action of the debtor, from the time it goes into the hands of the officer, except in the cases stated in said section. This lien continues after the return of the execution "no effects;" and has priority over a subsequent execution lien under the same law; even though there has been a proceeding by suggestion under the junior sooner than under the senior execution; and this though the executions issued from different courts.

Charron & Co. v. Boswell & al., 216

10. An order having been made upon the suggestion under the junior execution, directing a chose in action not yet due, to be delivered by the garnishee to the sheriff, and directing him to collect the amount when due, and after paying off a prior claim upon it, to pay the plaintiff his debt out of the proceeds; the creditor in the senior execution may proceed by petition filed in the court in which the order was made, and in that

1012

*proceeding to have the order corrected; or he may file his bill in equity to have it done.

Idem, 216

11. A forthcoming bond with condition to deliver property in execution on a day of sale occurring after the return day, is valid.

Ballard & als. v. Whitlock, 235

12. When a judgment is set aside, the execution which has issued upon it falls with it, without any express order to quash the execution.

Idem, 235

13. When court n and award of execu judgment and awa feited forthcoming Bonds, No. 2, 3, and

EXPRES

See *Joint Stock Co Anderson v. Th*

FI

1. The act of Ap amend the crimina 1866-67, p. 915, ch. trial of a prisoner f indictment found b of competent jurisd

FORI

1. The fourth se gress of June 7, 186 collection of taxes districts," 12 Stat. and is not intended ture of the land to it *ipso facto* ceases former owner, and property of the Uni *Martin v. Snou Bennett v. Hun Portner & Rec*

2. Congress has power to impose th lands for the non-p thereon.

3. If the forfeitu to be regarded as al on persons engaged United States, then tion and punishmer fail to pay the tax, provision of the co Congress to pass a

FORTHCO

1. A forthcoming deliver property tak of sale occurring ; valid.

Ballard & als.

2. A judgment s upon a forfeited fo been entered by del that to which notice which the judgmen was rendered has jt of the plaintiff, to s quash the executio to the defendants. § 23.

3. The plaintiff notice to the oblig bond, for a judgme thereon, and they to the rendering of of execution asked same time quash th cution, and render

award of execution on the bond. And the obligors being present by their counsel, they had reasonable notice of the motion to quash. *Idem*, 235

4. The defence of set-off is admissible in a motion upon a forthcoming bond taken on a warrant of distress for rent.

Allen & als. v. Hart, 722

FRAUD.

1. What should be done by a court of equity before directing land conveyed for the separate use of a wife to be sold for payment of her husband's debts. See *Practice in Chancery*, No. 19, and

Cronie v. Hart & als., 739

GUARANTY.

1. The acts of March 20, 1848, and of March 29, 1851, authorized the guaranty of the State upon the bonds of the city of Wheeling, to pay her subscription to the stock of the Baltimore and Ohio R. R. Co., payable to bearer and transferable by delivery, though not payable to the company, but to a third person.

Arents v. The Commonwealth, 750

1013 *2. If the contract of guaranty of a coupon bond transferable by delivery, is not negotiable at law, along with the bond and coupons, it is assignable in equity, and an interest in it passes in equity to each successive holder of the bond and coupon.

Idem, 750

3. To give effect to the manifest intention of the parties, the right to enforce the guaranty, unless lost by laches or otherwise, must be held to be co-extensive with the right to enforce payment of the bond or coupon. The guaranty, as an accessory to the bond or coupon, follows it and adheres to it in equity, and the right to enforce the guaranty must be determined by the right to demand payment of the bond or coupon.

Idem, 750

4. Though in general, the contract of a guarantor is to pay, if after due diligence the debt cannot be made out of the principal, yet the intention of the parties must govern, and if it was the guarantor's intention to make himself liable on the default of the principal debtor, without the use of the ordinary means to compel payment by him, or proof of his insolvency, he will be held liable accordingly.

Idem, 750

5. The degree of diligence required of the holder of a coupon, is to be ascertained by reference to the relation of the parties. It must be presented for payment within a reasonable time after it becomes due and payable, so as to save the liability of the guarantor in case of any injury resulting from delay.

Idem, 750

HUSBAND AND WIFE.

1. A husband, trustee for his wife, contracts for the purchase of land for her; but the contract is in his own name. He is put into possession, but he fails to comply with the terms of the contract. In a proceeding by unlawful detainer by the vendor to re-

cover possession, the wife is not a necessary or proper party in the action.

Williamson, trustee, v. Paxton, trustee, 475

2. What should be done by a court of equity before directing land conveyed for the separate use of a wife to be sold for payment of husband's debts. See *Practice in Chancery*, No. 19, and

Cronie v. Hart & als., 739

3. When counsel may bind wives as well as their husbands by their action in a cause. See *Attorneys at Law*, No. 1, and

Hill & als. v. Bowyer & als., 364

4. See *Legacies and Legatees*, No. 3, and

Brent v. Washington's adm'r, 526

INFANTS.

1. It seems that in Virginia a court of equity has not authority, under its general jurisdiction as guardian of infants, to sell their real estate, whenever it is for the advantage of the infants to do so.

Faulkner & als. v. Davis & als., 651

2. The statutes in relation to the sale of infants' lands are remedial in their nature, and should be construed liberally.

Idem, 651

3. By the act of February 18, 1853, *Sess. Acts*, ch. 34, p. 39, and the previous acts on the subject, courts of equity had authority to sell the land in which infants had an interest, whether in possession or remainder, vested or contingent, if the proper parties could be brought before the courts.

Idem, 651

4. What parties are sufficient in a suit to sell lands in which infants have a contingent interest. See *Trusts and Trustees*, No. 12, and

Idem, 651

INSTRUCTIONS.

1. When the court below refuses to give an instruction to the jury asked by the defendant, and gives an instruction which, after the refusal of the first, was calculated to mislead the jury, the judgment will be reversed.

Ragland & Co. v. Butler, 323

2. If an instruction asked does not correctly expound the law, the court, as a general rule, may refuse to give it, and is not bound to modify it, or give any other instruction in its place.

Rosenbaums v. Weeden, Johnson & Co., 785

3. An instruction asked for may be so equivocal that to give or refuse it might mislead the jury, and thus it might have all the effect of an erroneous instruction. In such a case, it would be proper for the court to modify the instruction so as to make it plain.

Idem, 785

4. An instruction asked being equivocal, and being correct on one construction of it, the court should not refuse to give it, but should give it with such an explanation of its meaning as to insure its being understood by the jury.

Ward & als. v. Churn, 801

1014

*ISSUE.

1. When an issue should be directed by the court of equity to ascertain whether there was or was not fraud in procuring a deed, or whether it had been afterwards confirmed. See *Practice in Chancery*, No. 8, and *Metter's adm'r v. Hagan*, 231

JOINT STOCK COMPANIES.

1. The § 93, of the act of February 15th, 1866, for the assessment of taxes, embraces express companies chartered by the State of Virginia; and the present stockholders are personally liable for taxes due to the Commonwealth from the company, incurred while they were stockholders.

Anderson v. The Commonwealth, 295

2. Though the charter of an express company did not make the stockholders personally liable for the debts of the company, the said assessment act passed subsequent to the charter, has so far modified the charter as to make them personally liable. *Idem*, 295

3. The charter reserving to the General Assembly the power to modify or repeal the charter, this was effectually done by the act for the assessment of taxes; and it is not in violation of § 16, article 4, of the constitution. *Idem*, 295

4. QUERE: Whether § 93, of the said assessment act makes the stockholders of an express company liable for taxes due him from the company primarily, or only as guarantors. *Idem*, 295

5. The board of directors of a railroad company have no authority, without the sanction of a lawful meeting of the stockholders, to make a lease for years of the road and property of the company, with authority to the lessees to operate the road, and to charge for carrying upon it.

Stevens & al. v. Davison, 819

6. A by-law of the stockholders provides that no contract shall be made by the directors involving the franchise of the road, except the same be approved by a general meeting representing a majority of the stock, after being recommended by a majority of the stockholders. Though a lease made by the directors does not involve the essential franchise of the company to be a corporation, yet if it authorizes the lessees to take toll upon the road, it involves a franchise within the meaning of the by-law, and is null and void. *Idem*, 819

7. Though a by-law of the company authorizes the directors to alter or amend the by-laws, the directors have no authority, under said by-law or otherwise, to disregard or alter another by-law, which was intended to impose a limitation on their powers. *Idem*, 819

8. Though a court of equity will be reluctant to appoint a receiver to take charge of and manage a railroad, it is competent to do so when such a course is indispensable to secure the rights of the legitimate stockholders, and to prevent a failure of justice. *Idem*, 819

9. Though the court should properly, under the circumstances, appoint a receiver to take charge of and manage the road, it may not be proper to enjoin the directors of the company from doing any act as such. *Idem*, 819

JURIES.

See *Criminal Jurisdiction and Proceedings*, No. 10, and *Trim's case*, 983

LACHES.

1. What laches of a party in a pending suit will not conclude him.

James River & Kan. Co. v. Littlejohn, 53

Littlejohn v. Ferguson & als., 53

2. See *Practice in Chancery*, No. 15, and

Hill & als. v. Bowyer & als., 364

LANDLORD AND TENANT.

1. What will not constitute a tenancy from year to year. See *Vendors and Purchasers*, No. 8, and

Williamson, trustee v. Paxton, trustee, 475

2. It is a mere presumption of law, in the absence of evidence to the contrary, that a tenant who holds over after the expiration of his term, by permission of the lessor, is a tenant from year to year. And this presumption may be repelled by evidence which may show that the holding over, though by permission of the lessor, is not as tenant from year to year, but in some other character, or for some other purpose. *Idem*, 475

3. The defence to set-off is admissible in a motion upon a forthcoming bond, taken on a warrant of distress for rent.

Allen & als. v. Hart, 722

1015

*LEASES.

1. K leased to M a house and lot in the city of A for four years; but there was a stipulation in the lease, that if K sold the property before the time ran out, upon a proper notice of such sale, M should deliver up possession of the premises. The lease had been destroyed, and the contents were proved by parol evidence. K did sell the property before the four years expired, and gave a notice to M to deliver possession. HELD: It was for the jury to ascertain, from the evidence, what were the terms of the contract, and to determine under such instructions as the court might give, for their information and guidance, what was their legal effect.

Millan v. Kephart, 1

2. The jury was to ascertain the true intention of the parties as embraced in the contract. For that purpose, they were to consider the whole contract; not any provision only, but all its provisions; not the words merely in which they were expressed, but their object and purpose, as disclosed by the language, by the subject matter, and the condition and relations of the parties; and thus to determine whether the stipulation for the surrender of the property upon a sale and notice was a collateral limitation or a covenant. *Idem*, 1

3. If the stipulation was a collateral limitation, K was entitled to recover the premises;

if it was a covenant, he was not entitled to recover.

4. The notice was not required to be for three months or for any particular period.

5. By deed of April 1, 1861, A leased certain coal property to B until December 31st, 1864; and by deed of November 11, 1861, endorsed on the first, and declared to be a part of it, he leased other adjoining coal property to B for the same time. By contract of September 4, 1864, A and B agree to renew the lease of April 1, 1861, for five years from the 1st of January, 1865. A question arising whether the lease of the property mentioned in the deed of November 11, 1861, is renewed as a part of the lease of April 1, 1861. HELD: This is a latent ambiguity, and parol evidence is admissible to prove what was the intention of the parties.

Midlothian Coal Mining Co. v. Finney & als., 304

6. In a proceeding to recover rent due upon a perpetual lease granted out of land, with right of distress and entry if the rent is not paid, a special verdict finds the entry of the grantee of the rent upon the land, and the holding by him and those claiming under him for forty-three years; but does not find that the original entry was under the right of entry given by the deed, or that the parties held adversely, nor any facts from which such an entry or such a possession results as a conclusion of law. The court, therefore, cannot infer either fact.

Turner v. Smith, &c., 830

LEGACIES AND LEGATEES.

Testator says—I give to my son H the sum of £1,000 Virginia currency, in trust to apply the interest and profits towards the support of my daughter A, to her sole and separate benefit, free from the debts, &c., of her husband, during her natural life; and after her decease to divide the principal equally amongst her children and their representatives, according to the statute of distributions. Testator died in 1823; A died in 1861. HELD:

1. The children of A took vested interests in the remainder on the death of the testator, subject to be divested on their dying in the lifetime of A.

Brent v. Washington's adm'r, 526

2. On the death of a child of A in her lifetime, unmarried, the next of kin of the child took a vested interest in his or her share, which was absolute, and not subject to be divested by the death of such next of kin in the lifetime of A. *Idem,* 526

3. On the death of a child of A in her lifetime, leaving a husband and child surviving her, the husband took the interest of his wife; and this though such child of A died before the act, Code, ch. 123, § 10. *Idem,* 526

LIENS.

1. For the extent and priority of liens under ch. 188, § 3, of the Code. See *Executions*, No. 9, and

Charron & Co. v. Boswell & al., 216

1016 *LIMITATIONS OF ESTATES.

1. See *Devises*.

2. See *Legacies and Legatees*.

LIMITATIONS—STATUTES OF.

1. QUERE: Whether the statute limiting the period in which an absent defendant may answer and have the decree corrected, applies to the time of presenting the petition, or of filing the answer, or of the decree upon the rehearing.

James River & Kan. Co. v. Littlejohn, 53

Littlejohn v. Ferguson & als., 53

MERGER.

See *Estates*, No. 2, and *Scott's ex'x v. Scott,* 150

MISDEMEANORS.

1. The Code (1860), ch. 104, § 6, p. 799, punishes the omitting or delaying to perform any duty pertaining to the office of one who is authorized to serve legal process.

Old's case, 915

2. The offence punishable by the act, is the omitting or delaying to perform any duty, &c.; not doing any act. *Idem,* 915

MUNICIPAL CORPORATIONS.

See *Corporations*.

MUTUAL PROMISES.

See *Pleading at Common Law*, No. 5, and *Ragland & Co. v. Butler,* 323

NEGOTIABLE INSTRUMENTS.

1. In an action by an endorsee against his immediate endorser, upon a protested bill, parol evidence of an agreement between them at the time of the endorsement, which would vary the legal liability of the endorser under his endorsement, is inadmissible.

Woodward, Baldwin & Co. v. Foster, 200

2. B. & Co. make their negotiable notes blank as to the names of the payees, and put them in the hands of an agent to be sold for their benefit. The agent sells them at a greater discount than the legal rate of interest; the purchasers not being informed that they were sold for the benefit of B. & Co.; and the names of the purchasers are inserted in the blanks as payees either by the agent at the time of the sales, or by themselves afterwards. The purchasers sue upon the notes, describing themselves as payees, against B. & Co. as makers; and B. & Co. plead usury. It is not usury.

Brummel & Co. v. Enders, Sutton & Co., 873

Same v. Hill's ex'or, 873

Same v. James Gray's Sons, 873

3. The case of *Whitworth v. Adams*, 5 Rand. 333, has settled the law of Virginia on the subject of usury in the purchase and sale of negotiable paper. *Idem,* 873

NEW TRIALS.

See *Criminal Jurisdiction and Proceedings*, No. 9, and

Kemp & als. case, 969

NOTICE.

1. There is a stipulation in a lease, that the lease shall terminate upon a sale of the premises and notice by the lessor. The notice is not required to be for three months or for any particular period.

Millan v. Kephart, 1

2. The statute, Code ch. 175, § 4, does not limit the class of cases in which the court may direct that notice may be given by publication; and it is no valid objection by a party upon whom process in a suit has been served that he did not see or hear the notice by publication, of the taking an account by a commissioner, under the order of the court.

Hill & als. v. Bowyer & als., 364

3. When vendee in possession who has forfeited his contract, will not be considered as tenant from year to year, so as to entitle him to the legal notice to quit. See *Vendors and Purchasers*, No. 8, and

Williamson, trustee, v. Paxton, trustee, 475

PAROL EVIDENCE.

1. See *Evidence*, No. 4, 5, 6.

PARTIES.

1. To a bill filed by an assignee of a chose in action, if the assignment purports to transfer the whole interest of the assignor, and there is nothing in the pleading and proofs to induce the belief that it did not really do so, the assignor is not a necessary party.

Jas. Riv. & Kan. Co. v. Littlejohn, 53
Littlejohn v. Ferguson & als., 53

2. Upon the doctrine of the representation of parties. See *Trust and Trustees*, No. 12, and

The opinion of *Moncure, P.*, in
Faulkner & als. v. Davis & als., 651

3. When it is doubtful whether an interest in property belongs to the estate of a husband or wife, and the same person is representative of both estates, he may sue in both characters.

Brent v. Washington's adm'r, 526

PARTNERSHIP.

1. A partnership in failing circumstances, may convey the whole property of the partnership and the individual partners, for payment of their debts, giving preferences among their creditors, and requiring a release from such as accept it.

Gordon & als. v. Cannon & als., 387

2. To render such a deed valid, the whole property of the partnership and the individual partners must be conveyed by it; but this need not appear upon the face of the deed.

Idem, 387

3. If two of the three partners convey all the effects of the firm and their individual property, and the third has none, they may require a release both of the firm and all the members, by the creditors who accept the deed.

Idem, 387

4. R., A. & Co. stopped business, and R. and R., two of the members of that firm, and

P. formed the firm failed, and conveyed firms, and the individual trust to pay indiscriminately the debts of the two firms a release. The deed reformed so as to apply to pay first the debts from whom or from whom derived.

5. See *Trusts and* and

PLEADING A

1. B contracts to sell timber on certain land, pile the said lumber and deliver it in Richmond recover the price, or was piled openly with says the lumber is merchantable pine the lumber was merchantable meant the and therefore the find that merchantable lumber, and that was good.

Ragland & Co.

2. In this case the delivery by a note avers the refusal to refuse to pay the days. HELD: If that was the sole gravamen of the refusal, surplusage, and denied. But held further: give the note to pay in legal intentmen that time if there note.

3. By the contrary advance the freight deducted when the necessary to aver by B.

4. One count avers to receive to deliver implies to receive; and therefore a breach of the

5. The demand have been made to deliver the lumber promises, and B note when he delivered the lumber; and too soon.

PLEADING

1. When an answer will be treated as in *Chancery*, No. *Mellert's adm'r*

2. M is administrator and it being doubtful fund is in the wife, he sues characters. for misjoinder of *Brent v. Wa.*

POWERS.

1. A case in which a power of appointment authorizes the appointment of all or any part of the estate to any one or more, or all of the children, or of the descendants of any child dying in the lifetime of the donee of the power.

Rhett & wife v. Mason's ex'x & als., 541

2. A life-tenant with power of appointment, and a provision for distribution of so much of the estate as she does not appoint, should keep a correct account of the principal of the estate, and of the appointments made by her under the power, and exhibit the same to any of the parties interested therein who may desire to see them.

Idem, 541

PRACTICE AT COMMON LAW.

1. There is a lease of premises for four years, and a stipulation that upon the sale of the premises, and notice by the lessor to the lessee, he should deliver up possession. The lease was destroyed and the contents were proved by parol evidence. The premises were sold and notice given. It was for the jury to ascertain from the evidence what were the terms of the contract, and to determine, under such instructions as the court might give them, what was their legal effect.

Millan v. Kephart, 1

2. The jury was to ascertain the true intention of the parties as embraced in the contract. For that purpose they were to consider the whole contract; not any one provision only, but all its provisions; not the words merely in which they were expressed, but their object and purpose, as disclosed by the language, by the subject matter, and the condition and relation of the parties, and thus to determine whether the stipulation for the surrender of the property upon a sale and notice was a collateral limitation or a covenant.

Idem, 1

3. In a proceeding at law against several parties, judgment against one or more are entered at one time, and against others at another time, one execution may be issued against all.

Walker & als. v. The Commonwealth, 13

4. Upon a motion in vacation to quash a second execution, the judge may, in vacation, allow the sheriff to amend his return on the first execution.

Idem, 13

5. When court may set aside a judgment and award of execution thereon, and render another judgment and award of execution on a forfeited forthcoming bond. See *Forthcoming Bonds*, No. 2, 3, and

Ballard & als. v. Whitlock, 235

6. Where the parties to a cause waive a jury, and submit the whole case to the decision of the court, upon a statement of facts agreed, this statement is not to be treated as a special verdict or a case agreed in lieu of a special verdict; but the court may make any inferences from the facts stated that a jury might have made.

Dearing's adm'x v. Rucker, 426

7. Where a suit in equity and an action at common law, for the same cause of action, are pending at the same time, it is not ground of defence at law, either under the general issue or a plea in abatement; but the proper mode of making the objection, is by a rule in the chancery suit, to put the plaintiff to his election between the two suits.

Williamson, trustee, v. Paxton, trustee, 475

8. If an instruction asked does not correctly expound the law, the court, as a general rule, may refuse to give it; and is not bound to modify it, or give any other instruction in its place.

Rosenbaums v. Weeden, Johnson & Co., 785

9. An instruction asked may be so equivocal, that to give or refuse it might mislead the jury, and thus it might have all the effect of an erroneous instruction. In such a case it would be proper for the court to modify the instruction so as to make it plain.

Idem, 785

Ward & als. v. Churn, 801

10. On a motion to abate an attachment on the ground that it was issued on false pretences and without sufficient cause, the plaintiff declining to express any wish for a jury, and the defendant expressing a wish that a jury might be dispensed with, and that the court should hear and decide the case; the court should hear and decide it without a jury.

Claffin & Co. v. Steenbock & Co., 842

11. When a cause is heard by the judge, and there is an exception to his decision, the whole evidence is spread upon the 1019 record, and the appellate court must regard the case as upon a demurrer to evidence, considering the appellant as the demurrant.

Idem, 842

PRACTICE IN CHANCERY.

1. In a suit in which there is an absent defendant, there is a decree against the home defendant, from which he appeals. Pending the appeal, the absent defendant may file his petition in the court below, to be permitted to appear and file his answer in the cause, and may have the decree re-heard and set aside, if it is erroneous as to him.

James River & Kan. Co. v. Littlejohn, 53

Littlejohn v. Ferguson & als., 53

2. QUÆRE: Whether the statute limiting the period in which an absent defendant may answer and have the decree corrected, applies to the time of filing the petition, or of filing the answer, or of the decree upon a re-hearing.

Idem, 53

3. What laches of a party in a pending suit will not conclude him.

Idem, 53

4. Plaintiff alleging that an order which is the basis of his claim, was drawn by one of the defendants, the act, Code ch. 171, § 38, applies to it; and no proof of the signature is necessary.

Idem, 53

5. A commissioner's report is based upon papers filed in the cause; and there is no exception to the report. The papers not being competent evidence of the facts recited

in them, the court may disregard the report, and decide the case upon the competent evidence and against the report. *Idem*, 53

6. The written opinion of an attorney of a party, or the recitals in a bond, though the papers are filed with the answer of a defendant, and are not excepted to as evidence, are not competent proof of the facts recited in them against other parties. *Idem*, 53

7. In a suit by the vendee for the specific execution of a contract for the purchase of land, the defendant denies the contract as stated in the bill. The fact that the answer is disproved as to some facts which are denied, does not destroy the weight ascribed to it by law, in respect to other facts, as to which it is not disproved by the required amount of evidence.

Broughton v. Coffey, 184

8. M in his lifetime conveyed by deed to H, M's interest in the estate of J deceased, upon the consideration, as expressed in the deed, of \$1,000. After the death of M, H files his bill to recover the said interest; and M's administrator resists it, on the ground that M was incapable from drink of making a contract, and that the deed was obtained by the fraud of H, and that H gave no consideration for it. The evidence touching M's incompetency being contradictory, and there being some proof that M had confirmed the deed after its execution. HELD:

1. An issue should be directed to ascertain: 1st. Whether the deed had been procured by fraud; and 2d. If procured by fraud, whether it had afterwards been confirmed by M without coercion or restraint, when he was competent to act.

Mettler's adm'r v. Hagan, 231

2. If it had not been procured by fraud, or if it had been confirmed by M without coercion when he was competent, H is entitled to a decree for M's interest in the estate of J, without regard to the value of the consideration paid therefor.

Idem, 231

3. Though, according to the strict rules of pleading, a bill or cross-bill should have been filed to set aside the deed, yet the answer of M's administrator may, for that purpose, be treated as a cross-bill, so as to enable the court to do ample justice in the cause.

Idem, 231

9. A question arising on the construction of a contract for the renewal of a lease evidenced by two deeds of different dates, one endorsed on the other and made a part of it, though the question was before a commissioner, the court decided it on the construction of the deeds; and the appellate court holding that it was a latent ambiguity, and that parol evidence was admissible to prove the intention of the parties, and there having been little enquiry before the commissioner as to the intention of the parties, upon reversing the decree, the cause will be referred to a commissioner, with liberty to both parties to introduce testimony.

Midlothian Coal Mining Co. v. Finney & als., 304

10. A party against whom a decree has

been rendered with apply to the court either by petition or form it is an original be commenced with the court.

Hill & als. v.

1020 *11. If applied to the court for leave a decree, and the application is not a legal adjournment presented in the petition the case of a refusal to be filed, in which case it is necessary to entitle the party may therefore have the decree opened.

12. An original bill contains errors in a decree in its face, and also sets out a mistake and surprise without leave, cannot be reviewed. But a copy being filed with the bill, and corrected in its face of the decree by the court under

13. The statute, which limits the class of cases in which the court may direct that a bill be published; and if a party upon whom a bill has been served, that he may be notified by publication, and that he may be held to account by a commission of the court.

14. A decree by a guardian and his co-guardian had not been served. Upon a bill by the guardian to open the decree on this ground. Nor will the decree alone be ground for a decree.

15. A defendant who has been served, who has not contents himself with his lawyer who practices for him, without giving notice about his defence, is attending to the relief against a ground of surprise the decree may be

16. Where a suit is pending at the same time at the same defence at law, issue or a plea in equity, in mode of making in the chancery his election between

Williamson, et al.

17. A defendant of an answer, or a bill; and upon the court overruling upon the case. 7

and cause, reverse a decree which is correct upon the merits.

Brent v. Washington's adm'r, 526

18. A decree may be made for the sale of lands in which infants have an interest, when the facts which appear on the record will authorize it on any grounds. See *Equity Jurisdiction and Relief*, No. 15, and

Faulkner & als. v. Davis & als., 651

19. Bill by creditors of C to set aside a conveyance to a trustee for the separate use of C's wife on the ground of fraud, alleging the land paid for by C; C and wife answer, denying the fraud; and C says he had conveyed his property to E in trust to pay his debts, which had been sold and was in the hands of E; and he exhibits the deed. He says further, that \$2,000 of the purchase money of the land was derived from the sale of the wife's interest in her father's estate, and the balance derived from the profits of the land. **Held:** Before setting aside the deed.

1. E should be made a party, and there should be an account of the trust fund in his hands, and it should be applied to the payment of such of the plaintiffs as were secured by that deed.

Cronie v. Hart & als., 739

2. There should be an enquiry, whether there was an agreement that the proceeds of the sale of the wife's property should be applied to her use; and whether it had been so applied. *Idem*, 739

3. Whether the debts could not be paid out of the rents and profits in five years.

Code of 1860, ch. 186, § 9. *Idem*, 739

1021 *PRACTICE IN CRIMINAL CASES.

See *Criminal Jurisdiction and Proceedings*.

PRESENTMENTS.

1. A presentment under the act, Code (1860), ch. 194, § 6, p. 799, should follow the terms of the statute, or must use terms which show conclusively, or beyond any rational doubt to the contrary, that the accused is guilty of the offence described in the statute; and unless this is done, the addition that "so the accused did receive money for omitting or delaying to perform a duty pertaining to his office of constable," &c., will not cure the defect. *Old's case*, 915

PRESUMPTIONS.

1. R gives to L an order on J his debtor for a certain sum; much less than the whole debt; and he gives to F an order on J for the whole balance due from J to R. F's order being lost, in a controversy between F and L, in the absence of any evidence on the subject, the presumption is that the order in favor of L was first given.

James River & Kan. Co. v. Littlejohn, 53

Littlejohn v. Ferguson & als., 53

2. In an action on a bond, in which is the name of one person as a surety, who did not sign it, in the absence of all evidence of a

without the signature of the other party whose name is in the bond.

Ward & als. v. Churn, 801

PROMISSORY NOTES.

See *Negotiable Instruments*.

RAILROAD COMPANIES.

See *Joint Stock Companies*.

RECEIVERS.

When equity will appoint a receiver to work a railroad. See *Equity Jurisdiction and Relief*, No. 15, and

Stevens & al. v. Davison, 819

RELEASES.

When a debtor conveying his property for payment of his debts may require a release. See *Creditors and Debtors*, No. 1, 2, 3, 4, and

Gordon & als. v. Cannon & als., 387

REMOVAL OF CAUSES.

1. Suits at law brought by the original owners of land, against purchasers at a sale for taxes under the act of Congress, to recover the land, are not within the act of Congress of March 3, 1863, authorizing the removal of certain suits from the State courts to the courts of the United States.

Martin v. Snowden, trustee, 100

Bennett v. Hunter, 100

Portner & Recker v. Cazenove, 100

RENT.

1. The defence of set-off is admissible in a motion on a forthcoming bond taken on a warrant of distress for rent.

Allen & als. v. Hart, 722

RICHMOND CITY.

1. For the liability of the city of Richmond for its bonds issued by its officers, though in violation of their instructions. See *Corporations*, No. 1, 2, 3, and

DeVoss & als. v. City of Richmond, 338

2. For the liability of the city for liquor destroyed by order of the Council, upon its evacuation by the Confederate forces. See *Corporations*, No. 4, and

Jones & Co. v. The City of Richmond, 517

3. The act, Sess. Acts 1866-67, p. 635, extending the boundaries of the city of Richmond, is constitutional in all its provisions.

Wade & als. v. The City of Richmond, 583

Thomas & als. v. The Same, 583

4. The act operates upon the municipal relations of the inhabitants of the territory annexed to the city, but in political elections they are still to vote as a part of the county of Henrico. *Idem*, 583

5. The General Assembly having the authority to extend the boundaries of the city, the justice or expediency of it is not a question of which the courts can take jurisdiction. *Idem*, 583

1022

*SALES.

1. W, a merchant, sells goods to R, who returns them, and refuses to complete

the contract. W informs R that he will hold him to the contract, and that he holds the goods for him. R still refusing to take the goods and pay for them, W may sell them and sue R for the loss upon them.

Rosenbaums v. Weeden, Johnson & Co., 785

2. In such a case W is not bound to give R notice of the time and place of sale; and though he gives such notice, he may postpone the sale to another day, if that seem judicious. *Idem*, 785

3. Though the price of such goods was declining, and W retains them for two months or more before he sells them, he is still entitled to recover. *Idem*, 785

4. For sale of infants' lands. See *Infants, passim*, and

Faulkner & als. v. Davis & als., 651

SET-OFF.

1. The defence of set-off is admissible in a motion upon a forthcoming bond taken on a warrant of distress for rent.

Allen & als. v. Hart, 722

SHERIFFS.

1. Upon a motion in vacation to quash a second execution, the judge may, in vacation, allow the sheriff to amend his return on the first execution.

Walker & als. v. The Commonwealth, 13

2. See *Executions*, Nos. 1, 2, 3, 4, 5, 6, and *Idem*, 13

SPECIAL VERDICT.

1. See *Leases*, No. 6, and

Turner v. Smith, &c., 830

2. Jury waived, and whole case submitted to the court; this not a special verdict, or case agreed in lieu of it.

Dearing's adm'x v. Rucker, 426

STATE OFFICERS.

1. The 22d section of article vi. of the constitution of Virginia applies to all State officers; and the Governor whose term has expired, holds over until his successor is qualified. *Lawhorne, ex parte*, 85

STATUTES.

1. The act, ch. 170, § 13, authorizing an absent defendant to appear and defend the suit, considered in

James River & Kan. Co. v. Littlejohn, 53

Littlejohn v. Ferguson & als., 53

2. The constitution of Virginia, art. vi., § 22, in relation to the holding over of officers of the State, construed in

Lawhorne, ex parte, 85

3. Section 4 of the act of Congress of June 7, 1864, concerning collection of taxes in insurrectionary districts, construed in

Martin v. Snowden, trustee, 100

Bennett v. Hunter, 100

Portner & Recker v. Cazenove, 100

Corbett v. Nutt, trustee, 624

4. The act of Congress of March 3, 1863, authorizing the removal of causes from the

State to the United States courts, construed in *Idem*, 100

5. The act, ch. 188, § 3, of the Code, in relation to the lien of a *fi. fa.*, construed in *Charron & Co. v. Boswell & als.*, 216

6. The act of March 2, 1866, to stay the collection of debts, declared to be unconstitutional, in

Taylor v. Stearns & als., 244

7. Section 93 of the act of February 15th, 1866, for the assessment of taxes, construed in

Anderson v. The Commonwealth, 295

8. The second and third sections of the act of March 3d, 1866, to stay the collection of debts for a limited period, construed in

Utterbach & als. v. Rixey, 313

9. The act, Code, ch. 181, § 5, in relation to the correction of errors in decrees, construed in

Hill & als. v. Bowyer & als., 364

10. The act of March 3, 1866, for scaling Confederate debts, construed in

Dearing's adm'x v. Rucker, 426

11. The act of February 12, 1866, requiring the banks to go into liquidation, construed in

Robinson & als. v. Gardiner & als., 509

12. The act, Sess. Acts 1866-67, p. 635, extending the boundaries of the city of Richmond, construed in

Wade & als. v. The City of Richmond, 583

Thomas & als. v. The Same, 583

13. The act of February 18, 1853, 1023 *Sess. Acts, ch. 34, p. 39, in relation to sale of infants' lands, construed in

Faulkner & als. v. Davis & als., 651

14. The act, Code of 1860, ch. 186, § 9, in relation to paying debts from rents and profits, construed in

Croniev. Hart & als., 739

15. The act of March 20, 1848, and the act of March 29, 1851, authorizing the guaranty of the bonds of the city of Wheeling by the State, construed in

Arents v. The Commonwealth, 750

16. The act of Congress of February 6, 1863, for a sale of land for taxes, construed in

Turner v. Smith, &c., 830

17. The act, Code of 1860, ch. 151, § 22, in relation to attachments, construed in

Claffin & Co. v. Steenbock & Co., 842

18. The act, Code of 1860, ch. 194, § 6, p. 797, punishing officers for omitting, &c., to serve legal process, construed in

Old's case, 915

19. The act of April 27, 1867, Sess. Acts 1866-67, ch. 128, p. 915, to revise and amend the criminal procedure, construed in

Matthew's case, 989

Garner's case, 989

STAY LAW.

1. The act of March 2, 1826, to stay the collection of debts for a limited period, so far as it applies to deeds of trust to secure debts which provide for the time and terms of their

execution, is a violation of that provision of the constitution of the United States which forbids the passage of any act which impairs the obligation of a contract.

Taylor v. Stearns & als., 244

2. Where a creditor gives up a substantial part of a debt due before the 2d of April, 1865, or the liability of a person bound to him for its payment, in consideration of a new security for the payment of the debt, or any part of it, such new security comes within the saving of the second section of the act to stay the collection of debts for a limited period, passed March 2, 1866, Sess. Acts 1865-'6, p. 180; and may be enforced according to its terms; such a case not being embraced in the third section of the act.

Utterbach & als. v. Rixey, 313

SURETIES.

1. When sureties not bound by a bond delivered on a condition which is not complied with. See *Bonds*, No. 4, and

Ward & als. v. Churn, 801

SURRENDER.

See *Estates*, No. 2, and

Scott's ex'x v. Scott, 150

TAXES AND TAX SALES.

1. The fourth section of the act of Congress of June 7, 1862, entitled "an act for the collection of taxes in the insurrectionary districts," 12 Stat. at Large 422, does not, and is not intended to, create such a forfeiture of the land to the United States as that it *ipso facto* ceases to be the property of the former owner, and becomes the property of the United States.

Martin v. Snowden, trustee, 100

Bennett v. Hunter, 100

Portner & Recker v. Cazenove, 100

2. Congress has not the constitutional power to impose the penalty of forfeiture of lands for the non-payment of taxes assessed thereon. *Idem*, 100

3. Congress has all the powers for enforcing the collection of its taxes that were in use by the Crown of England, or were in use by the States at the time of the adoption of the constitution of the United States; but forfeiture of the land assessed with the tax was not then in use, either in England or the States, as a mode of collecting the tax. *Idem*, 100

4. If the forfeiture provided by this act is to be regarded as absolute, and as a penalty upon persons engaged in rebellion against the United States, then it is a legislative conviction and punishment, without trial, of all who fail to pay the tax, and is a violation of the provision of the constitution which forbids Congress to pass a bill of attainder. *Idem*, 100

5. The power of Congress to provide for a sale of land for the payment of the tax, is limited to that object; and a law which requires that the whole land shall be sold in all cases, without regard to the fact that it may be divided without injury to it, and the tax may be paid by a sale of a part of it, is unconstitutional. *Idem*, 100

6. If the tax is paid or tendered by any

person before the land is sold, the sale is void, and of no effect; though the act may provide that unless the owner shall appear *in person and pay the tax, the commissioner shall proceed to sell the land. *Idem*, 100

7. Suits at law brought by the original owners of land against the purchasers at a sale for taxes under the act of Congress to recover the land are not within the act of Congress of March 3, 1863, authorizing the removal of certain suits from the State courts to the courts of the United States. *Idem*, 100

8. The § 93, of the act of February 15th, 1866, for the assessment of taxes, embraces express companies chartered by the State of Virginia; and the present stockholders are personally liable for taxes due to the Commonwealth from the company, incurred while they were stockholders.

Anderson v. The Commonwealth, 295

9. Though the charter of an express company did not make the stockholders personally liable for the debts of the company, the said assessment act passed subsequent to the charter, has so far modified the charter as to make them personally liable. *Idem*, 295

10. The charter reserving to the General Assembly the power to modify or repeal the charter, this was effectually done by the act for the assessment of taxes; and it is not in violation of § 16, article 4, of the constitution. *Idem*, 295

11. QUÆRE: Whether § 93, of the said assessment act makes the stockholders of an express company liable for taxes due from the company primarily, or only as guarantors? *Idem*, 295

12. A married woman whose land has been sold for taxes under the act of Congress of June 7, 1862, may in person redeem the same within two years, upon taking the oath prescribed by the act, or a person appointed her trustee in another State, and professing to act as such, may redeem for her.

Corbett v. Nutt, trustee, 624

13. When land sold under the acts of Congress of June 7, 1862, and February 3d, 1863, has been redeemed after the commissioners have paid the money into the treasury, the owner is entitled to recover it, without showing that the certificate of redemption has been forwarded to the Secretary of the Treasury, and that the purchaser has been paid his purchase money by draft drawn on the treasury of the United States. *Idem*, 624

14. Commissioners making a sale of land for taxes under the act of Congress of February 6th, 1863, are bound to bid off the land for the United States, if no person will bid more than two-thirds of its assessed value, unless the owner shall request it to be struck off to some other person at a less price; and the commissioners have no discretion in the case.

Turner v. Smith, &c., 830

15. When the certificate of the commissioners, of the sale of land for taxes under the act of Congress, shows upon its face that the land has been sold to a purchaser other than

the United States, for less than two-thirds of its assessed value, it shows that the commissioners had no authority to make the sale to the purchaser, and it is therefore void and of no effect.

Idem, 830

TRUSTS AND TRUSTEES.

1. The act of March 2, 1866, to stay the collection of debts is unconstitutional so far as it applies to deeds of trust.

Taylor v. Stearns & als., 244

2. A debtor, in failing circumstances, may convey his whole property for payment of his debts, giving preference among his creditors, and requiring a release from such as accept it.

Gordon & als. v. Cannon & als., 387

3. To render such a deed valid, the whole of the debtor's property must be conveyed by it; but this need not appear upon the face of the deed.

Idem, 387

4. A partnership in failing circumstances has the same power; and if two of three partners convey all the effects of the firm and their individual property, and the third has none, they may require a release both of the firm and all the members, by the creditors who accept it.

Idem, 387

5. A deed conveys a stock of goods of the grantors, and refers to a schedule of the goods, which, when made out, is to be considered as annexed to the deed and made a part of it. Though the schedule is not annexed before the recording of the deed, the deed is valid without it.

Idem, 387

6. A deed of trust for the payment of debts authorizes the trustee to appoint agents, and provides that he shall only be liable for the money that comes to his hands, and shall not be liable for the omissions or defaults of the agents. This does not discharge the trustee from the obligation to select fit agents, and to hold them to a strict and prompt responsibility for their acts. And this is the extent of his liability, without such a provision in the deed.

Idem, 387

7. The fact that in such a deed the trustee is a creditor named in it, does not affect the validity of the deed, but only the power of the trustee to act. If the debtor does not object to his acting, it is no reason why another creditor should object, if that is the only objection to him.

Idem, 387

8. When the debtor in such a deed requires a release, the deed should give to the creditors all the information in the power of the debtor, as to the nature and value of the property conveyed, and the amount of the debts intended to be provided for, and time to obtain information not given in the deed; and to determine whether they will accept or reject the offer made to them. In this case sixty days were allowed, and held sufficient.

Idem, 387

9. R. A. & Co. stopped business, and R. & R., two of the members of that firm, and P, formed the firm of R. R. & Co. They failed, and conveyed all the assets of both firms, and the individual property of R, in trust to pay

indiscriminately a of the two firms; The deed is valid as to apply the pro the debts of that p or from which the

10. Devise of last tract of Columbia Though N is removed by the decree at the suit of Y and his place, that do move N from his ginia; and N may recover them.

Corbett v. N

11. Two vacant are conveyed to his wife L, and at the death of L, and at the death of L, conveyed by the trustee, who should be a survivor, and the children as shown descendants; and if N should think or any part of the land, he may commit him to do so, and held upon the land, out selling the land, children survive, continues, and a it.

Faulkner &

12. Upon a bill against the child the lots, the court descendants of a time of the widow; the parties any such descendant entitled under t

UNLAWFUL

A proceeding maintained against possession of land session has not years, though t the only question

Corbett v. L

1. When a deed is Confederate Contracts, No. Boulware

2. B. & Co. blank as to the them in the hands their benefit. greater discount; the purchase they were sold the names of the the blanks as the time of the wards. The person describing the

It is not usury.

Brummel & Co. v. Enders, Sutton &

Co., 873

Same v. Hill's ex'or, 873

Same v. James Gray's Sons, 873

3. The case of *Whitworth v. Adams*, 5 Rand. 333, has settled the law of Virginia on the subject of usury in the purchase and sale of negotiable paper. *Idem*, 873

4. A, B and G execute a bond for one 1026 *thousand dollars to P for a loan of money at usurious interest. Subsequently O, J and W, with B, who signs himself security, execute their bond to P for the amount, principal and interest, of the first bond, and another small bond of A in lieu of these bonds. The usury is purged by the change of parties, and the last bond executed is valid.

Drake's ex'or v. Chandler & als., 909

VENDOR AND PURCHASER.

1. On a parol contract for the sale of land, the vendor executes a deed, by which he conveys a part of the land purchased by the vendee. It is not competent for the vendee to prove by parol evidence, that the deed was only in part execution of the contract, and that the vendor had agreed at the time the deed was executed, to convey the remainder at another day.

Broughton v. Coffey, 184

2. Such an agreement could only be relied on as an independent contract; and must either have been in writing, or there must have been part performance. *Idem*, 184

3. Property is conveyed by deed, by the vendor to the purchaser; if the deed has not been procured by fraud, or if it has been afterwards confirmed by the vendor, without coercion and when he was competent to act, the vendee is entitled to the property without regard to the value of the consideration paid for it.

Metterl's adm'r v. Hagan, 231

4. A vendor of land, who has put the purchaser in possession, whilst the contract remains executory, has the legal title, and unless the provisions of the Code, ch. 135, § 20, apply to the case, may recover possession

demand or possession; even though the vendee may be entitled in equity to a specific execution of the contract.

Williamson, trustee v. Paxton, trustee, 475

5. In such a case, parol agreement on the part of the vendor, however explicit, to waive the forfeiture of the contract which the purchaser had incurred, would be of no effect at law; and would be enforced in equity only when there had been part performance.

Idem, 475

6. QUÆRE: What facts will not be considered as the waiver by the vendor of land, of the forfeiture of the contract by the purchaser, so as to entitle the purchaser to retain possession of the land according to the terms of the contract. *Idem*, 475

7. P, trustee for B a *feme covert*, with power to sell and re-invest, at his discretion, sells to W on conditions which W fails to comply with, and thus forfeits the contract. No unauthorized dealing of B with W, can entitle W to hold the land against his vendor P, after forfeiting his right to the possession by violating the contract of sale. *Idem*, 475

8. The contract provides for the payment by W in cash, of a sum of money, and that if W fails by a day certain within the year, to do a certain act, that he shall hold for a year, and the sum paid shall be the rent for the year. W having failed to do the act, and holding as tenant for the year, and then holding over, does not thereby become tenant from year to year, and so entitled to the legal notice to quit. And though during the second year the purchaser paid rent for that year, it would not of itself constitute him tenant from year to year, so as to entitle him to the legal notice to quit. *Idem*, 475

9. One who is put in possession upon an agreement to purchase land, cannot be ousted by ejectment or unlawful detainer, before his lawful possession is determined by demand of possession or otherwise. *Idem*, 475

WILLS.

1. See *Devises, passim*.

2. See *Legacies and Legatees, passim*.

■

■

■

■

▲

■

